TIME AND THE LAW: INTERNATIONAL PERSPECTIVES ON AN OLD PROBLEM

ROSALYN HIGGINS*

I begin by confessing a general fascination with the concept of time. I puzzle endlessly over the relationship between time and matter, and the insistence of scientists that before the Big Bang time did not exist. I grapple with the relationship between time and speed, and the fact that if we could travel at the speed of light time would not move. I seek to grasp Stephen Hawking's recent conversion to the view that, in the physical world, time may yet run in reverse. I am intrigued that our concepts of time came to Australia only with the First Fleet, for aboriginal time was cyclical rather than linear. Events could recur, dead people could live again.[1] I find exhilarating the idea that we see at this moment, through our telescopes, stars that no longer exist. I love the objective reality of the equator and the total artificiality of the meridian, and the intention that this felicitous fiction is the place for us to see in the "real beginning" of the next century.

It has therefore been a happy occurrence for me that the concept of time plays an important part, too, in international law. Every student of international law is familiar, of course, with the inter-temporal rule of international law, and I shall not be able to escape saying a word on that in due course. But I shall hope to show, first, that temporal matters are all around us; and, second, that they are a necessary incident to the resolution of important matters of policy.

This fact is perhaps conveniently illustrated if we gather the plethora of legal detail on matters temporal under the following heads: Now and Then; Then and Now; Long Enough Time; and Too Long Ago.

I. NOW AND THEN

INTERNATIONAL law exists in a horizontal legal system. Because the jurisdiction of all international tribunals is based on consent, acceptances of that consent have to be articulated at a precise moment of time. Does the acceptance *now* suppose that jurisdiction may be exercised over facts that occurred *then*? The answer is complex, and depends in part upon the type of expression of consent and the nature of the tribunal to which the consent is given.

* Judge of the ICJ. This article is based on the 20th F.A. Mann lecture, delivered on 26 Nov. 1996.

1. G. Davidson, *The Unforgiving Minute*, p.8.

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One method by which States accept the jurisdiction of the International Court of Justice is through Article 36(2) of the Statute, the so-called Optional Clause. Under this provision a State declares that it accepts the jurisdiction of the Court in respect of a dispute with any other State which accepts the same obligations. Just what, temporally speaking, does this mean?

The answer is complicated by the fact that the Statute of the International Court provides that it may settle *disputes* over which it has jurisdiction. A dispute may crystallise at a time different from that at which the precipitating facts or situations occurred. The broad position of the Court—and its predecessor, the Permanent Court of International Justice—has been that acceptance of the jurisdiction of the Court *does* have retrospective effect in respect of these two elements, unless this is specifically excluded by a reservation to the general acceptance of jurisdiction.[2] The most effective way for a State to avoid that retrospective application is by a formula such as that introduced by Belgium in 1925. It stipulated that Belgium accepted the jurisdiction of the Permanent Court save for "any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification".[3] This double temporal exclusion appears in many comparable declarations accepting the jurisdiction of the International Court.[4]

An exclusion from the jurisdiction of the Court of events prior in time to the acceptance of the Optional Clause can also be achieved in other ways. There can be reference to a past date for commencement; or particular past periods of time (which often reflect sensitive events) can also be excluded from the jurisdictional reach of the Court. Some 20 such declarations have been made under the International Court, referring to periods of hostilities, military occupation, or to the Second World War.[5]

Whichever form of reservation is used, it is *still* necessary for the Court to decide when a particular dispute crystallised, to see if it is before the exclusion date or outside the excluded period. The same is true of those facts and situations giving rise to the dispute. Disputes, facts and situations may have occurred at different times. The jurisprudence of the two Courts reveals something of a tussle between the proponents and opponents of the "comprehensive whole theory" of matters temporal.[6] I should briefly

2. *Mavrommatis Palestine Concessions* (*Greece* v. *United Kingdom*), Judgment No.2, (Jurisdiction) (1924) P.C.I.J. Ser.A, No.2, p.6 at p.35; *Anglo-Iranian Oil Co.* (*United Kingdom* v. *Iran*), Preliminary Objection, Judgment, I.C.J. Rep. 1952, 93, 106.

3. See *Second Annual Report of the PCIJ*, Ser.E, No.2, p.77.

4. See the excellent study by S. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice* (1995), Annex II, pp.142–143.

5. *Idem*, p.150.

6. See e.g. the dissenting opinions of Judges Winiarski and Badawi in *Right of Passage over Indian Territory*, Merits, Judgment, I.C.J. Rep. 1960, p.6 at p.73.

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add that the principle of reciprocity applies to reservations, including temporal reservations, to the Optional Clause declarations,[7] whereby each party can benefit from an exclusion provision of the other. This complicates matters yet further. The *Electricity Company of Sofia and Bulgaria*, *Right of Passage*[8] and *Interhandel*[9] cases illustrate the argument well.

The European Convention on Human Rights and the International Covenant on Civil and Political Rights are both human rights treaties with "opting in" provisions that allow a party to either treaty to accept the jurisdiction of the relevant treaty bodies. Neither of these require consideration of whether "disputes" exist, and from when. Articles 25 and 46 of the European Convention effect the establishment of jurisdiction of the Commission and Court; and an Additional Optional Protocol to the Covenant achieves the same end for parties to the Covenant. Nor does the principle of reciprocity to reservations apply here.

