Leiden Journal of International Law, 23 (2010), pp. 277–289
 doi:10.1017/S0922156510000026

CLEVERINGA LECTURE 2009

Ethics and International Law

ROSALYN HIGGINS, DBE, QC*

Abstract

This article, based on a lecture offered in honour of Professor Cleveringa, provides some insights into the difficult question of 'unjust laws' and the place of ethics in law, with an emphasis on international law. While this question has long been a bone of contention between natural lawyers and positivists, it has a particular importance in international law. Attention is paid to the role of ethics in the context of non-discrimination and armed conflicts.

Key words

armed conflict; ethics; humanitarian intervention; non-discrimination; responsibility to protect

I am honoured to be invited to deliver the 2009 Cleveringa Lecture. This lecture honours a man whose profound sense of ethics led him to act with extraordinary bravery.

I have tried to learn as much as I can about the remarkable man we recall tonight. I thank those who have assisted me in this quest, and very particularly Mvr ten Kate, Professor Cleveringa's daughter. Thanks to her kindness, I have held his impressive writings in my hands, seen old photographs, and have learned more of his life in the university he so loved.

Professor Cleveringa was Professor of Commercial Law and also of Procedural Law. Before the war he had a special responsibility for the students coming from the Dutch East Indies. And in 1940 he was Dean of the Faculty of Law. Though an important professor, he was also a modest man, drawing no attention to himself.

When as a young man Rudolph Pabus Cleveringa had prepared his thesis, his tutor had been Professor E. M. Meijers. As is often the case with a very able student and his tutor, they became in due course professional colleagues and then personal friends.

In November 1940 the German occupying authorities issued an edict requiring the dismissal of all Jewish academics from their posts. They were to teach no more. On 26 November, at the hour Meijers should have given his customary lecture, Cleveringa presented himself to the students instead, and gave his momentous address. He protested strongly against the dismissal of Jewish academics. He told the students how fundamentally incompatible was the order with the Dutch tradition

* Delivered at the Faculty of Law of Leiden University on 26 November 2009 [ljil@law.leidenuniv.nl].

of equality and non-discrimination – a tradition that had reflected itself not just in laws but also in the very life of the nation. He then spoke of the greatness of his dismissed colleague Meijers. His lecture was the embodiment of the University motto 'Praesidium libertatis' – bastion of freedom.

The next day this great university was closed and Cleveringa was taken by the occupying authorities to Scheveningen prison, where he was interrogated. No charges were ever brought against him. He was simply kept there – allegedly 'for his own protection'.

And so it went on. Professor Koningsberger, Professor of Plant Physiology, had also spoken out against the dismissal of Jewish colleagues at Utrecht, as did Professor Telders and others at Leiden. Professor Telders was imprisoned shortly after the 26 November lecture. In the summer of 1941, Cleveringa was, thanks to the intervention of friends, allowed to visit his ailing mother for a fortnight. This period was extended, Cleveringa was essentially freed – but not allowed to go to Leiden.

In 1944 he was imprisoned again, now at Vught camp. He was joined there by Benjamin Marius Telders. Telders was sent from there to Bergen Belsen and died in that place of horror shortly before the British liberation. Cleveringa was freed from the Vught camp in 1944 and he existed as a 'non-person' in the Netherlands, waiting for a post-war future.

His colleague Meijers was imprisoned after his dismissal from Leiden. He was imprisoned in various places in the Netherlands and was ultimately sent to Terezingstaat.

By some miracle, he, his wife, and their daughter survived and were able to return eventually to the Netherlands.

Leiden reopened in May 1945 with an opening attended by Her Majesty Queen Wilhelmina. Cleveringa became Rector Magnificus in 1946 and was in that post when the university bestowed an honorary degree on Winston Churchill.

Tonight, 26 November, it is Cleveringa's lecture to the students that we commemorate.

1. Ethics, justice and international law

For a lawyer the question of 'unjust laws' presents very difficult problems. Neither the ordinary citizen nor indeed the judge can pick and choose between laws he or she likes or does not like: 'the law is the law'. This guiding principle of the lawyer feels less qualified than the soldier's guiding principle ('orders are orders'), for it is generally recognized that the soldier's duty of obedience ceases in the face of an order to commit a crime. But how are ordinary people to be protected against pernicious laws and what role can the lawyer or judge play in such protection?

