The Development of Human Rights Law by the Judges of the International Court of Justice

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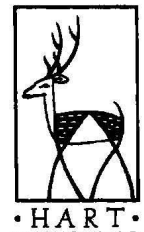

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INTRODUCTION

There are no limits to the heights that a human being can attain, nor to the depths that he can sink. It is *for you to choose* between the heights of bliss and happiness or the depths of pain and agony. (emphasis added).

(Maharaj Charan Singh[1])

THIS JURO-MYSTIC POSTULATE with its two contrasting scenarios is emphatic about mankind's strong determination to set priorities. If we do not go forward we go backwards, for life does not stand still. If we do not rise we fall; it is always for us to choose and set our priorities.

Looking at the post 9/11[2] world in the perspective of the preceding postulate we can see international human rights as the pinnacle of the collective legislative spirit of *'We, the people of the United Nations'* and the frequent flagrant violations of human rights as the depths to which the conscience of man will sometimes sink.

The international scene of today is well described by Judge Weeramantry, a former Vice-President of the International Court of Justice: 'We live in the midst of terrorism, genocide, racism, torture, narcotics, militarism, arms races, hijacking, environmental devastation, and human rights violations of every kind.'[3] The terrorist attack on the World Trade Organization's building on 11 September 2001 represents the worst aspect of the sunken and perverted spirit of man. Yet instead of prudently admitting their failure to strengthen the protective mechanism of collective security based on force, which is the monopoly of the international community, States are still choosing primitive and disastrous mechanisms for self-defence as well as overt or covert military alliances, the corollary of rights springing from the old concept of absolute sovereignty[4], of the pre-Charter era. *9/11* needs to be seen as a wake-up call. The assassination of Archduke Franz Ferdinand in 1914 which ignited the First World War, the *blitzkrieg* by Germany which ignited WWII in Europe, and the Japanese attack on *Pearl Harbour* in 1942 were similar moments in history when war was taken to the rest of the world. The post

[1] MC Singh, *Quest for Light, Radha Soami Satsang Beas*, 4th edn, (Panjab, India, 1988) 54.

[2] The terrorist attack on the World Trade Organisations' building on 11 September 2001 has popularly become to be known as 9/11.

[3] CG Weeramantry, *The Lord's Prayer: Bridge to a Better World* (Liguori, MO, Triumph, 1998) 3.

[4] Jessup opines: 'Those who still preach the traditional license of absolute sovereignty as an excuse for disregarding the interest of the world community, sound a discordant note . . .', see PC Jessup, 'A Half Century of Efforts to Substitute Law for War' (1960) 99 *Recueil des Cours* 1, 20.

9/11 events are in danger of repeating the old scourge. All this is the reverse of the heights at which the post-WWII signatories of the UN Charter and the International Bill of Human Rights aimed on behalf of all mankind. Amidst the turmoil there are signs that the whole of humanity is once again willing to engage in warfare as it did during the two world wars. Yet if it is for man *to choose* between the heights and depths then *what is the choice* between these two contrasting scenarios? History provides ample evidence. *The path of the law based on respect for human rights and human dignity is the choice* is well described in the words of Prof Jessup, a former Judge of the International Court of Justice:

> We lawyers do not have the arrogance to assert that the path of the law is the only way to peace. We do confidently assert that no human society has ever discovered an ordered substitute for violence save through the use of law and legal institutions whether the law in question be secular or religious. It is the same in international community. Those who look realistically at what often seems to be an international anarchy and who suggest the solutions of economics, of political or of science, come first or last to rely upon some agreement, some treaty, even though they may ignore the fact that a contractual obligation is essentially one of the simplest and one of the most pervasive manifestations of the acceptance of the very spirit of law. Whatever form of organisation they propose, it must be in structure and in operation a legal phenomenon, because law can be defined as a description of the way people organise and act.[5] (emphasis added).

To those who think that the role played by international law in international relations has never proved so successful, the words of Judge Manfred Lachs, a former President of the ICJ, may provide a satisfactory answer: 'Though imperfect and inadequate in many respects, international law is honoured more in the observance than the breach.'[6] The inherent juridical sense of man, respecting his fellow human beings at the personal level of a single individual—for law in its antiquity was personal—or at the level of nation States, or internationally at the level of the UN always shows a determination to follow the path of righteousness, which we call humanity; virtue in the Republic of Plato and human rights in the United Nations Charter. That the spirit of man is always, unless clouded and perverted, capable of distinguishing between right and wrong—is capable of legislating the path from within his own reason and spirit; and, is capable of implementing his own legislation and if needs be passing a judgment on his own actions—is his dignity. Every individual is a living parliament (billions of cells in his brain engaged in constant deliberation and decision-making), a living executive (constantly implementing his own decisions) and a living court of justice (reviewing and judging his own actions consciously and conscientiously according to his *dharma*, the chosen path of action) unto himself. It is also the dignity of man to respect the spirit and the path of his fellow human beings and to live a life of peaceful

[5] Ibid, p 4.