If the parties to these treaties accept these optional jurisdictional provisions at the very same time they become party to the treaty itself, no temporal issue arises. But—and here a problem arises that is not present for the International Court—often the acceptance of jurisdiction follows some years after becoming party to the treaty that contains the obligations.

What are the temporal implications? The European Court of Human Rights has taken a retrospective position similar to the International Court, in that it has found that jurisdiction exists over disputes, claims and events occurring at any time since the State concerned became party to the European Convention itself, regardless that the date of acceptance of the jurisdiction of the Commission or Court might be later.[10] The implications of this have been somewhat mitigated by the "six-month rule", which requires that an application to the Commission be brought within six months of exhaustion of local remedies.[11]

By contrast, the Human Rights Committee acting under the Covenant has supposed that an acceptance of the Optional Protocol does *not* have retrospective effect, but operates only to grant jurisdiction over claims and events occurring subsequent *to the acceptance of the Optional Protocol.* But it should be noted that there is no six-month rule to limit the scope of retrospective application of jurisdiction. It has to be said that some

7. *Electricity Company of Sofia and Bulgaria*, Judgment (1939) P.C.I.J. Ser.A/B, No.77, p.64 at p.81.

8. *Right of Passage over Indian Territory*, Preliminary Objections, Judgment, I.C.J. Rep. 1957, 125, 142; Merits, *supra* n.6, at pp.35–36. See also the discussion in Rosenne, *The Law and Practice of the International Court* (2nd rev. edn), pp.483–489.

9. I.C.J. Rep. 1959, 21–30.

10. Harris, Warbrick and O'Boyle, *Law of the European Convention on Human Rights* (1995), p.640.

11. *X* v. *France*, No.9587/81 (1982) 29 D.R. 228; and Art.26, European Convention on Human Rights.

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acceptances of the Optional Protocol to the Covenant on Civil and Political Rights contain reservations comparable to the so-called "Belgian formula" of the Permanent Court of Justice, but the Committee on Human Rights has always treated them as *ex abundante cautelae* and serving no juridical purpose. What in the jurisprudence of the International Court has been seen as necessitating a reservation *ratione temporis* has been seen in the Committee of Human Rights as self-evident.

Continuing Events

What is the situation when events relating to the dispute began before the starting date but are claimed to be repeated subsequent to that date—and thus to found jurisdiction? This matter came before the Permanent Court of International Justice in the case of *Phosphates in Morocco*, in 1938.[12] The case concerned claims brought by Italy against France (as the responsible power in Morocco), in which Italy claimed that, by a series of decrees—*dahirs*—that denied the vested rights of Italian nationals in that industry, those rights had effectively been expropriated.

Both Italy and France had made declarations accepting the compulsory jurisdiction of the Permanent Court. The French declaration of acceptance of jurisdiction was dated September 1931. The *dahirs* that created the monopolisation of Moroccan phosphates were handed down in January and August 1920. But there was, said Italy, a continuing progressive illegality, which indeed had only been completed by certain acts subsequent to the French declaration of 1931.

What constitutes repetition of a claimed illegality and what is the mere consequence of that illegality? The Permanent Court found that what was crucial was the legislation of 1920 and that the subsequent events could not be considered separately from that. The test, said the Court, was whether the later events would *by themselves* constitute grounds of a dispute—and that was not the case in the present affair.

It is interesting to see how this issue has been dealt with in relation to a human rights treaty, namely the International Covenant on Civil and Political Rights. Two cases illustrate the point well. First, the *Gueye* case:[13] in ratifying the Optional Protocol under the Covenant on 17 February 1984, France made a declaration, rather than a reservation. This stated:[14]

> France interprets Article 1 [of the Protocol] as giving the Committee the competence to receive communications alleging a violation of the rights set forth in the Covenant which results from either acts, omissions, develop-

12. P.C.I.J. Ser.A/B, No.74, p.10.

13. *Ibrahima Gueye et al.* v. *France*, No.196/1985 (views adopted 3 Apr. 1989), 35th Session, Human Rights Committee.

14. Submission under r.91, 8 Apr. 1987, referring to the French declaration of 17 Feb. 1984.

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> ments or events occurring after that date on which the Protocol entered into force for the Republic, or from a decision relating to acts, omissions, developments or events after that date.

France's interpretative declaration does indeed correspond with the interpretation of the Committee itself. The applicants were retired Senegalese members of the French army, who claimed discrimination contrary to Article 26 of the Covenant by virtue of the fact that they received inferior pensions to those enjoyed by retired soldiers of the French army of French nationality. The relevant pensions legislation was enacted in 1979, pre-dating the entry into force of the Optional Protocol for France.

The Senegalese claimants stated that they had continued negotiations with the French government and that the final rejection from the Minister for Economics, Finance and Budget occurred in a letter dated 12 November 1984—six months after France's ratification of the Optional Protocol. The Committee decided that the continued application, after May 1984, of laws and decisions relating to the claimed rights of the applicants made the claim admissible.