Just as Cleveringa had things to explain to the students in the face of the dismissal of Jewish colleagues in 1940, so Gustav Radbruch, a German professor, had something to say to his students in 1945. He wrote a letter ('Fünf Minuten Rechtsphilosophie')[1]

1 G. Radbruch, *Gesamtausgabe*, ed. Arthur Kaufmann, Vol. 3 (*Rechtsphilosophie* III) (1990), 78 ff.

addressing the lawyer's dilemma of the relationship between legal security and validity on the one hand, and the sense of justice on the other. He explained to the students,

> The conflict between justice and legal certainty may well be resolved this way: the positive law, secured by legislation and power, takes precedence even when its content is unjust and it fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute . . . is flawed law and must yield to justice.

This so-called 'intolerability formula' is often described as the Radbruch formula and it is referred to as such in the judgments of the German courts which have had to face this issue. Many German judges left their homeland rather than apply Nazi laws.

Of course, this reasoning has not been without its opponents, for example the legal philosopher H. A. Hart, who insisted on the separation of law from morals.[2] Without this separation, said Hart, there was a confusion between law as it is and law as it should be.

This is, of course, the debate between legal positivism and others, on which there is a vast literature. It also feeds into the larger question of whether law is indeed value-free, or rather a tool of social engineering the very purpose of which is to secure particular values.

Some great jurists, like Lord Denning, the famous English judge, somehow adroitly skated over the dilemma. He never admitted to choosing 'the law as it should be "over" the law as it is'. He had a strong sense of justice, and somehow, through inventive interpretations, the 'law as it is' always *was* the 'just' legal solution. He was greatly admired, and generally a beloved figure for his simple way of speech and kindness in court. But he also had his opponents, who thought he delivered justice rather than legal certainty.

In international law we find something of the same debate. There, the operative concepts are just a bit different: *lex lata*, the law as it is, and *lex ferenda*, law in the making, not yet crystallized. The 'law as it should be' is assimilated into this notion of 'law that is not yet fully formulated'. Some international lawyers – again, those inclined towards positivism – insist upon a rigorous distinction. My own approach has been to avoid the dichotomy as much as possible, but not by the rather sleight-of-hand methodology of Lord Denning. Rather, in my own view, law is really to be seen not as rules but as opposing norms which must be chosen between (no use of force/self-defence). And that can only be done by articulating the values which can be promoted by the one choice over the other.

But in any event, this is a matter of general philosophy and not confined to the agonizing choices between 'the law as it is' and 'justice', as faced by Cleveringa and others.

---

2 H. A. Hart, *Essays in Jurisprudence and Philosophy* (1983), 76. For an informed analysis, see Miguel Galvao Teles, 'Ex Post Justice, Legal Retrospection, and Claim to Bindingness', in Augusto Silva Dias et al. (eds.), *Liber Amicorum de Jose de Sousa e Brito* (2009), 425.

Unless you are a positivist (which I am not), the Radbruch formula (law, unless it presents an intolerable conflict with justice) is rather attractive. The trouble, of course, is that we each have a different perception as to when that level of 'intolerable conflict' has been reached. In England, during the prime ministership of Margaret Thatcher, thousands upon thousands refused to pay the so-called 'poll tax', which in their eyes was profoundly unjust. In the eyes of others, this law might at most have been said to fall within the Radbruch formula of 'unjust and failing to benefit the people', but still did not present such an intolerable conflict between statute and justice as to render it a 'flawed law' that must yield to justice.

If one accepts that a law is in principle to be obeyed, even if personally we regard it as unfair and undesirable, how can we objectively know if denial of that law may nonetheless exceptionally be warranted because of this 'intolerable degree' of conflict with justice?

At the end of the day, each such dilemma will have to be resolved by brave judges and by brave citizens. There is no global answer to cover every case. But our understanding of the difference between a law that is detested and a law that is intolerable may be assisted by a framework of reference. And that is to be found in existing laws that underpin the values of our society.

One such value-based law that assists in assessing the relationship between another law and 'justice' is the law of non-discrimination. And I now turn briefly to that topic.

