

New Zealand Journal of Public and International Law



VOLUME 5 • NUMBER 2 • DECEMBER 2007 • ISSN 1776-3930

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Rt Hon Sir Kenneth Keith

Juliet Philpott

Duncan Webb

Fiona Wright

Elisabeth McDonald

VICTORIA UNIVERSITY OF WELLINGTON

Te Whare Wānanga o te Ūpoko o te Ika a Māui



FACULTY OF LAW
Te Kauhanganui Tatai Ture

© New Zealand Centre for Public Law and contributors

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

December 2007

The mode of citation of this journal is: (2007) 5 NZJPL (page)

The previous issue of this journal is volume 5 number 1, June 2007

ISSN 1176-3930

Printed by Stylex Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

Essay

The ICJ — Some Reflections on my First Year <i>Rt Hon Sir Kenneth Keith</i>	201
--	-----

Articles

Damages Under the United Kingdom's Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990 <i>Juliet Philpott</i>	211
Keeping the Crown's Conscience: A Theory of Lawyering for Public Sector Counsel <i>Duncan Webb</i>	243
Law, Religion and Tikanga Māori <i>Fiona Wright</i>	261

Legislative Comment

Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993 <i>Elisabeth McDonald</i>	301
---	-----

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship.

The NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Authors should see earlier issues of the NZJPIL for indications as to style; for specific guidance, see the Victoria University of Wellington Law Review Style Guide, copies of which are available on request. Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Contributions to the NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ\$100 (New Zealand) and NZ\$130 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
United States of America
e-mail info@gaunt.com
ph +1 941 778 5211
fax +1 941 778 5252

Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

THE ICJ — SOME REFLECTIONS ON MY FIRST YEAR

*Rt Hon Sir Kenneth Keith**

In this essay Rt Hon Sir Kenneth Keith reflects on his first year as a judge of the International Court of Justice. He includes some comparisons with his earlier judging and arbitrating experience — national and international — to help provide a context. The essay concludes with a comment about universities, as Sir Kenneth has spent most of his working life at the Victoria University of Wellington. That final comment consists of a story told by a great Victorian scholar about an even greater English one.

I reflect on my ICJ experience under three headings — *who, how* and *what*? To the huge fourth question, *why*,¹ I give brief answers in terms of the purpose, principles and provisions of the Charter of the United Nations (the Charter) requiring the settlement of international disputes by peaceful means.² As well as the particular statement of the function of the Court set out in the Statute of the International Court of Justice (the Statute),³ which is an integral part of the Charter, the Court is to decide disputes submitted to it in accordance with international law. The importance of its function may be seen as being recognised by the increase in the number, range and importance of the cases before it in the last decade or two — I comment a little about some of them later — and in the endorsement of the Court's role in the September 2005 outcome document of the meeting of Heads of State and Government at the United Nations.⁴

* An essay adapted from remarks given to the UK Friends of Victoria University of Wellington in the Adam Room, Lloyd's of London on 31 May 2007.

- 1 For an excellent discussion of *what next?* (compliance and enforcement), see Colter Paulson "Compliance with Final Judgments of the International Court of Justice since 1987" (2004) 98 AJIL 434.
- 2 Charter of the United Nations (26 June 1945) in *Acts and Documents Concerning the Organisation of the Court No 6* (United Nations Publications, New York, 2007) 3.
- 3 Statute of the International Court of Justice (26 June 1945), art 38(1) in *Acts and Documents Concerning the Organisation of the Court No 6* (United Nations Publications, New York, 2007) 59.
- 4 UNGA Resolution 60/1 (24 October 2005) A/RES/60/1.

That increase in activity may be related to the present growth of international dispute settlement procedures and especially the increasing use made of them in specialised areas such as investment, trade, human rights and the law of the sea, on a regional or universal basis. It may also be seen in the context of the many cases, apparently increasing, in national courts in which international law issues arise. Those increases raise large issues about specialists versus generalists, regional and universal bodies of law and procedure, possible conflicts of decision and jurisdiction — sometimes referred to as problems of "fragmentation" — and the better education of the legal profession (including judges) in international law.

On the question *who*, the membership of the Court provides an immediate contrast with my earlier experience in courts and tribunals — and inevitably so since the Court is an international court with 15 judges all with different nationalities and from all corners of the world. As the Charter says, the Court is the principal judicial organ of the United Nations.⁵ The Statute requires the electors of the judges to bear in mind that, in the Court as a whole, the representation of the main forms of civilisation and the principal legal systems of the world should be assured.⁶ In addition to that overall criterion and turning to the particular, the Statute requires that "the Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character".⁷ They are to possess the qualifications required in their respective countries for appointment to the highest judicial offices or [they are to be] juriconsults of recognised competence in international law.⁸ Three of the 11 initial judges elected in 1922 to the Permanent Court of International Justice, the predecessor of the ICJ, were from national courts and there is an ongoing question about the correct balance of skills.