The fine-slicing pursuant to this temporal problem is illustrated also by a recent Covenant case, *Simunek* v. *The Czech Republic.*[15] The applicants were forced to leave Czechoslovakia in 1987, under pressure from the security forces of the communist regime. Under the legislation then applicable, their property was confiscated. In June 1991, after the establishment of democracy, the Czech Republic ratified the Optional Protocol.

Just before that, in April 1991, there entered into effect an Act which provided for the rehabilitation of Czech civilians who left the country under communist pressure and laid down the conditions for restitution or compensation for loss of property. Restitution was available only if the persons concerned had retained Czech nationality and were permanent residents in the country. The applicants could not fulfil these conditions and complained of unlawful discrimination in access to a remedy. Although the law complained of was passed in April 1991 and the Protocol was ratified in June 1991, the Committee found that the violations complained of continued after the entry into force of the Optional Protocol. It added: "A continuing violation is to be interpreted as an affirmation after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State Party." On the merits—though this is beyond my theme—the Committee found for the applicants, observing: "Taking into account that the State Party itself is responsible for the departure of the [applicants], it would be incompatible with the Covenant to require them permanently to return to the country as a prerequisite for the restitution of their property." I might add that several

15. No.516/1992, views adopted 31 July 1995, 54th Session of the Human Rights Committee.

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Eastern European countries have comparable provisions that apply also to seized Jewish property. The requirement that a claimant return to live in a country which destroyed his family's life and where the Jewish community has been decimated is manifestly unacceptable.

The concept of "continuing acts" is not an easy one.

Human rights tribunals have been disinclined to rest on the "inevitable consequences" theory advanced by the International Court. In the 1995 case of *Yagci and Sargin* v. *Turkey*[16] Turkey reminded the European Court of Human Rights that its acceptance of the Court's compulsory jurisdiction on 22 January 1990 was in respect of "matters raised in respect of facts... which have occurred subsequent to" that date. The applicants had been arrested and detained on charges relating to political activities. They complained that the length of their detention violated Article 5(3) of the European Convention and that the length of the criminal proceedings which ensued violated Article 6(1). The applicants had been arrested in 1987, the trial opened in 1988. Various applications for release were made from 1989 onwards. Only in 1992 were the defendants acquitted of all charges and released.

Turkey contended that the facts occurring subsequent to 22 January 1990—the date of its acceptance of the Court's jurisdiction—were "merely extensions of ones occurring before that date".[17] This argument was rejected by the European Court of Human Rights. Going perhaps further than logic dictates, it said that it mattered not if the acts were extensions of what was already in train before, because: "From the critical date onwards all the State's acts and omissions not only must conform to the Convention but are also undoubtedly subject to review by the Convention institutions."[18]

A final point on the issues I have illustrated under "Now and Then": I mentioned earlier that the jurisdiction of the International Court of Justice may also be based on a treaty provision. Here too the International Court of Justice has applied the principle of jurisdictional retroactivity. On 20 March 1993 Bosnia-Herzegovina filed an application instituting proceedings against Yugoslavia (Serbia-Montenegro) claiming violations of the Genocide Convention. Yugoslavia (Serbia-Montenegro) asserted that even if the Court had jurisdiction on the basis of the Genocide Convention, it could deal only with events subsequent to the date on which the Convention might have become applicable as between the parties, i.e. 29 December 1992. Addressing this question, the Court said that the Genocide Convention "does not contain any provision, the object or effect of

16. (1995) 20 E.H.R.R. 505.
17. *Idem*, p.523.
18. *Idem*, p.524.

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which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the parties themselves make any reservation to that end".[19]

It would thus seem that both the International Court and the European Court of Human Rights have been bolder than the UN Committee on Human Rights in assuming a retrospective effect of an acceptance of jurisdiction.

On the other hand, the European Court of Human Rights and the Committee on Human Rights have been more liberal than the International Court of Justice in assuming that acts occurring prior to the jurisdictional starting date may sometimes have a continuing life of their own after that date, sufficient to found a cause of action.

II. THEN AND NOW

SHOULD the events of yesterday ever have the law of today applied to them?

Let us begin with a problem common to all systems of law—one on which the United Kingdom has much exercised itself in relation to the European Court of Justice. If a court today finds the law to be X, is the State liable for all past occasions in which it has applied it as if it were Y? This is well illustrated by the 1974 case of *Marckx* v. *Belgium*, in which Marckx challenged the legality under the European Convention on Human Rights of the legislation that discriminated in inheritance matters between legitimate and illegitimate children. Ill-advisedly seeking to warn the Court off a certain course of action, the government of Belgium said this:[20]

> If the Court were to find certain rules of Belgian law to be incompatible with the Convention, this would mean that these rules had been contrary to the Convention since its entry into force for Belgium [in 1955] ... the result of such a judgment would be to render many subsequent distributions of estates irregular and open to challenge before the Courts.