[6] M Lachs, 'Thoughts on the Recent Jurisprudence of the International Court of Justice' (1990) 4(1) *Emory International Law Review* 78. Judge Lachs also mentions: 'If you look at the world at large, law is vital and essential part of the daily affairs of nations. Without it, our daily life would be impossible. Without it, all routine events we so frequently take for granted would be impossible.' (*Ibid*, pp 77–78).

co-existence. When in contact, or even in conflict, people similarly legislate for themselves, implement their laws and adjudicate upon the matters in contention. The organised life of human beings has long since moved from the level of numerous nation States to the international community level of the UN. The path *'we the peoples of the United Nations'* enacted for ourselves is provided in the UN Charter. Historically, every democratic rule of law proves that the secret of success of a legal system lies in respect for the rights of its subjects and the protection of those rights, if necessary by force. It is not hard to see that the root cause of the relative imperfection and inadequacy of international law, and the consequent flagrant violations of human rights worldwide (including by means of terrorism) lies in the failure of *'we the peoples of the United Nations'*—rulers and ruled alike—to establish the conditions for the institutionalisation of the use of force monopoly held by international society. The primitive practices found in the outdated international rights of States, such as the right of self-defence and collective security based on alliances, which disregards the possibility of establishing a workable system of force monopoly within international society, is detrimental to the very concept of collective security based on force monopoly in the international community in the age of international human rights. The very core of the legislative spirit of the UN Charter reflects this and needs to be recalled here briefly.

Every constitution is imbued with a spirit and philosophy that animates the path chosen by its people and enacted as legislation by its legislators. One does not become a legislator simply by getting elected to that office by the people. The legislator must pursue the spirit and philosophy of the people's constitution to a point that the law is enforced by a strong executive and guarded by an impartial judiciary. One does not become a judge simply by getting elected to that office. Handsome is he who handsome does and similarly, justice is he who justice does. The spirit and the school of law, reflected in the judicial ideology of the judge go a long way to create the proper conditions for decision-making in the field of human rights. The judge must mould his judicial conscience in accordance with the spirit and philosophy of the path prescribed in the constitution and adopted by the people of his society. Every element of his reasoning must conform to them. Detailed adjudication speaks louder and clearer than the frequently terse language of constitutions. Judgements are even more potent. Adjudication by a Court must bear the hallmark of the legislative spirit and the legislature must strengthen the executive to facilitate compliance with judicial pronouncements. The juridical conscience of a community often lies in the preamble to its constitution and the United Nations Charter is, for all practical purposes, such a constitution for the international community. It is to the Preamble to the Charter that we must therefore look. The Charter opens with the words *'We, the peoples of the United Nations'*, and not with *We, the sovereign States of the United Nations.* That choice of the universality of the *collective human conscience* of *'We'* showed the UN's determination to follow the path of human rights prescribed by the UN Charter. Even a brief analysis of the Charter reveals what the *'peoples'* were *'determined'* to achieve for themselves and for coming generations: the *four key 'ends'*. First: 'to save succeeding generations from the

scourge of war, which twice in our lifetime has brought untold sorrow to mankind. Second: 'to reaffirm faith in the fundamental *human rights, in the dignity and worth of the human person,* in the equal rights of men and women and of nations large and small.' (emphasis added). Third: 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.' And the fourth: 'to promote social progress and better standards of life in larger freedom.' All the four ends perceived in a circle reflect the spirit of the doctrine of human rights and human dignity at the centre of that circle. The first two ends speak of achieving peace based on human rights and human dignity. The third end speaks of establishing an international rule of law, a condition for the achievement of peace based on human rights. The fourth signifies the promotion of social welfare and civil liberty, well enshrined now in the UN Charter and its associated instruments popularly called the International Bill of Human Rights.