Candidates are nominated by groups of up to four individuals who constitute national groups, groups which are intended to act independently and in some cases certainly do.⁹ The election, which follows those nominations and what can be very lengthy campaigns, is in the United Nations General Assembly and Security Council, through the voting of governments. Successful candidates have to achieve a majority in each.¹⁰ In November 2005 this meant 96 or more in the General Assembly, in fact between 134 and 158, and eight or more in the Security Council, in fact between

5 Charter of the United Nations, above n 2, art 92.

6 Statute of the International Court of Justice, above n 3, art 9.

7 Ibid, art 2.

8 Ibid.

9 Sir Kenneth Keith "Member of the Permanent Court of Arbitration" in Cheryl Sanders and Tim McCormack (eds) *Sir Ninian Stephen: A Tribute* (Melbourne University Publishing, Melbourne, 2007) 155-175.

10 Statute of the International Court of Justice, above n 3, art 10(1).

11 and 13. The regular term is nine years, with five vacancies occurring every three years. That rotating election, introduced in 1945 with effect from 1948, helps maintain some continuity in the membership, and avoids what had been seen as serious drawbacks resulting from the (possibly) complete replacement of the membership every nine years. Every three years, the Court elects from among its number a President — a most exacting position — and a Vice-President.

I return to the two criteria for the election. The general representative criterion is manifested by the fact that the membership has for some time matched that of the Security Council — nationals from each of the five permanent members (China, France, the Russian Federation, the United Kingdom and the United States), three from Africa, two more from Asia, two from Latin America and the Caribbean, one more from Eastern Europe and two more from Western Europe and others (which is where New Zealand comes, along with Australia and Canada).¹¹ This results in great diversity of civilisations and legal systems.

In terms of the qualification in the Statute for the candidates, the individual judges have backgrounds different from what I had earlier experienced. Many have spent much or all of their working lives in the foreign service, generally including time as legal advisor and ambassador, for instance in New York or Geneva. Others have been academics and have practised at the international bars and in their national courts. And others have been members of courts — national and international — and of related tribunals and bodies. The diversity of that experience, along with the other differences, presents interesting challenges for the day-to-day operation of the Court, as well as for broader approaches to its role. In that context I should mention that in general all 15 judges sit, sometimes with judges ad hoc added if one or both parties do not have a national on the Court. That provision has long been the subject of controversy, although analogies may be seen in the composition of arbitral panels, nationally as well as internationally.

Working with such a large group is obviously very different from my usual experience, even in bodies with multinational membership such as arbitral tribunals and Pacific appeal courts. The difference is not just of size and diversity but also of method of appointment, because in the case of tribunals and courts of those types the disputing parties or the relevant head of bench will often have the power to bring particular panels together. With the ICJ, by contrast, the parties have no choice but to go with the results of the electoral and related processes, unless they agree on a chamber (unusual in recent years). If they do decide to constitute their own tribunal, they face the challenges of composing it, meeting administrative and other costs and establishing such matters as a registry, hearing room, interpreters, translators and rules.

¹¹ John E Read from Canada was a judge from 1946 to 1958 and Sir Percy Spender from Australia from 1958 to 1967.

That last reference, to rules and procedure, brings me to my second question, *how?* Like other courts and tribunals we have written pleadings including evidence, we have oral arguments and occasionally hear witnesses, as last year in the *Genocide Case* between Bosnia and Serbia.¹² While that much is common, differences arise from the fact that the Court operates at first and last instance with disadvantages in terms of the sorting of the facts and then the refining of the arguments, from the fact that the parties are states, from the largely passive position adopted by the judges in the public hearings and from contrasting attitudes held by the judges and counsel to procedural matters, especially to oral hearings. Those factors and others lead to very lengthy proceedings.

A further difference, at least from my usual experience, is that while the Court may call upon the parties to produce documents, it has no coercive power to require that particular witnesses be called or evidence provided. That issue arose last year in the *Genocide Case* and gave rise to differences within the Court. And the proceedings are bilingual, in English and in French, with simultaneous interpretation during hearings and deliberations and bilingual drafting, leading to real advantages for the drafting of the Court's judgments and orders.