Yes, indeed, said the Court, unsympathetically. It observed that, although it was dealing with the particular case, it was inevitable that the Court's decision *would* have some effects extending beyond the confines of the particular case. The illegalities, observed the Court, stemmed not from its findings but from the offending provisions of law. The Court's judgment could not annul or repeal them. It pointedly concluded: "It leaves to the State the choice of means to be utilized in its domestic legal system for performance of its obligations under Article 5, paragraph 3."[21]

The retrospective application of the criminal law has very special overtones. The principle of *nullum crimen, nulla poena sine lege* is indeed so

19. I.C.J. Rep. 1996, para. 34.
20. (1979–80) 2 E.H.R.R. 330 at p.352.
21. *Idem*, para.58.

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widely accepted that it may properly be described as a general principle of law—that is, one common to all developed legal systems and thus itself a source of international law. Certainly it is reflected in all human rights instruments and finds voice in Article 7 of the European Convention on Human Rights and Article 15 of the Covenant on Civil and Political Rights.[22]

The principle clearly is an important protection against arbitrary executive power and its application is usually fairly straightforward. It is an elementary principle of justice—tested to the limits when there is a strong view within society that the offence concerned is so repugnant that it *should* long since have been classified as a crime, and that change is on the horizon. That point was well illustrated in *R.* v. *R.*, the marital rape case that came before the House of Lords in 1991. Their Lordships held that the rule that a husband cannot be criminally liable for raping his wife if he has intercourse with her without her consent was no longer the law of England, since, as it was put, "a husband and wife are now to be regarded as equal partners in marriage and it is unacceptable that by marriage the wife submits herself irrevocably to sexual intercourse in all circumstances".[23] The husband thus convicted of rape complained to the European Court of Human Rights that the United Kingdom had violated Article 7 of the European Convention. It was there held that the object and purpose of Article 7 were to ensure that no one should be subject to arbitrary prosecution. In a distinctly common-law method of reasoning, undoubtedly affected by the subject matter, the European Court said that criminal law *could* be applied retrospectively, provided that the development of criminal liability was foreseeable. Although at the time the sexual acts were committed the principle of marital immunity still obtained, the Law Commission had recommended its abolition and "the adaptation of the existing offence could be reasonably foreseen".[24] Not, one might imagine, by the men concerned—but I have no complaint about the result-led reasoning.

At the time of the Nuremberg Tribunal, it was quite clear that war crimes were unlawful, and known by Germany and all nations to be unlawful, even by 1939. The DPP, in his important study made in preparation for possible legislation,[25] indicated a hesitation as to whether

22. The common core of both provides: "No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

23. *R.* v. *R.* [1992] 1 A.C. 599.

24. *SW* v. *United Kingdom*, *The Times*, 5 Dec. 1995.

25. Report of the War Crimes Enquiry, Cm.744 (1989), para.6.44. See also Greenwood, "The War Crimes Act 1991", in Fox and Meyer (Eds), *Effecting Compliance* (1993), pp.221–225.

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crimes against humanity—also a head of indictment at Nuremberg—had been a known offence at the time of their commission. There are different views on that question.

The drafting of the UK 1991 War Crimes Act is in the narrowest possible terms. It follows the cautious approach on this—and, indeed, every other—point. The Act confers jurisdiction on the British courts to try those who are currently UK residents for the offences of murder, manslaughter or culpable homicide amounting to war crimes that were committed during the Second World War. I am, of course, aware that in the debates in the House of Lords several of the United Kingdom's most distinguished judges referred to this as a proposal for retrospective penal legislation. With all respect, this clearly is not so, in the sense that all the (narrowly defined) offences were manifestly unlawful as war crimes, throughout 1939–1945.

What one *did* have in the 1991 Act, however, was a tardy assertion under English law of a jurisdiction already permitted to the United Kingdom under international law, for the purpose of trying offences known to have been offences at the time of their commission. One may or may not think that desirable—but it is certainly *not* a retrospective application of criminal law.

The policy considerations for ensuring that the most heinous categories of crime attract the full reach of the law are apparent, not least in Bosnia and Rwanda. The Dayton Accord solution for the former,[26] and any small hopes one might have for the latter,[27] have trial and punishment at their heart. But it must also be conceded that there are particular circumstances in which the case for forgetting the past is powerful.

The policy considerations concerning punishment for atrocities occurring in the past are many and varied. That they can sometimes pull in diverse directions is nowhere better illustrated than in the great debate about amnesties. The 1960s and 1970s in Latin America were characterised by dictatorships and the perpetration of acts of unspeakable cruelty, which included widespread torture and the phenomenon of the "disappeared". The widespread and welcome return to democracy brought with it the question of the trial and punishment of the perpetrators of these deeds. The problem is at once political and legal.

The victims of these unspeakable crimes, or—in the case of those who died or disappeared—their families, seek justice. In one country the

26. Dayton Peace Agreement, initialled at Wright-Patterson Air Force Base in Dayton, Ohio, 21 Nov. 1995 and signed in Paris, 14 Dec. 1995: GA Doc.A/50/750 "General Framework for Peace in Bosnia and Herzogovina".

27. Security Council Res.955(1994) establishing the UN International Criminal Tribunal for Rwanda.

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outgoing dictatorship itself passed on amnesty law as the condition for the return to civilian rule. Alternatively, the newly elected government may believe from the outset that this option is not open to it—for example, the army, among whom the perpetrators will often be found, remains visibly in the wings, as if to emphasise that the new democracy exists only on sufferance. Attempts may be made to bring the violators of human rights to justice, but disturbances occur within the army as trials begin. You will recognise each of these examples in the recent history of Latin America.

