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Human Rights in the World Court

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ABSTRACT

In this Article, Judge Schwebel reviews the cases of the International Court of Justice and its predecessor, the Permanent Court of International Justice, that have substantial human rights implications. He observes that, while the World Court is not a human rights court in the contemporary sense of that term, since standing in contentious cases is limited to States, it nevertheless has constructively dealt with a number of important issues of human rights, as in its early holding that individuals may be the direct beneficiaries of treaty rights.

The Court has played a notable role in promoting the protection of human rights by its interpretation of treaties protecting minorities. What may be the earliest judicial assertion of the doctrine of affirmative action is found in a case of the Court. The Court has proscribed the imposition of criminal liability by analogy; it has emphasized the supremely immoral and illegal character of genocide; it has concluded that apartheid violates on its face the norms of human rights; and it has held that the human rights provisions of the United Nations Charter give rise to obligations binding upon States. Judge Schwebel submits that in these and other respects the Court has been, and should continue to be, an instrumental force in the progressive development of the law of international human rights.

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** Judge of the International Court of Justice.

I. INTRODUCTION

The International Court of Justice (ICJ) is not a human rights court in the contemporary sense of that term. Article 34 of the Statute of the Court provides: "Only States may be parties in cases before the Court."[1] Consequently, individuals, corporations, nongovernmental organizations, and even international governmental organizations may not be parties to contentious cases before the Court. Moreover, the focus of the large majority of contentious cases between states and of the Court's advisory opinions given in answer to questions of international governmental organizations—i.e., the United Nations and its specialized agencies—has not been on human rights' questions.[2]

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1. Statute of the International Court of Justice, art. 34, para. 1, 59 Stat. 1031, 1059, 3 Bevans 1153, 1186.

2. What may be viewed as a regressive development of judicial possibilities is that the Permanent Court of International Justice (PCIJ), in contrast with the ICJ, dealt with some requests by the League Council for advisory opinions, requested not on its own behalf or on behalf of what today would be called a specialized agency, such as the International Labor Organization, but on behalf of states, *see, e.g.*, Nationality Decrees in Tunis and Morocco, 1923 P.C.I.J. (ser. C) No. 2, and other international organizations. *See, e.g.*, Jurisdiction of the European Commission of the Danube, 1927 P.C.I.J., (ser. c) No. 13-IV. The United Nations Charter, however, provides in article 96:

1. The General Assembly or the Security Council may request the International

Since the drafting of the Statute of the Permanent Court of International Justice by the Advisory Committee of Jurists in 1920, it has provided that only states may be parties to contentious cases. This, however, in no way signifies that the statute could not provide otherwise, as the constituent instruments of the European Court of Human Rights, the Inter-American Court of Human Rights, and some other international judicial bodies do. The principle that only states have standing before international tribunals[3] has long since been modified. That principle, however, continues to and will govern the World Court unless and until the statute is amended.

In his seminal book on *International Law and Human Rights* published in 1950, then Professor and later Judge Sir Hersch Lauterpacht proposed to amend article 34 to provide: "The Court shall have jurisdiction: (1) in disputes between States; (2) in disputes between States and private and public bodies or private individuals in cases in which States

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Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Thus, the effective advisory jurisdiction of the ICJ appears to be narrower than was the PCIJ's advisory jurisdiction. Nevertheless, a remaining question is whether the General Assembly or Security Council could construe their authority to ask for an advisory opinion "on any legal question" to embrace questions originating in states, in their national courts, or in international organizations other than specialized agencies, governmental (regional or otherwise), or even nongovernmental. The answer to that question is unclear. The expansive approach taken by the League Council and the PCIJ arguably might support a positive answer to that question. But the *travaux prêparatoires* of the San Francisco Conference on International Organization are open to more than one interpretation. For a diversity of views, see C. WILFRED JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 160-61 (1964); Stephen M. Schwebel, *Preliminary Rulings by the International Court of Justice at the Instance of National Courts*, 28 VA. J. INT'L L. 495 (1988); Shabtai Rosenne, *Preliminary Rulings by the International Court of Justice at the Instance of National Courts: A Reply*, 29 VA. J. INT'L L. 401 (1989); *see also* Stephen M. Schwebel, *Was the Capacity to Request an Advisory Opinion Wider in the Permanent Court of International Justice than it is in the International Court of Justice?*, 1991 BRIT. Y.B. INT'L L. 1991 (forthcoming 1992). If the General Assembly and the Court were to accept that international bodies other than specialized agencies (for example, the United Nations Committee that monitors implementation of the International Covenant on Civil and Political Rights) and, a fortiori, national courts, could ask for advisory opinions on questions transmitted to the Court in the form of General Assembly resolutions, the possibilities of the Court acting in the sphere of human rights could be transformed.

3. The PCIJ referred to "the general character of an international tribunal which, in principle, has cognizance only of inter-state relations." The Factory at Chorzow (Claim for Indemnity), 1928 P.C.I.J. (ser. A) No. 17, at 27 (Sept. 13).

have consented, in advance or by special agreement, to appear as defendants before the Court."[4] But the states of the world show no disposition to amend the statute to so provide.