2. Ethics and non-discrimination

Professor Cleveringa told his students, in his famous brave lecture, that discrimination was anathema to Dutch values.

Every international lawyer is also imbued with the idea of non-discrimination. It has a long history in the subject.

The principle of non-discrimination was present in the jurisprudence of the Permanent Court of International Justice before the events that precipitated Professor Cleveringa's speech. The Permanent Court showed a profound insight into what was necessary to make the protection of national minorities a reality. In the *Polish Upper Silesia* case of 1926, the Court insisted 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.[3] In the *Minorities Schools* case of 1928 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'.[4] Of equal importance were the findings on what does *not* constitute discrimination: it was not

3 *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ Rep. Series A No. 7.
4 *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v. Poland)*, PCIJ Rep. Series A No. 15, at 17.

discrimination to limit minority schools to those whose minority language was in fact their mother tongue, for therein lay the key to the benefits.

We all have a general sense of what is discriminatory. International law has sought to tie the idea to discrimination on the grounds of race, colour, sex, language, or political opinion. This formula is to be found in many treaties, including the European Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR). In recent years the formula has sought to keep up with the realities, and with the times, by adding the prohibition on grounds of ethnic, national, or social origin, or sexual orientation.

The General Comment 18 of the Committee on Human Rights (which operates under the ICCPR) tells us that

> Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the practice of human rights.

One clause in the ICCPR, Article 2(1), requires each state party to ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant, without any such discrimination. A question which the Committee had to grapple with was whether that meant that no claim could be brought of discrimination as regards matters not to be found in the provisions of the Covenant. For example, the Covenant does not purport to deal with social security and disability entitlements. It would seem that no claim by a citizen in respect of discriminatory treatment by a state in such matters could come before the Committee under Article 2(1) (which specifically prohibits discrimination in respect of rights guaranteed by the Covenant).

However, the Committee ruled that Article 26 of the Covenant was more generally formulated, prohibiting 'any discrimination under the law'. The Committee – and now is the moment for me to admit that I was a rather active member at the relevant time! – decided that if a country had no law on a particular matter, discrimination in respect of it could not fall under its remit. But if a government *did* allow an entitlement as a matter of law, the Covenant prohibited discrimination in respect of that entitlement, even if it was not a legal entitlement of the Covenant itself.

And so it came about that, in a series of cases, the Committee found the Netherlands to have been in violation of the non-discrimination principle in Article 26, in respect of social security and disability benefits.[5] This was not easy for the Netherlands, which with justification regarded itself as a law-complying nation, and which was somewhat astonished at the finding of discrimination in respect of something (social security) on the face of it outside the Covenant.

I know there were serious and long discussions in the Dutch government about these findings – not least because there were very considerable financial implications flowing from them. In considering its course of action, the Netherlands could not only have challenged the correctness of the finding, but could also have insisted that

5 395/1990 (*Spenger v. The Netherlands*); 172/1984 (*Broeks v. The Netherlands*); 180/1984 (*Danning v. The Netherlands*); 182/1984 (*Zwaan-de Vries v. The Netherlands*).

the Committee was not a court of law, and could at the end of the day be ignored. But the commitment of the Netherlands both to international institutions and to the concept of non-discrimination was such that these findings were in the event accepted, and indeed acted upon. I have always hugely admired this.

Of course, non-discrimination does not necessarily require that everyone be treated identically. There may be reasons, good reasons, for differentiations being made. If a state decided to provide free transport for its pensioners, it will not have violated any non-discrimination provision by making the young people pay for their trams and trains. I benefit from the *vijfenzestig* (65+) tickets at the cinema. That is no discrimination against youthful movie-goers.

General Comment 18 deals with this in its paragraph 8, which provides that 'The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every case.' It continues,

> Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiations are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

I need hardly say that excluding persons from a profession, or from serving in a particular job, on the basis of their religion or race, can never be anything other than discrimination.

There is very much international case law on this topic. And of very special interest, I think, has been the interface between international and national law on the question of *positive* discrimination (sometimes referred to as affirmative action). The United States, in particular, struggled with these complex issues in a series of cases[6] where those then referred to as black students were given certain preference over others in university admissions, entry to the police force, and so on. The US courts held that, provided a past inequity was being redressed, provided there was a current societal need for current imbalances to be alleviated, provided the measures were temporary, and provided the measures did not amount to quotas as such, they were not unconstitutional. The United States Constitution, of course, prohibits discrimination.