More complicated was the case of Uruguay, which held a public referendum on whether the "page should be turned" on bringing perpetrators to trial. The majority decided that the country should put the past behind it and that an amnesty should be granted. But by what moral entitlement may those who have not suffered decide that the perpetrators of harm to others should walk free?

Can the healing process occur if the evils of the past are rehearsed again, at length and in detail, in the present? But, equally, can the lessons of the past be learned if these evils appear to be tolerated? The dilemma is of truly momentous proportions.

The Committee of Human Rights under the International Covenant on Civil and Political Rights has had to examine various States which find themselves in this dilemma. 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 Covenant, 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.

It is that fine line that the South African Truth and Reconciliation Commission seeks to tread. Those who are prepared to admit guilt may come before the Commission, to seek indemnity, giving full details of the events concerned and their responsibility in them. Those who deny their guilt will go before a court of law. Some important facts and truths do seem to be emerging. But it remains to be seen whether this will be sufficient to maintain the miraculous reconciliation achieved thus far.[28]

Occasionally, very occasionally, we see a State which decides that the best hope for reconciliation lies in going right back in time. Where other countries seek to turn the page forward, New Zealand has chosen to turn the pages back. Under the Treaty of Waitangi, signed in 1840 between the British Crown and representative chiefs, it was stipulated that there would

28. See P. Parker, "The Politics of Indemnities, Truth Telling and Reconciliation in South Africa: Ending Apartheid without Forgetting" 17 H.R.L.J. (1996) 1.

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be two peoples, one nation.[29] Various exchanges of commitment were made to that end. The balance of power and advantage nonetheless swung in the direction of the Pakhia—the white settlers. In 1975, faced with a growing Maori resentment, the New Zealand government established the Waitangi Tribunal. Its jurisdiction was further extended in 1985. Under what must surely rank as one of the bravest and most radical social experiments of our time, Maoris may bring claims arising from prejudicial consequences of any legislation, policy or action of the Crown *since the year 1840*. The Waitangi Tribunal has only the power to recommend, no power of decision. Nonetheless, successive governments have given the closest attention to the recommendations of the Tribunal that the Treaty has been breached, and the results—in terms of the passing of control over natural resources, and of financial compensation—have been striking.[30] Certain political leaders of the Maoris remained dissatisfied with what can be obtained through the Tribunal; and at various times political leaders have spoken of the need to cap the claims being advanced by the Maoris.[31] But New Zealand has, in this extraordinary scheme, kept faith with the idea that the only way forward is to go backwards—back to the Treaty of Waitangi as a living social contract and the cornerstone of positive bicultural relationships between the Maori people and the other New Zealanders.

III. LONG ENOUGH TIME

I turn from our examination of "in respect of what time" to look at the issue of "long enough time".

Time limitations have a prominent role to play in all systems of law. Whether we speak of statutory limitations or the doctrine of laches, the policy purpose is the same. Time limitations are to be seen as one of the panoply of the techniques directed towards the principle of *interest rei publicae ut finis litium sit* (it is in the public interest that lawsuits should have an end). In English law this policy is supported also by such notions as cause of action estoppel, issue estoppel, the acceptance of foreign judgments, lacunae, striking out for delay, statutes of limitation and, of course, *res judicata*.

The same policy consideration—the principle of finality—applies equally in international law, though the armoury of techniques to support

29. The Treaty of Waitangi had provided for the ceding of sovereignty to the British Crown; a guarantee that Maoris could retain their lands and other material and cultural treasures for so long as they wished; and an assurance that Maoris would enjoy equal rights of citizenship with all other British subjects.

30. The Office of Treaty Settlements attached to the Ministry of Justice negotiates and implements claims settlements (including claims advanced through the Waitangi Tribunal).

31. In 1994 the government released a number of proposals for the global settlement of claims. These proved unacceptable to public opinion.

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it is more limited. When dealing in a horizontal legal order with sovereign States, striking out, for example, is manifestly inappropriate. Issue and cause estoppels do not exist as such. The principle of *res judicata*, indeed the whole concept of precedent, is complicated in the International Court because of the need for consent to jurisdiction. Article 59 of the ICJ Statute provides that judgments are binding only on the parties in the case concerned. At the same time, the Court obviously bases itself on its past jurisprudence. These matters have recently been excellently analysed by Judge Shahabuddeen.[32]

The concept of limitations has a greater resonance in international law. It may sometimes fall to an international tribunal to pronounce upon national limitations. In the *Emmott*[33] case in 1991 the European Court of Justice established the principle that, in the absence of specific Community rules on the subject, it was for the domestic legal system of each State to determine procedural conditions governing legal actions—provided always that this would not render it virtually impossible to exercise the rights conferred by Community law. The English limitations regarding actions in debt, in negligence or otherwise, continue to have a general application within the EU system. But they may also fall for consideration under the European Convention on Human Rights. In the recently reported case of *Stubbings* v. *UK*[34] the applicant claimed violations of various articles of the European Convention arising from the limitation period in English law for rape and indecent assault. She had allegedly been the victim of family sexual abuse as a child but only when undergoing psychotherapy did she realise she had a cause of action. But by then she was out of time.