Nevertheless, questions of human rights have arisen in a number of cases before the World Court, and in some cases, the Court has rendered judgments or given advisory opinions that have significantly influenced international law bearing on human rights. This Article describes the principal cases in which the Court has treated human rights questions and gives a sense of how it has disposed of them.

II. GERMAN SETTLERS IN POLAND

In 1923, the second year of the Permanent Court of International Justice's existence, the Court dealt with one of the Minorities Treaties, a favored instrument of the maintenance of human rights in post-World-War I years, in an advisory opinion on *German Settlers in Poland.* Under a Minorities Treaty that Poland concluded in pursuance of the Treaty of Versailles, Poland undertook "to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion."[5] The treaty provided: "All Polish nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language or religion."[6] It further provided: "Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals."[7]

Beginning in 1886, Imperial Germany pursued a policy of implanting German farmers in Polish areas of the German Empire to counter what German law characterized as "efforts to Polonize the provinces"[8] through legal enactment and purchase of lands that it delivered to settlers on concessionary terms. A Polish law of July 14, 1920 notified German settlers in territories that had been transferred from Germany to Poland that they would be required to leave their farms. Germany maintained that these notifications were in contravention of the quoted provisions of the Minorities Treaty. The Court stated:

> As has been seen, Article 7 of the treaty provides that all Polish nationals shall be equal before the law and shall enjoy the same civil and political

4. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 58 (1950).

5. Advisory Opinion No. 6, German Settlers in Poland, 1923 P.C.I.J. (ser. B) No. 6, at 20 (Sept. 10).

6. *Id.*

7. *Id.*

8. *Id.* at 16.

rights without distinction as to race, language or religion. The expression "civil rights" in the Treaty must include rights acquired under a contract for the possession or use of property, whether such property be immoveable or moveable.

Article 8 of the Treaty guarantees to racial minorities the same treatment and security "in law and in fact" as to other Polish nationals. The facts that no racial discrimination appears in the text of the law of July 14th, 1920, and that in a few instances the law applies to non-German Polish nationals who took as purchasers from original holders of German race, make no substantial difference. Article 8 is designed to meet precisely such complaints as are made in the present case. There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.

Article 5 of the law of July 14th, 1920 provides for the expulsion from the lands in question of any persons who may occupy them under an agreement with any of the proprietors for whom the Polish Treasury has been substituted under Article I of the law, and by Article I it appears that those for whom the Polish Treasury has been substituted include the German States. The outstanding, fundamental point in the present case is that the persons whose rights are now in question are as a class persons of the German race who settled on the lands in question under the Prussian law of 1886 and subsequent legislative acts, under contracts made with the Prussian State. Indeed, it is for this very reason that Poland contends that the contracts now under consideration are to be held invalid. Hence, although the law does not expressly declare that the persons who are to be ousted from the lands are persons of the German race, the inference that they are so is to be drawn even from the terms of the law. This is also clearly established as a fact by the proofs before the Court. It undoubtedly is true, as Poland has stated, that the persons whose rights are involved were settled upon the lands in pursuance of a policy of Germanization that appears upon the face of the legislation under which the contracts were made. The effect of the enforcement of the law of July 14th, 1920 would be to eradicate what had previously been done, so far as de-Germanization would result from requiring the settlers in question to abandon their homes. But, although such a measure may be comprehensible, it was precisely what the Minorities Treaty was intended to prevent. The intention of this Treaty was no doubt to eliminate a dangerous source of oppression, recrimination and dispute, to prevent racial and religious hatreds from having free play and to protect the situations established upon its conclusion, by placing existing minorities under the impartial protection of the League of Nations.[9]

Consequently, the Court concluded that the eviction of German settlers

9. *Id.* at 23-25.

by Poland would violate Poland's international obligations.

The Court's opinion in *German Settlers In Poland* today is striking in several respects. The language of article 55 of the United Nations Charter providing that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion," mirrors, in its "without distinction" clause, the terms of the Minorities Treaties. The opinion holds that discrimination in fact is debarred even if discrimination in form is absent. The Court defines "civil rights" to include property rights, a holding which supports the conclusion that human rights in international law include property rights.

III. TREATMENT OF POLISH NATIONALS IN DANZIG

In its advisory opinion on the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, the Court held:

> that the prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law. A measure which in terms is of general application, but in fact is directed against Polish nationals and other persons of Polish origin or speech, constitutes a violation of the prohibition. A similar view has already been expressed by the Court in its Advisory Opinion No. 6 relating to German settlers in Poland. Whether a measure is or is not in fact directed against these persons is a question to be decided on the merits of each particular case. No hard and fast rule can be laid down.[10]

IV. MINORITY SCHOOLS IN ALBANIA

Similar international obligations were at issue in the Court's 1935 advisory proceedings in *Minority Schools in Albania*. Albania entered into undertakings in 1921 that embodied provisions similar to those described in the previous cases and included the right of minorities to maintain or establish their own schools. In 1933, Albanian legislation provided for the abolition of all private schools in Albania. The Albanian government contended that the measure was not discriminatory because it applied to both the majority and the minority. The Court held:

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of

10. Advisory Opinion No. 44, Treatment of Polish Nationals in Danzig, 1932 P.C.I.J. (ser. A/B) No. 44, at 28 (Feb. 4).

> which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.
>
> In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.
>
> The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.
>
> The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.
>
> These two requirements 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.[11]

It further held that Albania's international obligation to ensure that "Albanian nationals who belong to racial, linguistic or religious minorities, will enjoy the same treatment and security in law and in fact as other Albanian nationals"[12] meant more than equality before the law. According to the Court:

> Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.
>
> It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact; treatment of this description would run counter to [Albania's international obligations].[13]

The Court concluded that Albania's plea—that since the abolition of private schools constituted a general measure applicable to the majority as well as the minority, it was in accordance with Albania's international obligations—was unfounded. The modern student of human rights will find in this opinion an early and incisive precursor of what today would be called affirmative action.