And further, to achieve 'these ends', the preamble speaks of adopting *four means.* First: 'to practice tolerance and live together in peace with one another as good neighbours.' Second: '*to unite our strength* to maintain international peace and security.' (emphasis added). Third: 'to ensure, by the acceptance of principles and institutions of methods, that *armed forces shall not be used, save in the common interest.*' And the fourth: 'to employ *international machinery* for the *promotion of the economic and social advancement of all peoples.*' The most striking of these means to achieve peace based on human rights is the element of *'to unite our strength'* clearly standing for the promotion of the system of force monopoly of international society. The concept of *'Armed forces shall not be used, save in the common interest'* read together with the concept of *'to unite our strength'* created a cardinal characterization of means aiming to limit the recourse to use of force in the forms of self-defence and alliances and to promote the collective use of force monopolized in the hands of the peoples of international society. The human rights spirit in the four means of achievement is exactly commensurate to the same spirit in the four ends. It is the humanity of man, in the form of human rights and human dignity, which stands at the core of this octagon of eight fundamental concepts, the first four representing the ends of the Charter and the other four standing for the means to be adopted. The position of human rights and human dignity in the UN Charter and the contemporary sources of international law are so central that any application and interpretation of any principle of law in disregard of the principles of human rights would need careful scrutiny.

The success, or failure, of the path of human rights, is something for which many can claim credit or be equally held responsible, respectively—States, individuals, the United Nations, etc—yet some are more praiseworthy and responsible than the others. Who actually is responsible for the present failed state of affairs in which the international legal system is not as effective as national legal systems? Is it the General Assembly of the UN? Is it the UN Security Council? Is it the International Court of Justice? Or, is it nation State leaders, mass-media or peoples themselves? Perhaps the best answer is to pose a counter-question: who does not

have a hand in it? The place of the judiciary in any society is always conspicuous. Therefore, the Charter provided for an international judiciary. To judge in full accordance with the legislative spirit of human rights and human dignity a judge must be sufficiently broadminded, human and humane in the core of his mental judicial faculty. The Statute of the International Court of Justice is an integral part of the Charter of the United Nations. In adjudicating upon any case, be it a judgment in a contentious case or an advisory opinion in an advisory case, the Court being an integral part and principal judicial organ of the United Nations, is bound to interpret and apply international law keeping constantly in mind the *ends and means*, described also as *purposes and principles*, enshrined in the UN Charter. Doing full justice to the common good of mankind, and the co-existence of *'we the peoples of the United Nations'*, the drafters of the Court's Statute carefully devised the following formula of method and qualifications to be followed when electing the judges of the principal judicial organ of the United Nations: 'at every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and the principal legal systems of the world should be assured.'[7]

And further, in order to strongly imprint in *the conscience* of every single judge the following provision was provided: 'Every Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.'[8]

Looking at the above provisions of the Court's Statute and the qualities of judgeship recounted therein one perceives that there are two cardinal concepts in the ICJ Statute, governing its adjudication process—1) *the concept of the main forms of civilization and the principal legal systems of the world* (Article 9 of the Statute), and 2) *the concept of deciding impartially and conscientiously* (Article 20 of the Statute)—which have great relevance to the eight fundamental concepts of the UN Charter.

Seen in the light of the above eight fundamental concepts in the UN Charter and the two cardinal concepts in the ICJ Statute, every principle developed by the International Court of Justice during the course of its adjudication is expected to be a super refined and clarified voice of the *human rights oriented international legislative spirit* of international community. To disregard that would be tantamount to betraying the trust of *'we the peoples of the United Nations'*. To pay due regard to this is to epitomize the *spirit of human rights and human dignity.*

Spirit is something constant (fixed) in man whereas the expression and meaning of his *conscience* is dynamic, depending always how *conscious* the man is about his own living essence of *spirit*, The Greeks used the word *logos*; in teutonic language it was *lag*, which later came to be known as *law*. And, in *that* spirit and conscience lies the defining stuff of the principle of human dignity. Hence; *we may*

[7] Article 9 of the Statute of the International Court of Justice.
[8] Article 20 of the Statute of the International Court of Justice.

also define the principle of human dignity as respect for the spirit and conscience of the man, for the man and by the man individually; and, respect for the spirit and conscience: of the people, for the people and by the people collectively. These are *'the elementary considerations of humanity'*, to use the language of the International Court of Justice. And these, applied to practical human conduct, either in the form of a right or a duty, run *erga singulum* as well as *erga omnes*, to use again the terms of the Court's jurisprudence. Depending upon the field of action and the actors involved—for instance legislation and legislators or the adjudication and the judges—it is the substance (human dignity) of the principle which matters most, the form being subservient.