The European Court of Human Rights looked at the matter by reference to the claimed violations of the Convention. There was in principle no violation of the right to access to a court. The six-year time limit was not unduly short—if an action had been commenced shortly before it ran out, the English courts would in fact have been adjudicating on matters which occurred about 20 years earlier. But a warning shot was fired. In the light of the developing awareness of the connections between child abuse and adult psychological disorders, "it was possible", suggested the Court of Human Rights, "that the rules of limitations of actions applying in member States of the Council of Europe might have to be amended to make special provision for that group of claimants in the near future". The bal-

32. *Precedent in the World Court* (1996).
33. *Emmott* v. *Minister for Social Welfare and the Attorney-General* [1991] I.R.L.R. 387. See also the ECJ's reference to the principle of legal certainty in *Gebroeders van Es Douane Agenten* v. *Inspecteur der Inroerrechten en Accijnzen* (143/93, [1996] E.C.R. I-431 at para.27).
34. *Stubbings and Others* v. *United Kingdom*, Case No.36–37/1995, *Times Human Rights Law Report*, 24 Oct. 1996.

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ance between the rights of claimants and the concept of finality is not static and must be constantly subject to review.

Within international human rights law itself the practice varies. For example, as I mentioned, the European Convention on Human Rights requires that an application be made within six months of the alleged violation having occurred. By contrast, the International Covenant on Civil and Political Rights has no time limitation for bringing applications under the Optional Protocol.

The Soviet Union became a party to the Covenant in 1976. The States of the former Soviet Union continue to be parties. Many of these States and other Eastern Europe States now accept the Optional Protocol, whereby individuals may bring actions for violations of Covenant rights. The profound implications of the absence of a limitation period for bringing an action perhaps explain why the Committee has taken a conservative approach to the theory of retrospective application of legal obligation.

Neither the Statute of the International Court of Justice nor its Rules provide for any limitation period. The failure of a State to bring a claim until many years after the claimed delict may be for a variety of reasons. Attempts at settlement may be among them. It is common knowledge that prolonged settlement talks were held between Iran and the United States regarding two potential legal actions, one concerning the shooting down of the Iran Airbus in 1988 and the other over the bombardment of certain oil platforms in the Gulf. The first resulted in a settlement between the parties, the second did not. In the *Oil Platforms* case[35] heard by the International Court in 1996, the United States drew to the attention of the Court the delay of four years in the institution of proceedings in 1992—not to achieve any procedural relief but to add credence to points it wished to advance regarding *bona fides*.

In the case of *Certain Phosphate Lands in Nauru*[36] Nauru claimed that Australia (as one of the joint Trusteeship Powers prior to Nauru's independence) was responsible for the necessary rehabilitation of the occupied area of the island. Australia raised a variety of objections to the admissibility of the claim, including the fact that the Trusteeship Agreement, under which Australia acted, was long since terminated by General Assembly resolution, against a background in which Nauru's complaints were already well known. The Court found, nonetheless, that any rights which Nauru might have had in connection with the rehabilitation of the lands remained unaffected. Australia also contended that the claim was brought too late—Nauru achieved independence on 31 January 1968 but

35. *Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), Preliminary Objections, Judgment, I.C.J. Rep. 1996.

36. I.C.J. Rep. 1992, 240.

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raised the matter with Australia only in December 1988: nearly 21 years later.

The International Court noted that international law does not lay down any specific time limits,[37] and that it is for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible. The Court found a sufficiency of initiative by Nauru *vis-à-vis* Australia in the 20-year period to avoid the application being rendered inadmissible by passage of time. Its finding seemed close to a determination that no laches of rights had occurred. That this is indeed a somewhat distinct matter is surely confirmed by the Court, when it immediately followed its rejection of inadmissibility by reason of passage of time with the statement: "Nevertheless, it will be for the Court, in due time, to ensure that Nauru's delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law."[38]

It is interesting that, in the absence of any specific time limits in international law, the Court seemed to treat the question of want of action or otherwise as determinative of admissibility, and the prejudicial aspects of the question of delay as a management problem for the merits. In the event the matter was settled and we have no way of knowing how the Court would have exercised its intended protection against prejudice from delay.

There is little agreement on the application of the principle of finality in respect of statutory limitations in criminal matters. Most civil law countries have statutory limitation periods for criminal offences. By contrast, most common law countries do not. For these countries it would seem that other policy considerations relating to public order outweigh those of finality.

These policy considerations come into acute focus when the crimes are the gravest known in our depraved world. These are reflected in war crimes and in crimes against humanity. Certain efforts have been made to codify in treaty law the prohibition of statutory limitations in respect of these offences. The 1970 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[39] was used in the United Nations (where it was drafted) as an opportunity to enlarge the Nuremberg Definition of Crimes Against Humanity to include such contemporary considerations as apartheid and the violation of the rights of indigenous peoples. Accordingly, it attracted only a very particular support. Neither the United States nor any Western European country became party to it.

37. *Idem*, p.254.
38. *Idem*, p.255.
39. Adopted by General Assembly Res.2391(XXIII), 26 Nov. 1968.

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In the European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes,[40] drawn up within the Council of Europe, the list of offences went beyond the Nuremberg principles, to take into account the crimes of genocide as specified in the 1948 Genocide Convention and the violation of certain articles in the four 1949 Geneva Conventions concerning the protection of non-combatants in time of war. The Convention has never entered into effect.