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11. Advisory Opinion No. 64, Minority Schools in Albania, 1935 P.C.I.J. (ser. A/B) No. 64, at 17 (Apr. 6).

12. *Id.* at 18.

13. *Id.* at 19.

V. CONSISTENCY OF DANZIG LEGISLATIVE DECREES

In its advisory proceedings on the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, the Court confronted a very different and no less fundamental question of human rights: whether two legislative decrees amending the Penal Code of the Free City of Danzig, following similar legislation previously adopted by the German Reich, were consistent with the Danzig Constitution. The first decree provided:

> Article I. - *Creation of law by the application of penal laws by analogy.*
> Articles 2 and 2 *a* of the Penal Code are amended as follows:
> Article 2. - Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act, it shall be punished under the law of which the fundamental conception applies most nearly to the said act.[14]

Prior to the 1935 amendments, the Penal Code provided:

> Article 2. - An act is only punishable if the penalty applicable to it has been prescribed by a law in force before the commission of the act.[15]

As to the foregoing provision, the Court held:

> [It] gives expression to the well-known twofold maxim: *Nullum crimen sine lege*, and *Nulla poena sine lege*. The law alone determines and defines an offence. The law alone decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that

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14. Advisory Opinion No. 65, Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, 1935 P.C.I.J. (ser. A/B) No. 65, at 45 (Dec. 4). The second decree provided:

> (*a*) The following provisions shall be inserted in the Code of Criminal Procedure and shall constitute Article 170 *a* and Article 267 *a*.
> Article 170 *a* - If an act which, according to sound popular feeling, is deserving of penalty is not made punishable by law, the Public Prosecutor shall consider whether the fundamental conception of any penal law covers the said act and whether it is possible to cause justice to prevail by the application of such law by analogy (Art. 2 of the Penal Code).
> Article 267 *a* - If, in the course of the trial, it appears that the accused has committed an act which, according to sound popular feeling, is deserving of penalty but which is not made punishable by law, the Court must satisfy itself that the fundamental conception of a penal law applies to the act and that it is possible to cause justice to prevail by the application of such law by analogy (Penal Code, Art. 2).

Id. at 45-46.

15. *Id.* at 45.

case. A penalty decreed by the law for a particular case cannot be inflicted in another case. In other words, criminal laws may not be applied by analogy.[16]

The Court continued:

> Under the two decrees a person may be prosecuted and punished not only in virtue of an express provision of the law, as heretofore, but also in accordance with the fundamental idea of a law and in accordance with sound popular feeling.
>
> Whatever may be the relation between the two elements . . . it is clear that the decision whether an act does or does not fall within the fundamental idea of a penal law, and also whether or not that act is condemned by sound popular feeling, is left to the individual judge or to the Public Prosecutor to determine. . . . A judge's belief as to what was the intention which underlay a law is essentially a matter of individual appreciation of the facts, so is his opinion as to what is condemned by sound popular feeling. Instead of applying a penal law equally clear to both the judge and the party accused, as was the case under the criminal law previously in force at Danzig, there is the possibility under the new decrees that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely upon the appreciation of the situation by the Public Prosecutor and by the judge. Accordingly, a system in which the criminal character of an act and the penalty attached to it will be known to the judge alone replaces a system in which this knowledge was equally open to both the judge and the accused.
>
> Nor should it be overlooked that an individual opinion as to what was the intention which underlay a law, or an individual opinion as to what is condemned by sound popular feeling, will vary from man to man. Sound popular feeling is a very elusive standard.[17]

After recounting that the Constitution of the Free City of Danzig, which the League of Nations had guaranteed, provided for a state governed by the rule of law, and that the Constitution assured the inhabitants of Danzig fundamental rights and individual liberties, the Court held:

> The rule that a law is required in order to restrict the liberties provided for in the Constitution therefore involves the consequence that the law itself must define the conditions in which such restrictions of liberties are imposed. If this were not so, i.e., if a law could simply give a judge power to deprive a person of his liberty, without defining the circumstances in which his liberty might be forfeited, it could render [Constitutional liber-

16. *Id.* at 51.
17. *Id.* at 52-53.