Profoundly striking is the truth: *'Legislative and judicial processes are inseparable'.*[9] The traditional view that judges only find and apply the law, and do not make it, is not only rapidly losing ground in national judicial circles but hardly has a place in international adjudication, particularly the International Court of Justice, whose founding fathers expected from its judges the ability to develop international law to the extent of delivering to posterity an *'empire of justice'*. That is not to reflect that the international judges have taken over the role of legislature on the international plane of 'global governance', and neither is it to maintain the view that the judiciary in general has become more powerful than the legislature. It is simply to recognize an existing fact—the result of constant historical, legal and political development, generally and in all national jurisdictions, but certainly and particularly in the international community—that legislative and judicial processes are getting so interwoven and interdependent that their complementarity is something to be taken notice of and to be appreciated in a positive spirit. It is a *'creative act'* on the part of the judiciary and not a *'conspiracy'* against the legislature.[10]

'Jurists are the Judges and guides of the Judges.'[11] A prominent jurist turned judge of the ICJ, Judge Hersch Lauterpacht (UK), writing on the International Court of Justice as an agency for developing the law, posed a question: *'What... is the explanation of the wide recognition of the achievement of the Court?'*[12] His own spontaneous answer to the question he posed for himself was: *'The explanation is that, debarred from directly acting as an important instrument of peace, the Court has made a tangible contribution to the development and clarification of the rules and principles of international law.'*[13] That the Court has played a significant role by contributing to the orderly development of international law is a well-known fact. It is also well known that several pronouncements of the Court have had a considerable impact on the development of the law of the sea, the law of the treaties,

[9] JL Brierly, H Lauterpacht and H Waldock, (eds), *The Judicial Settlement of International Disputes: The Basis of Obligation in International Law* (London, 1958) 98.

[10] *Ibid.*

[11] Justice VR Krishna Iyer, Human Rights (A Judge's Miscellany, 1995) p 52.

[12] Sir H Lauterpacht, *The Development of International Law by the International Court of Justice* (London, Stevens & Sons, 1958) 5.

[13] *Ibid.*

international economic law, the law of decolonization, the law of the international organizations, environmental law and so on.[14] However, what is less known is the fact that the International Court of Justice, though not a special human rights court as such, has also made, and sometimes also failed to make, an important contribution to the development of human rights law. Though there are some articles[15] published on this particular subject, and some publications on the case law of the International Court which cover the subject briefly, mainly mentioning the principle of self-determination and the concept of obligations *erga omnes*, yet there is not a single monograph[16] to be found in the English literature which comprehensively covers the development of human rights law by the International Court of Justice.

Regularly engaged in the research in the Court's jurisprudence, and frequently noticing the lack and need of an account of such a nature, I had often felt it worthy of research. It is no exaggeration to state that whenever I carried out an analytical study of the reasoning of any decision of the Court, particularly involving human rights issues, the reasoning preceding its decisions, as well as the independent opinions appended by individual judges to those decisions, repeatedly impressed upon me that any theoretical principle of human rights law enshrined in any human rights instrument is more like a tiny legal seed which goes through a

[14] See particularly: 1) Judge Sir H Lauterpacht, *The Development of International Law by the International Court of Justice* (London, Stevens & Sons, 1958); 2) Judge N Singh, *The Role and Record of the International Court of Justice* (Dordrecht, Nijhoff, 1989); 3) Judge Mohamed Shahabuddeen's *Precedent in the World Court* (1996); 4) JN Singh's *International Justice: Jurisprudence of the World Courts* (1991); 5) JHW Verzijl's *The Jurisprudence of the World Court*, vol II (1967); 6) E McWhinney, *The World Court and the Contemporary International Law-Making Process* (Alphen aan den Rijn, Netherlands, Sijthoff & Noordhoff, 1979); 7) Judge Jimenez de Arechiga's 'The Work and the Jurisprudence of the International Court of Justice 1947–1986' (1987) 58 *British Year Book of International Law* 1–38; 8) Judge Manferd Lach's two articles: a) 'Some Reflections on the Contributions of the International Court of Justice to the Development of International Law' (1983) 10 *Syracuse Journal of International Law and Commerce*, Nr 1, p 239, and b) 'Thoughts on the Recent Jurisprudence of the International Court of Justice' (1990) 4 *Emory Journal of International Dispute Resolution* 193–236; and 9) E Hambro and AW Rovine's, *The Case Law of the International Court of Justice*, 8 vols, 1952–76.