State practice on this matter remains diverse. Germany has avoided a general exception for this class of offences. Rather, the normal statutory limits for criminal offences have been extended once where war crimes and crimes against humanity are concerned—and all statutory limitation was removed for the offence of genocide. Limitations were in 1979 further extended, but this time for the general class of murder—which would include murders by Nazis but not necessarily the generic class of war crimes.[41] In France the statutory limitations apply even to war crimes. It was for that reason that in 1983 Barbie could not be charged with war crimes. Crimes against humanity were a relatively new category of crime in French law, however, and they were introduced into French law as a new offence without limitation.

As for the United Kingdom, the issue is academic in any event, in the sense that English law lacks statutory limitation periods for *all* criminal offences. The question of a special exemption for the most heinous crimes does not arise.

IV. TOO LONG AGO

I turn finally to a different issue: the predication of contemporary rights and duties upon acts long since passed. It is this problem that is addressed by the so-called Rule of Inter-Temporal Law, known to every international lawyer.

Few arbitral *dicta* have been more widely cited, or have come to assume a more important place in international law, than that of Judge Huber in the *Island of Palmas* case. It will be recalled that the *dictum* consists of two elements. The first part provides:[42]

> A judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled.

The observation was directed towards the question of the legal requirements, at a certain era, for the establishment of sovereign title. The ques-

40. Council of Europe, *European Conventions and Agreements*, Vol.III, 1972–74 (Strasbourg, 1975), pp.212–215.

41. For an excellent analysis, see F. Weiss, "Time Limits for the Prosecution of Crimes Against International Law" (1982) III B.Y.I.L. 162–195.

42. (1949) II U.N.R.I.A.A. p.829 at p.845.

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tion Max Huber was addressing was whether mere discovery had allowed Spain to acquire and retain title.

The second element of Huber's doctrine has caused much more difficulty. He distinguished "between the creation of rights and the existence of rights" and spoke of a principle by virtue of which "the existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of the law".[43]

Some have interpreted this second limb as providing that a right, even if lawfully obtained by reference to the law of the era, will be lost if a later rule of international law evolves by reference to which the basis of the "right" would no longer be lawful. But to give such an understanding to the second limb of the Huber *dictum* would often wipe out the legal consequences of the first. Our understanding of it should flow from the realisation that it was a *dictum* offered in the context of establishing and maintaining territorial title. The second element may then be seen as providing that the creation of an initial right does not of itself suffice to maintain it up to the moment of the claim. Perpetuation of that right, demonstrated by effective occupation (as required by later law), is necessary. The Huber *dictum*, taken in its entirety, may be taken as providing that by virtue of the principles of inter-temporal law a State must continue to maintain a title, validly won, in an effective manner—no more and no less. It has, however, been read in the most remarkably extensive fashion, as providing obligatory rules in circumstances that it never addressed, with consequences that it never intended.[44]

Even the first limb of the Huber *dictum*, apparently so well established, seems to have its exceptions.

There are good reasons for thinking that treaties that guarantee human rights—whether expressly or as an incident of their subject matter—fall into a special category so far as inter-temporal law is concerned. The matter still cannot be better put than it was by Judge Tanaka in the 1966 *South West Africa* cases. There it had been suggested by South Africa that the mandate was to be interpreted by reference to the law as it stood in 1920, without reference to the much more recently formulated notion of self-determination. The reason Judge Tanaka believed that contemporary law should be applied was because:[45]

> In the present case, the protection of the acquired rights of the Respondent is not the issue, but its obligations, because the main purposes of the man-

43. *Ibid.*
44. The meaning and scope of the inter-temporal rule were the subject of contending pleadings, written and oral, in *Case Concerning the Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*), but the Court's judgment turned on different issues and it thus never had need to pronounce upon these arguments.
45. I.C.J. Rep. 1966, 294.

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> date system are ethical and humanitarian. The Respondent has no right to behave in an inhuman way today as well as during these 40 years.

The European Court of Human Rights has taken an approach based on the same starting point, reminding us in the *Tyrer* case and others that:[46]

> the Convention is a living instrument which ... must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in general policy of the member States of the Council of Europe in this field.

Whereas for the International Court the issue was the application of contemporary international law to the international human rights obligations undertaken in a treaty, for the European Court of Human Rights the issue has, rather, been the insistence on the European Convention on Human Rights as a living instrument, which is to be achieved by interpreting its provisions "in the light of present-day conditions". Those "present-day conditions", in turn, are to be found largely by reference to the developing practice of the member States themselves, in an approach that is now well established. This is not identical to the interpretation of obligations by reference to contemporary customary international law, but the underlying approach is very similar. If it is clear that the inter-temporal principle of international law, as it is commonly understood, does not apply in the interpretation of human rights obligations, what can be said of treaties in general?