3. Ethics and armed conflicts and humanitarian disasters

If non-discrimination is central in peacetime to the international lawyer's sense of ethics, so humanitarian law (*jus in bello*) is central to the provision of core ethics in times of conflict.

International humanitarian law (IHL) is the body of law which governs the conduct of hostilities. It speaks to the notion that in times of conflict all trace of law is *not* lost. Parties are limited in the choice of methods used in warfare. They are

6 *Regents of the University of California v. Bakke*, 438 US 265 (1978). See also *Johnson v. Transp. Agency, Santa Clara County*, 480 US 616 (1987) (on employment); *Wygant v. Jackson Bd. of Educ.*, 476 US 267 (1986); *United Steelworkers of Am. v. Weber*, 443 US 193 (1979) (in the context of employment); *Grutter v. Bollinger*, 539 US 306 (2003) (on race generally as a factor in admissions).

also constrained in their choice of targets. Further, international humanitarian law lays down how those who are no longer participants in the conflict (the injured, the captured) are to be treated. And it instructs an occupier as to how he must behave within the land occupied.

It is hard to exaggerate the importance of this corpus of law. The cynic who believes that nothing is obeyed of this law is wrong. It is in the interests of all that conflict, if it has to happen, be conducted according to norms applicable to everyone. An invading state may still have some of its own military being held as prisoners of war. And a state, fearing reprisals if it uses an unlawful weapon, will surely not use such means and is satisfied with the prescriptions of IHL on the matter. There is a great mutuality of interest underlying IHL, and – although terrible things continue to happen all around us – there is often a genuine effort by parties at compliance.

The military conflict between the United Kingdom and Argentina over the Falklands in 1982 was conducted by both parties with a very high regard for what international law required. Such a 'civilized' conduct of war is perhaps unusual. But the existence of the requirements of IHL does act as a restraining factor, and without them the conduct of military hostilities would be infinitely worse.

There is a vast body of law on these matters emanating from international conventions – the post-Second World War 1949 Geneva Conventions, of course, but many others too. And there is now a great corpus of judicial pronouncements on the obligations of international humanitarian law. In the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice (ICJ) stated what it termed the two cardinal principles of international humanitarian law: first, the distinction between combatants and non-combatants, including civilians; and second, that states do not have unlimited freedom of choice in the weapons they use.[7] As to the second element, some weapons are prohibited in terms. As regards others – including, recently, phosphorus shells – countervailing positions are held by the protagonists. It is for the courts and other leading decision-makers to offer ethical interpretations and to take an ethical lead when opportunity arises.

Some of the underlying problems, of course, are agonizingly difficult. What if – as today we all too often see – one state deliberately locates its heavy weaponry in a school or a hospital complex? There should be much, much more concerted international effort directed at condemning such behaviour, and finding means to make international outrage effectively bear upon the state concerned. At the same time, the protection of the civilian population remains a cardinal principle. Collateral damage (i.e. damage not intended, but regrettably in the particular case incidental to action against a legitimate target) will always occur. But deliberate targeting, in circumstances where it will necessarily be impossible to distinguish between civilians and combatants, remains unlawful. And this is so even if it is the targeted state which has itself chosen to 'hide' its military within its civilians, even indeed among schools and hospitals. IHL is not 'reciprocal'. The values that the norms represent are absolute. State A is not relieved of its obligations under

7 ICJ Reports 1996, para. 78.

https://doi.org/10.1017/S0922156510000026 Published online by Cambridge University Press

law because state B has already violated other provisions. The military dilemmas that this presents state A with are real, but can only be resolved by other paths of international action.

Professor Cleveringa, in his famous lecture which we commemorate tonight, was dealing with legal and ethical issues that arise in the context of military occupation. He cited to the students Article 43 of the Hague Regulations on the Laws and Customs of War on Land, which provides that the occupying power is required to respect the laws in force in the country of occupation 'unless absolutely prevented'. Germany certainly was not 'absolutely prevented' from respecting the Netherlands' laws of equality and non-discrimination.