> ties] entirely nugatory. . . . But, as the Court has already explained, the decrees of August 29th, 1935, so far from supplying any such definition, empower a judge to deprive a person of his liberty even for an act not prohibited by the law, provided that he relies on the fundamental idea of a penal law and on sound popular feeling. These decrees therefore transfer to the judge an important function which, owing to its intrinsic character, the Constitution intended to reserve to the law so as to safeguard individual liberty from any arbitrary encroachment on the part of the authorities of the State.
>
> It is true that a criminal law does not always regulate all details. By employing a system of general definition, it sometimes leaves the judge not only to interpret it, but also to determine how to apply it. The question as to the point beyond which this method comes in conflict with the principle that fundamental rights may not be restricted except by law may not be easy to solve. But there are some cases in which the discretionary power left to the judge is too wide to allow of any doubt but that it exceeds these limits. It is such a case which confronts the Court in the present proceedings.
>
> The problem of the repression of crime may be approached from two different standpoints, that of the individual and that of the community. From the former standpoint, the object is to protect the individual against the State: this object finds its expression in the maxim *Nulla poena sine lege.* From the second standpoint, the object is to protect the community against the criminal, the basic principle being the notion *Nullum crimen sine poena.* The decrees of August 29th, 1935, are based on the second of these conceptions; the Danzig Constitution is based upon the former. For this Constitution takes as its starting-point the fundamental rights of the individual; these rights may indeed be restricted, as already pointed out, in the general public interest, but only in virtue of a law which must itself specify the conditions of such restriction, and, in particular, determine the limit beyond which an act can no longer be justified as an exercise of a fundamental liberty and becomes a punishable offence. It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.[18]

The Court concluded that the decrees of the Danzig Senate were inconsistent with the guarantees that the Danzig Constitution provided for the fundamental rights of the individual.

In this case, the PCIJ took an approach worthy of the most progressive of modern human rights courts in terms that can hardly be improved upon. The issue of crimes by analogy has bedevilled the post-World War II years, as it did the Nazi years. The Court's condemnation of criminal liability by analogy is vigorous and persuasive, as is its analysis of the

18. *Id.* at 56-57.

centrality of a constitutional rule of law to the fundamental rights of the individual. An important consideration to bear in mind, however, is that the Court was not interpreting customary international law, but rather a constitutional law that gave individuals rights that a treaty-like instrument internationally guaranteed.

VI. JURISDICTION OF THE COURTS OF DANZIG

The Court laid the groundwork for international concern with individual human rights when it confronted and surmounted the doctrine that states are the exclusive subjects of international law. The claim that an individual could be a subject of international law was radical in the 1920s. It bore squarely on the question of whether human rights could be international rights, as contrasted with rights established and maintained by domestic law alone.

In its advisory opinion concerning the *Jurisdiction of the Courts of Danzig*,[19] the Court addressed the issue of whether treaties can confer rights directly on individuals, specifically with respect to financial claims of Danzig railway officials who had passed into Polish service. Poland argued that the agreement executed with Danzig conferred no right of action on the railway officials. Poland maintained that the agreement, being a treaty that had not been incorporated into Polish municipal law, created rights and obligations only between the parties. Therefore, Poland's failure, if any, to carry out the agreement made it responsible not to the interested private individuals, but only to Danzig. While that position accorded with orthodox international law, the Court rejected it, however, "in what was in effect a revolutionary pronouncement."[20]

The Court acknowledged that, according to a well-established principle of international law, an international agreement cannot "create direct rights and obligations for private individuals."[21] The actual answer, however, must depend upon the intention of the contracting parties. The Court held that "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts."[22] It then found that this actually was the parties' intention in this case, with

19. Advisory Opinion No. 15, Jurisdiction of the Courts of Danzig, 1928 P.C.I.J. (ser. B) No. 15, at 4 (Mar. 3).

20. SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 174 (1958).

21. Advisory Opinion No. 15, 1928 P.C.I.J. (ser. B) No. 15, at 17.

22. *Id.* at 17-18.

the result that Danzig railway officials had a right of action against the Polish Railway Administration based on the treaty. Thus, as Lauterpacht pointed out, the Court ignored the postulated insurmountable barrier between the individual and international law and denied the exclusiveness of states as the beneficiaries of international rights[23]—holdings fundamental to the modern international law of human rights.

VII. NATIONALITY DECREES ISSUED IN TUNIS AND MOROCCO

A final case in the Permanent Court that merits review is the advisory opinion on *Nationality Decrees Issued in Tunis and Morocco*. Procedurally, it is a singular case since the League Council, at the request of Great Britain and France, requested an advisory opinion of the Court. In the proceedings, however, the two states argued before the Court as if the proceeding were contentious. The case suggests that, in the Court's early days, the distinction between contentious and advisory jurisdiction may not have been fully established, which was understandable since the Statute of the Permanent Court did not provide at that stage for advisory opinions.[24] In any event, the case did not deal directly with questions of human rights apart from the fact that the nature of the dispute ultimately related to matters of nationality. The case, however, has great significance for human rights questions as the established authority on the scope of domestic jurisdiction. The question before the Court was whether a dispute between France and Great Britain, which concerned nationality decrees issued in Tunis and Morocco and their application to British subjects, "is by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant)."[25] The Court dealt with that question in terms which have become the classic arbiter of what is within and without the domestic jurisdiction of a state:

> The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.
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> For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not,

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23. LAUTERPACHT, *supra* note 20, at 175.

24. *But see* Rules of Court of the International Court of Justice, art. 102, paras. 2-3, *reprinted in* International Court of Justice, ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, No. 4, 157-58 (1978).

25. Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco, 1923 P.C.I.J. (ser. B) No. 4, at 21 (Feb. 7).