The International Court of Justice certainly has indicated that the doctrine of international law does apply to treaties, in the *Right of Passage* case[47] and in *Rights of Nationals of the United States of America in Morocco*;[48] it was recognised also by the Tribunal in the *Guinea Bissau* v. *Senegal* arbitration.[49] But the matter is not as straightforward as it might seem. In the *Aegean Sea* case in 1978 the issue arose in the context of an agreement made by Greece in 1931 to accept compulsory procedures for settlement of disputes including those relating to "the territorial status of Greece". How was that term to be understood? Could it include contested rights in the Aegean Sea? The Court said:[50]

> Once it is established that the expression "the territorial status of Greece" was used in Greece's instrument of accession as a generic term denoting any

46. Judgment of the Court, *Tyrer* case, 25 Apr. 1978, para.31, publ. Court A, Vol.26, pp.15, 16.
47. *Supra* n.8.
48. I.C.J. Rep. 1952, 176, 185–187.
49. Award of 14 Feb. 1985; English trans. in (1988) 25 I.L.M. 251.
50. I.C.J. Rep. 1978, 32, para.77.

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> matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.

The apparent exception to the Huber rule in the interpretation of human rights obligations now has added to it the "generic" exception. How are these exceptions to be tied together, and what is the general rule of inter-temporal law as it applies to treaties?

Sir Humphrey Waldock, when preparing for the International Law Commission his draft articles on the law of treaties, sought to introduce specific provisions on inter-temporal law.[51] But some took the view that the problem facing the International Law Commission was not really one of the application of an inter-temporal rule to the law of treaties at all. Rather, what was important was to look at the intention of the parties. The question to ask was whether it had been the intention of the parties, in settling their obligations, that those obligations should be determined by reference to the law as it then stood or as it might stand when any controversy later arose. Jiménez de Aréchaga put it thus:[52]

> The intention of the parties should be controlling, and there seemed to be two possibilities as far as that intention was concerned: either they had meant to incorporate in the treaty some legal concepts that would remain unchanged, or if they had no such intention, the legal concept might be subject to change and would then have to be interpreted not only in the context of the instrument, but also within the framework of the entire legal order to which they belonged.

This perspective had in fact been adopted by the International Court in the *Namibia* advisory opinion, when it found that the guarantees in Article 22 had to be read against the background that the mandate was a "sacred trust for civilization". Accordingly, it was to be assumed that the parties to the Covenant accepted that the content of Article 22 was evolutionary, and not static.[53]

Presumed intention was also the basis that the Court relied on in the *Aegean Sea* case to distinguish the finding in the *Abu Dhabi* arbitration,[54] on which the Greek government relied. In that case the Sheikh of Abu Dhabi had granted to Petroleum Development Ltd the right to explore and exploit the oil in the territory, islands and waters belonging to him. Did this give Petroleum Development Ltd rights over the continental shelf, whose existence as a doctrine in international law at the time of the

51. Third Report, draft Art.56.
52. (1964) 1 Y.B.I.L.C. 34, para.10.
53. *Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa)* I.C.J. Rep. 1971, 31.
54. *Petroleum Development Ltd* v. *Sheikh of Abu Dhabi* (1951) 18 I.L.R. 144.

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grant was in doubt? Lord Asquith stated that "it would seem a most artificial refinement to read back into a contract the implications of a doctrine not mooted till seven years later".[55]

The International Court distinguished these facts from those it was facing in *Aegean Sea*. It found that there was an essential difference between the two cases. The Court stated:[56]

> While there may be a presumption that a person transferring valuable property rights to another intends to transfer the rights which he possesses at that time, the case appears to the Court to be quite otherwise when a State, in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement a category of disputes which, though covering clearly specified subject matters, is of a generic kind.

We may now begin to see that intention of the parties is often to be deduced from the object and purpose of the agreement.

That the intention of the parties to a treaty (perhaps revealed by the objects and purposes) should be controlling was also the approach approved by the Institut de Droit International in its resolution on the inter-temporal problem in international law.[57]

The Vienna Convention on the Law of Treaties as it finally emerged itself contains no general rule on the inter-temporal question. The only hint one gets is in Article 31, which provides simply that treaties are to be interpreted in accordance with any relevant rules of law.

There also exist certain disparate clauses that bear indirectly on inter-temporal law. Thus Article 64, while making no pronouncement of general application, does stipulate that a treaty becomes void if it conflicts with a later emergent rule of *jus cogens*. (Article 53 provides that a treaty is also void if, at the time of its conclusion, it conflicts with a rule of *jus cogens*. No element of inter-temporal law is engaged here.) And Article 52 provides that a treaty is void if its conclusion has been procured by the threat or use of force contrary to the Charter of the United Nations.

V. CONCLUSION

IN conclusion, we may suggest that the Huber rule should not be extended beyond its proper confines. In the law of treaties—notwithstanding judicial indications that the Huber rule is applicable thereto—the intention of the parties is really the key. Attention to that point allows one to see that "generic clauses" and human rights provisions are not really random exceptions to a general rule. They are an application of a wider principle—intention of the parties, reflected by reference to the objects and purpose—that guides the law of treaties.

55. *Idem*, p.152.
56. I.C.J. Rep. 1978, 32, para.77.
57. *Annuaire de l'Institut de droit international* (Vol.56), p.536.

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A final concluding word: I hope I have said enough to show that time-related problems in international law are by no means restricted to the *inter-temporal rule*. Indeed, there are many other temporal questions that I have not been able to touch upon—the concepts of "critical date", of "reasonable time" (especially in human rights law), being among them. Even so there's been "time for ... a hundred visions and revisions, before the taking of a toast and tea".[58]

58. T.S. Eliot, "The Love Song of J. Alfred Prufrock".

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