[15] Strictly speaking, comprehensively dealing with the subject are, to my knowledge, are the following five articles: 1) by Judge R Higgins, 'The International Court of Justice and Human Rights' in K Wellens, (ed), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (The Hague, Martinus Nijhoff, 1998) 694; 2) by Judge SM Schwebel, 'Human Rights in the World Court' in RS Pathak and RP Dhokalia, (eds), *International Law in Transition, Essays in Memory of Judge Nagendra Singh* (New Delhi, Lancer Books, 1992) 267–90. (The latter also published in (1991) 24 *Vanderbilt Journal of Transnational Law* 945–70); 3) by Judge SM Schwebel, 'The Treatment of Human Rights and Aliens in the International Court of Justice' in V Lowe and M Fitzmaurice, (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge, CUP, 1996) 327–51; 4) M Bedjaoui, 'À propos de la place des droits de la personne humaine dans la jurisprudence de la Cour internationale de Justice' in P Mahoney, *et al*, (eds), *Protecting Human Rights: The European Perspective* (Köln, Carl Heymanns Verlag KG) 87–93; 5) K Wellens, 'La Cour internationale de justice et la protection des droit de l'homme' in *Les incidences des jurisprudences internationale sur les droits Néderlandais et Français notamment sur les Droits de l'Homme* (Paris, Presses Universitaires de France) 41–81.

[16] However, there appeared in 2002 for the first time a monograph in French, ie, R Goy, *La Cour Internationale de Justice et les Droits de l'homme* (Brussels, Nemesis Bruylant, 2002).

circular process of adjudication—application-interpretation and interpretation–application; no–yes; yes–no; until the impartial and conscientious reasoning faculty of judges convincingly hear the inner voice which says: a) there is for me now clear, convincing, sufficient and conclusive evidence, and b) beyond any reasonable doubt this is my inner conviction—it appears in the form of a gigantic tree whose every leaf, branch, flower or fruit sparkle with the human rights spirit which was encased in the tiny seed. The blossom of a rose, its delicate perfume, the soft moisture of open petals, are experiences and manifestations of its essence hidden in the seed. The principle of equality for instance produced the legal reasoning of 503 pages in the joint cases concerning *South West Africa.*[17] The simple principle of State responsibility was expressed in 128 pages in the case concerning *Corfu Channel,*[18] developing the principle of *elementary considerations of humanity,* manifesting the very substance and application of human rights, finding its place in 1949 Geneva Conventions and in the international law for the protection of environmental needs. At the heart of the 357 page judgment in the *Barcelona Traction*[19] case, dealing with diplomatic protection to shareholders, the Court developed the most revolutionary concept, that *'human rights run erga omnes.'* Just to mention one more case in which the Court adjudicated upon the question of the legality and illegality of nuclear weapons,[20] the advisory opinion of the Court amounted to 368 pages. These pages, including individual opinions of several judges, contain a boundless treasury on international humanitarian law and human rights law. As a matter of fact the Court's record on international human rights adjudication, like most of its jurisprudence, shows a refined and developed form of the spirit of international human rights legislation, something *'we the peoples of the United Nations'* must know. However, when, on occasion the Court has spoken with a voice which is conservative, formal and proceduralist, the light of the law has been missing and the concept of human dignity was thereby dimmed. Fortunately, individual opinions of the judges have meant that the Court has never been completely formal and proceduralist; for instance, thanks to the dissenting opinions (290 pages)[21] of exactly half the Court's members in the *South West Africa* cases, its human rights interpretation and the extensive elaboration of the principle of equality prevailed in the long run despite its casting vote and conservative decision in the *dispositif.* 185 judges on the bench of the Court (including 94 judges *ad hoc*)—delivering 89 judgments in 107 contentious cases, giving 25 advisory opinions in 24 advisory cases, making 429 orders altogether, and appending hundreds of individual opinions to all these decisions[22]—producing forests of gigantic jurisprudential trees

[17] Judgment of 18 July 1966 in the joint cases of South West Africa, ICJ Reports 1966, pp 4–505.

[18] Judgment of 9 April 1949 on Merits of the case concerning *Corfu Channel (United Kingdom v Albania),* ICJ Reports 1949, pp 4–131.

[19] Judgment of 5 February 1970 in the case concerning *Barcelona Traction, Light and Power Company, Ltd,* New Application: 1962 *Belgium v Spain,* ICJ Reports 1970, p 3.

[20] Advisory Opinion of 8 July 1996 in the case concerning Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, pp 226–593.

[21] Judgment of 18 July 1966 in the joint cases of South West Africa, ICJ Reports 1966, pp 216–505.

[22] Statistics are as they stand on 8 April 2005; for details see the bibliography at the end of this book.