> in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15, paragraph 8, then ceases to apply as regards those States which are entitled to invoke such rules, and the dispute as to the question whether a State has or has not the right to take certain measures becomes in these circumstances a dispute of an international character and falls outside the scope of the exception contained in this paragraph.[26]

Accordingly, as Professors McDougal, Lasswell, and Chen explained, "[t]he choice between 'international concern' and 'domestic jurisdiction' was thus made to depend not only upon fact, but upon changing fact, permitting a continuing readjustment of inclusive and exclusive competences as conditions might require."[27] They relate this fundamental holding to human rights considerations by pointing out that "[h]ow a state treats its own nationals was long regarded as an internal affair of the particular state, beyond the reach of international law. The very essence of the contemporary international law of human rights is, however, precisely to shatter this traditional insulation of competence."[28] Once a state has undertaken obligations toward another state, or toward the international community, in a specified sphere of human rights, it may no longer maintain, vis-à-vis the other state or the international community, that matters in that sphere are exclusively or essentially within its domestic jurisdiction and outside the range of international concern.

VIII. Reservations to the Genocide Convention

One of the ICJ's early advisory opinions concerned the making of reservations to treaties, an opinion that had a determinative influence on the content of the subsequent Vienna Convention on the Law of Treaties. In the course of its opinion, the Court declared:

> The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the

26. *Id.* at 24.

27. Myres S. McDougal, et al., Human Rights and World Public Order 211 (1980).

28. *Id.*

> United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-opération required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.
>
> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'etre* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[29]

The Court thus recognized that genocide is supremely unlawful under both conventional and customary law, foreshadowing its later holdings on international obligations *erga omnes*.

IX. INTERNATIONAL STATUS OF SOUTH-WEST AFRICA

In its advisory opinion on the *International Status of South-West Africa*,[30] the ICJ extended further the conclusion of *Jurisdiction of the Courts of Danzig* by holding that, as a result of resolutions adopted by the Council of the League of Nations in 1923, the inhabitants of the mandated territories acquired the international right of petition, a right

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29. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28).

30. International Status of South-West Africa, 1950 I.C.J. 128 (July 11).

maintained by article 80, paragraph 1, of the United Nations Charter. This right "safeguard[s] the rights of States and peoples under all circumstances and in all respects."[31] Once again, the Court treated individuals as invested by an international instrument with an international right.

X. Reparation for Injuries Case

In its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the Court held that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights."[32] The Court concluded that the United Nations possessed a large measure of international personality, which includes the right to bring an international claim—a holding that reinforced the principle that international rights do not belong solely to states.

XI. Corfu Channel Case

In its first contentious case, *Corfu Channel*, the Court held that Albania had an obligation under international law to notify international shipping of the existence of a minefield in Albanian territorial waters. This obligation derived from:

> certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.[33]

The Court, as will be shown, has since had cause to return to the "elementary considerations of humanity, even more exacting in peace than in war." The relation of these considerations to the substance and application of human rights requires no elaboration.

XII. Asylum Case

In the *Asylum* case between Colombia and Peru, to which Colombia's grant of diplomatic asylum to Sr. Haya de la Torre gave rise, the Court concluded that regular prosecution by judicial authorities, even if the prosecution relates to revolutionary activities, does not present an urgent

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31. *Id.* at 136.

32. Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 178 (Apr. 11).

33. Corfu Channel Case, 1949 I.C.J. 4, 22 (Apr. 1949).

case within the terms of the Havana Convention because "[i]n principle . . . asylum cannot be opposed to the operation of justice." The Court, however, significantly qualified this holding:

> An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents.[34]

XIII. PEACE TREATIES CASE

In advisory proceedings concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the General Assembly put questions to the Court concerning the obligations of those states to implement the dispute settlement procedures of the Peace Treaties. The disputes turned on allegations of the three states' failure to "take all measures necessary to secure to all persons under [their] jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting."[35] The three states contended that the request for an advisory opinion was an act *ultra vires* of the General Assembly because, in dealing with the question of the observance of human rights and fundamental freedoms in these three states, the General Assembly was "interfering" or "intervening" in matters essentially within the domestic jurisdiction of states. This alleged incompetence of the General Assembly was deduced from the terms of article 2, paragraph 7, of the United Nations Charter.[36]

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34. Asylum Case (Colom. v. Peru), 150 I.C.J. 266, 284 (Nov. 20). For a definition of an arbitrary act, see also Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 74-76. ("To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. . . . Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.")

35. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. 65, 73 (Mar. 30).

36. Article 2, paragraph 7, provides:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The Court held this argument to be based on a misunderstanding. The Court was not asked to address the charges of the violation of the human rights provisions of the Peace Treaties, but only the procedure for dispute settlement under the Treaties. It held that the interpretation of the terms of a treaty for this purpose could not be considered a question essentially within the domestic jurisdiction of a state, but is "a question of international law which, by its very nature, lies within the competence of the Court."[37] The Court held that these considerations sufficed to dispose of the argument based on article 2, paragraph 7.