In 2004, in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ took the opportunity to state that the Hague Regulations had become part of customary international law. They were not dependent upon the protagonists being parties to the pertinent convention (or treaty). And the Court observed that Article 43 was applicable to the West Bank.

That same Article, cited by Professor Cleveringa, was at issue again before the Court in the 2005 case between the Democratic Republic of the Congo and Uganda. In an interesting finding, the Court held that a state does not have to be in occupation of an entire territory for it to be an occupying power (with the legal obligations that entails). The Ugandan forces had passed through large swathes of Congolese territory, without actually replacing local authority by their own. But it *was* an occupying power in Ituri Province and Article 43 of the Hague Regulations applied. The Court stated that Uganda was accordingly under an obligation not only – as would always be the case – to ensure that their own troops did not violate IHL and human rights. As an occupying power, it had to 'protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party'.[8] So it had to be vigilant to prevent violations of IHL and human rights by all persons within the territory it occupied, 'including rebel groups acting on their own account'.[9]

A few words must now be said about the question of so-called humanitarian intervention which is one of the controversial areas of contemporary international law. For some, the right of a state to use force in international relations is strictly constrained by the combined effect of Article 2(4) and Article 51 of the Charter. Force against another state may not be used unless it is in self-defence (or unless it is authorized by the Security Council as necessary for the maintenance or restoration of international peace). For other states, some situations may be so appalling that to watch and do nothing is the ultimate immoral act. For them there has to be a right, *in extremis*, to intervene for humanitarian reasons. And some states, who think the potential for abuse is so worrying that there should be no publicly acknowledged entitlement to intervene, even *in extremis*, in fact will not much protest if they share the intervener's perception that an intolerable moral situation has arisen.

Actions by individual states or groups of states in Kosovo and Sierra Leone are well-known examples of this range of dilemmas.

8 ICJ Reports 2005, para. 178.
9 ICJ Reports 2005, para. 179.

In recent years some (but not sufficient) persons have begun to appreciate that the legal question of humanitarian intervention cannot be dealt with in isolation, or just centred on a perception of sovereignty that refuses all outside interference, with nothing more.

Secretary-General Kofi Annan spoke in the Great Hall of the International Court of Justice in May 1999, shortly after the NATO bombing of Kosovo in the wake of the horrors, including ethnic cleansing, being perpetrated there. There was a great debate raging as to whether this military action, classified by those engaged in it as humanitarian intervention, was lawful. Kofi Annan reiterated that force was only to be used in individual or collective self-defence. But then he said (and I paraphrase him): but it is not enough that states simply berate unlawful uses of force. They have a *responsibility*, which they are failing to exercise, to ensure that extreme situations of suffering, which a state or states feel(s) calls for humanitarian intervention, do not occur. It is not enough to allow such situations to arise, and then simply protest at actions, perhaps unlawful, to alleviate them.

This line of reasoning, which I personally appreciate very much, was rather courageously pursued and elaborated by Kofi Annan. Ban Ki-moon put it thus in January this year:

> The twentieth century was marred by the Holocaust, the killing fields of Cambodia, the genocide in Rwanda, and the mass killings in Srebrenica, the latter two under the watch of the Security Council and United Nations peacekeepers. Genocide, war crimes, ethnic cleansing and crimes against humanity: the brutal legacy of the twentieth century speaks bitterly and graphically of the profound failure of individual states to live up to their most basic and compelling responsibilities as well as the collective inadequacies of international institutions. These tragic events led . . . Kofi Annan . . . to ask whether the UN and other international institutions should be exclusively focused on the security of States without regard to the safety of people within them. Could sovereignty, the essential building block of the nation-State era and of the United Nations itself, be misused as a shield behind which mass violence could be inflicted on the populations with impunity? How deeply and irreparably had the legitimacy and credibility of the United Nations and its partners been damaged by such revelations? Could we not find the will and the capacity in the new century to do better?[10]

Sadly, the answer to this last question appears to be in the negative. We only have to look at Darfur, Myanmar, among other situations. But there is an increasing effort, now led by Ban Ki-moon, to breathe life into the idea of responsibility to protect. Francis Deng, the distinguished Sudanese academic and occasional representative of the Secretary-General, worked on refining the concept of sovereignty as 'sovereignty as responsibility'. He and his colleagues emphasized that sovereignty entailed obligations towards one's own people, as well as certain international privileges. The state, by fulfilling fundamental protection obligations and respecting core human rights, would have far fewer reasons to be concerned about unwelcome intervention from abroad.[11]

10 Implementing the Responsibility to Protect, UN Doc. A/63/677, 12 January 2009, esp. paras. 6–7.
11 Francis M. Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa* (1996).