The United Nations Charter, hardly less a treaty than the Peace Treaties, proclaims the purpose of achievement of international cooperation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."[38] It provides in articles 55 and 56 that the United Nations shall promote universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion, and further provides that the members of the United Nations pledge to take joint and separate action in cooperation with the Organization to achieve these purposes. Accordingly, any question of the breach of these treaty obligations, if they are obligations, equally would not be matters within the domestic jurisdiction of a state. The importance of that conclusion to the contemporary international law of human rights is fundamental because the Court would later hold that these Charter provisions do give rise to international obligations.

XIV. SOUTH-WEST AFRICA CASES

The Court repeatedly has been involved in the governance of, and the promotion of the independence of, South-West Africa, which is presently the state of Namibia. One such involvement is referred to above. Another was the *South-West Africa Cases* brought by Ethiopia and Liberia against South Africa alleging, among other things, that the practice of apartheid in South-West Africa constituted a violation of South Africa's mandatory obligation to promote to the utmost the well-being of the inhabitants of the territory. South Africa lodged a number of preliminary objections to the standing of Ethiopia and Liberia and the jurisdiction of the Court. In 1962, by a vote of eight to seven, the Court held that it had jurisdiction to adjudicate the merits of the dispute.[39] Four years later,

37. 1950 I.C.J. at 70-71.
38. U.N. CHARTER, art. 1, para. 3.
39. South-West Africa (Eth. v. S. Afr.), 1962 I.C.J. 319 (Dec. 21).

however, it held that the applicants had not established any legal right or interest appertaining to them in the subject-matter of the dispute.[40] The Court held that the argument of Ethiopia and Liberia:

> Amounts to a plea that the Court should allow the equivalent of an "*actio popularis*," or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the "general principles of law" referred to in Article 38, paragraph 1 (*c*), of its Statute.[41]

Accordingly, the Court never reached the merits, which had given rise to an exceptionally extended and detailed argument over human rights issues posed by the practice of an overt and acute form of racial discrimination.

XV. CONTINUED PRESENCE OF SOUTH AFRICA IN NAMIBIA

The Court's 1966 judgment in the *South-West Africa Cases* was criticized widely, especially in the United Nations General Assembly, which proceeded to find that "South Africa has failed to fulfill its obligations . . . to ensure the moral and material well-being and security of the indigenous inhabitants of South-West Africa and has, in fact, disavowed the Mandate."[42] The General Assembly accordingly terminated the mandate conferring upon South Africa the power to administer the territory.[43]

In 1970, the Security Council requested an advisory opinion of the Court on the legal consequences for states of the continued presence of South Africa in Namibia despite a Security Council resolution holding that presence to be illegal as a consequence of General Assembly resolution 2145 (XXI). The Court found that "the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory."[44] The Court held that the

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40. South-West Africa Cases (Eth. v. S. Afr.), 1966 I.C.J. 6, 51 (July 18).

41. *Id.* at 47.

42. G.A. Res. 2145(xxi), U.N. GAOR, 21st Sess., Supp. No. 16, at 2, U.N. Doc. A/L 483, *quoted in* Egon Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337, 348 (1972).

43. The General Assembly decided "that South Africa has no other right to administer the Territory." *Id. quoted in* Schwelb, *supra* note 42, at 348.

44. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Resolution 276 (1970), 1971

General Assembly had acted within the framework of its competence in terminating the mandate. Among the several objections to the validity of General Assembly resolution 2145 (XXI) that South Africa maintained before the Court was its claim that the resolution's holding that South Africa had failed to fulfill its obligations in the administration of the mandated territory required a detailed factual investigation, which had not occurred. The Court responded:

> 128. In its oral statement and in written communications to the Court, the Government of South Africa expressed the desire to supply the Court with further factual information concerning the purposes and objectives of South Africa's policy of separate development or *apartheid*, contending that to establish a breach of South Africa's substantive international obligations under the Mandate it would be necessary to prove that a particular exercise of South Africa's legislative or administrative powers was not directed in good faith towards the purpose of promoting to the utmost the well-being and progress of the inhabitants. It is claimed by the Government of South Africa that no act or omission on its part would constitute a violation of its international obligations unless it is shown that such act or omission was actuated by a motive, or directed towards a purpose other than one to promote the interests of the inhabitants of the Territory.
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> 129. The Government of South Africa having made this request, the Court finds that no factual evidence is needed for the purpose of determining whether the policy of *apartheid* as applied by South Africa in Namibia *is in conformity with the international obligations assumed by South Africa under the Charter of the United Nations.* In order to determine whether the laws and decrees applied by South Africa in Namibia, which are a matter of public record, *constitute a violation of the purposes and principles of the Charter of the United Nations*, the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of those measures upon the welfare of the inhabitants.
>
> 130. It is undisputed, and is amply supported by documents annexed to South Africa's written statement in these proceedings, that the official governmental policy pursued by South Africa in Namibia is to achieve a complete physical separation of races and ethnic groups in separate areas within the Territory. The application of this policy has required, as has been conceded by South Africa, restrictive measures of control officially adopted and enforced in the Territory by the coercive power of the former Mandatory. These measures establish limitations, exclusions or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour or employment and also submit them to restrictions or exclu-

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I.C.J. 4, 58 (Jan. 26).

sions of residence and movement in large parts of the Territory.

131. Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. *To establish instead, and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.*[45]

These holdings are of fundamental importance to the contemporary character of international law governing human rights. As Egon Schwelb said,

> When the Court speaks of "conformity with the international obligations assumed . . . under the Charter," of "a violation of the purposes and principles of the Charter," of the pledge to observe and respect human rights and fundamental freedoms for all, when it finds that certain actions "constitute a denial of fundamental human rights" and classifies them as "a flagrant violation of the purposes and principles of the Charter," it leaves no doubt that, in its view, the Charter does impose on the Members of the United Nations legal obligations in the human rights field.[46]

Admittedly, the Court specified that South Africa pledged itself to observe and respect human rights and fundamental freedoms for all, without distinction as to race "in a territory having an international status."[47] That clause, however, imports an aggravating, rather than a necessary, circumstance. In commenting upon this passage, Schwelb correctly maintained that "[w]hat is a flagrant violation of the purposes and principles of the Charter when committed in Namibia, is also such a violation when committed in South Africa proper or, for that matter, in any sovereign Member State."[48]

XVI. BARCELONA TRACTION

In 1970, the Court rendered judgment in the second phase of the proceedings in *The Barcelona Traction, Light and Power Company, Limited*,[49] a case of paramount importance for international human rights law. In finding the applicant's claims inadmissible, the Court

45. *Id.* at 56-57 (emphasis added).
46. Schwelb, *supra* note 42, at 384.
47. 1971 I.C.J. at 57.
48. Schwelb, *supra* note 42, at 349.
49. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 4 (Feb. 5).

distinguished

> between the obligations of a State towards the international community as a whole, and those arising vis-á-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
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> 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[50]

The Court found that the rules concerning basic human rights are the concern of all states—that obligations flowing from these rights run *erga omnes*. Therefore, when one state protests that another is violating basic human rights of the latter's own citizens, the former is not intervening in the latter's internal affairs; rather, it is seeking to vindicate international obligations binding upon it as well as all other states.

The Court also held in *Barcelona Traction* that "[o]bligations the performance of which is the subject of diplomatic protection are not of the same category" as obligations *erga omnes*.[51] "It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance."[52] The Court found that Belgium lacked standing to maintain a claim against Spain before the Court on the ground that while Belgians might be the principal shareholders of Barcelona Traction, the company was of Canadian nationality. Professors McDougal, Lasswell, and Chen accordingly conclude: "In contemporary law it is thus apparent that the individual human being is almost completely dependent upon a state of nationality for securing a hearing upon the merits upon injuries done to him by other states."[53]

XVII. NOTTEBOHM CASE

The issue in the *Nottebohm* Case was whether Liechtenstein could exercise diplomatic protection vis-à-vis Guatemala on behalf of Nottebohm, who had been granted Liechtenstein citizenship shortly after the outbreak of World War II. Nottebohm, a German national, had been a resident of Guatemala since 1905 and continued to reside there after the grant of Liechtenstein nationality. The Court held that, in view of the

50. *Id.* at 32.
51. *Id.*
52. *Id.*
53. MCDOUGAL, *supra* note 27, at 878.

absence of any bond of attachment between Nottebohm and Liechtenstein, the latter was "not entitled to extend its protection to Nottebohm vis-à-vis Guatemala" and that its claim was inadmissible.[54] While this decision has been widely criticized,[55] the "genuine link" concept that it embodied has been sustained. The principle may have the result that no state is in a position to maintain a claim on behalf of an individual, a result that may foreclose the realization of that individual's human rights. Nevertheless, the law of international claims traditionally has been replete with limitations on the exercise of diplomatic protection that may have this result. Thus, the question arises: if fundamental human rights do complement obligations that exist *erga omnes*, and if those rights indeed are of fundamental importance, should their pursuance on the international plane be so limited by the traditional rules of diplomatic protection?

XVIII. WESTERN SAHARA

In the course of rendering its advisory opinion on the *Western Sahara*, the Court spoke of the right of the population of Western Sahara to self-determination[56] in terms that demonstrate its conviction that people have the right "to determine their future political status by their own freely expressed will."[57] The Court supported the application "of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory."[58]

XIX. HOSTAGES CASE

In *United States Diplomatic and Consular Staff in Tehran*, the Court held unlawful the detention of the hostages, the occupation of the United States embassy, and the rifling of the embassy archives. The Court further held that "[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."[59] Subsequent grave and prolonged international incidents were to show the con-

54. Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 26 (Apr. 6).
55. *See* MCDOUGAL, *supra* note 27, at 872.
56. Western Sahara, 1975 I.C.J. 12, 36 (Oct. 16).
57. *Id.* at 36.
58. *Id.* at 68.
59. Case Concerning United States Diplomatic and Counsular Staff in Tehran (U.S. v. Iran), 180 I.C.J. 4, 42 (May 24).

tinuing relevance of that holding to the contemporary world.