It was at a conference convened by Canada that the phrase 'responsibility to protect' was coined. Within that concept, the conference commission identified three elements: responsibility to prevent, responsibility to react, and responsibility to rebuild.[12] Kofi Annan included in his continuing work some of these ideas, and his own reports[13] in turn provided a basis for the 2005 World Summit. His January 2009 report in response to the Summit Outcome Document paraphrased, *inter alia*, that '(b) the responsibility to protect applies, until it should be otherwise decided, only to genocide, war crimes, ethnic cleansing and crimes against humanity'. Realism and political sense ensured that the concept would not be said to apply, for example, to the response to a national disaster. As the report also said, '(c) while the scope should be kept narrow, the response ought to be deep'.[14]

Practical details followed as to what was to be expected by whom in what circumstances. I find this January 2009 report by the Secretary-General on Implementing the Responsibility to Protect to be very impressive. The Secretary- General has appointed a Special Adviser on the topic and it remains central to his agenda.

The responsibility to *prevent*, one of the three elements said by the Commission to be integral to the concept of responsibility to protect, had been addressed by the ICJ when it handed down its 2007 judgment in the *Genocide* case, that is, *Bosnia and Herzegovina* v. *Serbia and Montenegro.*

The ICJ rejected Serbia's contention that the obligation to prevent was absorbed by the obligation to punish, holding that the duty to prevent was 'normative and compelling'. The Court made clear that the obligation was one of conduct and not one of result. Responsibility would only be incurred 'if the State manifestly failed to take all measures which were within its power, and which might have contributed to preventing the genocide'. It set out a flexible test for deciding whether a state has duly discharged the obligation to prevent that took into account 'the capacity to influence effectively the action of persons likely to commit, or already committing, genocide', which would depend on geographical proximity and political links between the state and the main actors in the potential genocide.

A state cannot escape responsibility by claiming that its actions would not have sufficed to prevent the genocide: this is not only irrelevant to the breach of the obligation of *conduct* but also ignores the possibility that the combined efforts of several states might have averted the genocide. The ICJ built important restraints into the obligation to prevent. A state acting on the obligation may only act 'within the limits permitted by international law'. The obligation must be undertaken 'while respecting the United Nations Charter and any decisions that may have been taken by its competent organs'. Such limits are important because the obligation to prevent is triggered at a very early stage: 'the instant that the State learns of, or should normally

12 Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), vii.

13 High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 and Corr.1, 2 December 2004; In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc. A/59/2005, 21 March 2005.

14 Report of the Secretary-General, 'Implementing the Responsibility to Protect', UN Doc. A/63/677, January 2009, para. 10.

have learned of, the existence of a serious risk that genocide will be committed'. A state may violate the obligation to prevent even if it had no certainty that a genocide was about to be committed. (*Complicity* in genocide, in contrast, requires proof both that the state was aware that genocide was about to be committed or was in progress and that the state took positive action to furnish aid or assistance to the perpetrators.)

For the Court, its findings on the obligation to prevent genocide are elements that are very particularly forward-looking in its judgment.

4. Ethics and the international lawyer

I have spoken thus far on how the very character of international law incorporates into much of its substantive norms concepts that the layman may recognize as relating to ethics.

That the law he or she invokes or applies is ethical in its content is not, of course, the same as ensuring that the international lawyer is himself or herself ethical. But that is important, too, because the application of law (even an ethical law) is rarely automatic. Legal submissions to a judge are rarely simply 'right' or 'wrong'. The judge is often deciding which of two perfectly decent alternatives is to prevail. Articulating the implication of each choice for the values the law seeks is certainly a help. But it is not enough. The lawyer herself or himself must have a deep sense of ethics properly to carry out the noble tasks of this profession.