XX. MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

In *Military and Paramilitary Activities in and against Nicaragua*, the Court made several holdings of interest—and controversy—in the human rights sphere. In respect to mine-laying in Nicaraguan waters by United States agencies without United States notice to international shipping, the Court, citing the above quotation from *Corfu Channel Case*,[60] held that "a breach of the principles of humanitarian law"[61] had been committed. It also concluded that the United States did not exercise operational control over the Contras and, thus, could not be held responsible for violations of the law of war that might have been committed by the Contras.[62]

The Court next considered the lawfulness of the production and dissemination of a war manual to the Contras by United States officials. The Court held that the Geneva Conventions of 1949, in their common article 3, defined rules reflecting "elementary considerations of humanity" that are applicable as customary international law.[63] Doubt was expressed at the time,[64] and questions have been raised since, about whether the Court correctly held that the rules set out in the common article 3 of the Geneva Conventions have the status of customary international law,[65] a conclusion for which the Court supplied scant support. The Court held that the United States was bound and had failed to ensure respect for the following rules in their character as rules of customary international law: rules that provide for humane treatment without any adverse distinction founded on race, color, religion, sex, birth, wealth, or other similar criteria, and that prohibit, in respect of persons taking no part in hostilities, violence to life and person, taking of hostages, humiliating and degrading treatment, and arbitrary sentencing and

60. *See supra* note 33 and accompanying text.

61. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 112 (June 27).

62. *Id.* at 62.

63. *Id.* at 113-14.

64. *Id.* at 184 (separate opinion of Judge Ago); *id.* at 537 (dissenting opinion of Judge Jennings).

65. *See* THEODORE MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 3-37 (1989); Rosemary Abi-Saab, *The "General Principles" of Humanitarian Law According to the International Court of Justice*, 256 INT'L REV. RED CROSS 367 (1987).

execution.[66] The Court held that production and dissemination of a manual that advocated acts incompatible with these standards encouraged the Contras to commit acts contrary to general principles of humanitarian law.[67]

As one justification of its activities towards Nicaragua, the United States had publicly maintained, though it did not plead this position before the Court, that Nicaragua, upon the assumption of power by its revolutionary government, had undertaken, but failed to observe, commitments to the Organization of American States (OAS) and its members to respect human rights and in particular to hold free elections. The Court held that, even in the absence of these commitments, Nicaragua could not violate human rights with impunity. It continued: "[W]here human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves."[68] This implied that the United States was not entitled to take other measures to uphold human rights in Nicaragua—a position that may not be consistent with the *erga omnes* character of human rights obligations elsewhere affirmed by the Court.

This holding has been attacked as evidencing a regressive approach by the Court to questions of standing in the maintenance of human rights similar to the approach taken in *South-West Africa*.[69] Arguably, the logic of the position taken by the Court in *Nicaragua* is that if a government abuses human rights, but is nevertheless a party to a human rights convention, other states must confine their redress to the means provided by that convention, however limited in scope, however few the parties, and however inadequate those means may be. The Court's holding that Nicaragua had assumed only a political obligation through its assurances to the OAS and that those assurances ran only to the organization, and not to its members, has also been criticized as factually and legally erroneous, inconsistent with the Court's jurisprudence, and conceptually regressive.[70]

The Court also held that "while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua,

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66. 1986 I.C.J. at 114-15.

67. *Id.* at 129-30.

68. *Id.* at 134.

69. *See* Fernando R. Tesón, *Le Peuple, C'est Moi! The World Court and Human Rights*, 81 AM. J. INT'L L. 173 (1987).

70. *Id.*; *see also* 1986 I.C.J. at 274, 382-85, 398-402 (dissenting opinion of Judge Schwebel); *id.* at 186-87 (separate opinion of Judge Ago).

the use of force could not be the appropriate method to monitor or ensure such respect."[71] The Court concluded that the protection of human rights cannot be compatible with the mining of ports, the destruction of oil installations, and support for the Contras. Therefore, it held that any argument derived from the protection of human rights in Nicaragua could not afford a legal justification for the conduct of the United States. This holding, however, did not exclude the justification of that conduct by considerations of collective self-defense. Whether the Court's extraordinary holdings of fact and law respecting issues of collective self-defense are persuasive poses issues beyond the scope of this Article.

XXI. ELSI Case

Two recent cases merit final mentioning. The case concerning *Electtronica Sicula S.p.A. (ELSI),*[72] is the most recent illustration in the Court of a state taking up a national's claim and espousing it in an area of human rights, i.e., property rights (albeit, rights of a corporation, whose shares, however, are ultimately owned by human beings). In that case, the Court found no violation of rights established by treaty, and it also found to be absent a claimed arbitrary act, which, as noted above, it defined as an act contrary not to "a rule of law," but "to the rule of law."[73]

XXII. Mazilu Case

Finally, in its advisory proceedings on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations,*[74] the Court held that a special *rapporteur* of a subcommission of the United Nations Human Rights Commission (Mazilu) was entitled to the privileges and immunities of a United Nations expert on mission, even in circumstances in which he had not been permitted to leave a Member State to perform his functions.

XXIII. Conclusion

This survey of the cases in which the Permanent Court of International Justice and the International Court of Justice have treated questions of human rights, and allied questions, demonstrates that the influ-

71. 1986 I.C.J. at 134.
72. 1989 I.C.J. at 15.
73. *Id.* at 76. *But see id.* at 108-21 (dissenting opinion of Judge Schwebel).
74. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177.

ence of the Court on the evolution of international human rights law has been considerable and constructive. While little prospect exists in the near term that the Court will become a court of human rights, grounds exist for the expectation that the Court will continue to contribute to the progressive development of the international law of human rights.