Instilling this sense of ethics is both an easy and a difficult job. It is easy because the medical and legal professions emphasize, as a condition of being called to the profession, the importance of ethics in all that lies ahead. I know that when English law students are admitted to the Bar, the senior barrister of the Inn to which that student is attached makes a speech. Each such speech will vary in content. But a constant and always present theme is that of ethics. The student barrister is told that of course he must do everything to advance his client's case, whether or not he thinks the arguments persuasive himself and whether or not he likes the client. Everyone is entitled to be well represented in a court of law. But the new barrister is also firmly told that his *primary* duty is not to the client, but to the *court*. Honesty to the court, never misleading the court, is what is fundamental. The new barrister is also told that when any problems of ethics arise, he should always go to a senior barrister, to seek advice as to what is the ethical course for him to follow.

I suppose – but I may be wrong – that comparable things happen in other national Bar arrangements.

But it is *hard* to instil this sense of ethics. It is hard because, in international law at least, once embarked upon the profession, there do not exist structures for the control of the behaviour of the lawyer. Further, given that international lawyers, and indeed international judges, come from very varied backgrounds, there is often not a common sense as to whether something is, or is not, ethical.

I have certainly noticed, when occasional matters have arisen in the ICJ in relation to counsels' conduct that have disturbed me, that my civil law friends take a more relaxed approach to these matters than I do. For example, it feels to me professionally incorrect for a new argument or a new document to be introduced by counsel at

a stage in the pleadings when his opponent will have no opportunity to respond. And it is deeply unethical for a counsel to seek to mislead a court by suggesting that certain documents say things that they do not. But what seems unethical to me may warrant no more than a resigned shrug from a civil law colleague . . . It seems we look at things differently.

There is no International Bar in the formal sense of the term. The ICJ does not itself prescribe who may or may not plead before it. So we have, from the different countries, government officials, advocates, and barristers (often not specialists in international law), and academics who are indeed leading specialists in the subject. The ethics of their professional conduct will, if they are at the national Bar, largely be a matter for that Bar. If they are not professional advocates and barristers, it is largely unregulated.

So far as the international judiciary is concerned, the European Court of Justice in 2007 and the European Court of Human Rights in 2008 adopted codes on ethical behaviour for the judiciary. Both of these are more detailed than the comparable provisions that are applicable to Members of the Bench of the ICJ.

Of course, some things are totally obvious. An international judge is not a representative of his or her national state. A judge is to decide matters on the basis of law and not of his or her national interests. This question of the independence of the judiciary is critical to the effective functioning of the courts concerned, and to international confidence in those courts. The issue is not a simple and formalistic one. It *is* difficult for a judge, even if his or her government would never dream of making representations to that judge, to decide a case in a manner adverse to the stated position of the government. Just as we speak in certain situations of 'self-censorship', so a judge is keenly aware of how his or her views will be regarded at home. This is only human nature. Sometimes it may be a case in which a government has stated publicly its views on the law and the importance it attaches to them. The *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) was such a case. And sometimes it may be a case in which a judge's national state is actually a party before the Court. Even when no pressure is improperly brought, a judge may feel the need to draw on some moral courage to decide in a certain way. Indeed, all sorts of incidents that arise in a judge's career are a test of the judge's ethical probity.

5. Conclusion

The pressures upon, and concerns that may be felt by, an international judge are of course very, very different from the problem that faced Professor Cleveringa and the courage with which he acted.

Professor Cleveringa (unlike a judge who has to decide a case one way or another) was not under any external compulsion to lecture to the students after the dismissal of Professor Meijers. He could perfectly well have strongly disapproved the actions of the occupying Germans, without speaking out publicly. He could have co-operated to the absolute minimum, but left it at that.

Further, the moral act of speaking out carried not only risks but also probable penalties for others. How any such public speech would impact upon the university,

and upon his family, were also matters that would have required deep consideration. Professor Cleveringa made his moral choice. Knowing as he did the almost certain personal consequences, he acted with great courage.

Such courage, in such extreme circumstances, is born out of a pre-existing sense of morality and of ethics. This can be instilled by family, by religion, by sense of national tradition.

I have tried this evening to show the role that international law may play in contributing to our sense of ethics and justice, the bedrocks of a courage that may sometimes be needed.

https://doi.org/10.1017/S0922156510000026 Published online by Cambridge University Press