To be contrasted with the limited interaction in court between bench and bar is the very extensive interaction between the judges out of court. This happens in informal ways, depending of course on the personal relationships between the judges and the others involved (including members of the registry and our clerks), and in formal ways, in accordance with a resolution of the Court concerning its internal judicial practice, dating back to 1931, a resolution which built on the practice of the previous decade.¹³ The resolution provides a basis for the deliberation and drafting to be very inclusive. Each of the 15 or more judges has important opportunities to contribute to the several stages of the preparation, deliberation and drafting of the Court's judgments and orders. Indeed, they are obliged to do so if they are to vote on the final decision of the Court and if they wish to write separate or dissenting opinions.

That participation includes the opportunity for all, even those who are dissenting or writing separately, to continue to comment in writing and orally on the drafts — usually three — which the drafting committee prepares. The committee, generally of three members, is formed for each case and consists of the President and two other judges elected by the members of the Court. To take the

12 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) (26 February 2007) General List 91.

13 Resolution Concerning Internal Judicial Practice (12 April 1976) in *Acts and Documents Concerning the Organisation of the Court No 6* (United Nations Publications, New York, 2007) 175; also in Shabtai Rosenne and Yeal Ronen *The Law and Practice of the International Court 1920-2005* (4 ed, Martinus Nijhoff Publishers, Leiden, 2005).

major case of this last year: the *Genocide Case* judgment was delivered on 26 February 2007,¹⁴ the oral arguments having begun on 27 February 2006 (three weeks from the date the new judges took office) and ended on 9 May 2006, with the various stages of deliberation, drafting and voting following in the latter part of 2006 and the early part of this year. The judgment is 170 pages long, with its operative paragraphs being adopted by votes of between 10-5 and 14-1. There are six separate or dissenting opinions and two declarations to which 11 of the 15 judges subscribed. That process should contribute to the quality and pervasiveness of the reasoning — although compromise and ambiguity may also be involved as with any collective piece of writing.

The characteristic feature of the method of producing judgments, according to Shabtai Rosenne, the great expert commentator on the Court, is its emphasis on the active participation of every judge in the Court's deliberations.¹⁵ The procedure emphasises the "collective task" of the bench as a whole.¹⁶ An interestingly contrasting word was used by a member of the Court, writing about the deliberative process after he had been on the Court for seven or eight years and a little before he became its President. The process is, he said, "ecumenical".¹⁷ The word reminded me of our being with the judge, after he had retired from the Court, and his wife at evensong in Grantchester, and I wondered about his choice of that word with its apparent limits. *The Oxford English Dictionary* tells me that that judge was right and that the original meaning is not my confined one which goes back only to 16th century Christian Europe; rather "ecumenical" means "belonging to ... the inhabited earth" or indeed "the whole world".¹⁸ What that judge was emphasising by using that word goes back to my first question — *who?* If the Court is to speak with the authority of a world court it must, he said, be seen to be global in its collective thinking. A generally representative membership is only the beginning of what is required. That ecumenical quality must, he argued, also persist in the decision-making process itself. It is this process which lends to the Court's pronouncements a unique authority.

While there are limits on what I may say about the deliberations of the other courts and the tribunals on which I have sat, I can say without breaching any requirements of secrecy that the opportunities and obligations of the ICJ judges to participate are more extensive than those in any other court or comparable body of which I have been a member. The process should enhance the

14 *Case concerning the application of the Convention on the prevention and punishment of the Crimes of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, above n 12.

15 Shabtai Rosenne, above n 13, 369.

16 *Ibid.*

17 Sir Robert Jennings "The Internal Judicial Practice of the International Court of Justice" (1998) 59 BYIL 31, 46.

18 J A Simpson and E S C Weiner *The Oxford English Dictionary* (Clarendon Press, Oxford, 1998) V 64.

quality and authority of the published products, including the separate and dissenting opinions and declarations.

While the deliberations of the judges are secret, the results of those deliberations are not. They are seen in the judgments, opinions and orders which are read in public and widely distributed (now on the Court's website);¹⁹ in any opinions or declarations made by individual judges; and in the voting, with the judges identified by name (a requirement introduced only in 1978). The practice in many jurisdictions, international as well as national is, by contrast, to issue only a single judgment, with any differences within the Court being kept secret.

The products resulting from the process I have discussed are a principal manifestation of the answer to my third question, *what?* — the business of the Court, including the law it applies, declares or develops in producing judgments. The contrasts may not be as large as those under the other two headings, although those differences undoubtedly have an effect under this third heading. I should mention that in addition to deciding disputes between states — the contentious jurisdiction — the Court may also be asked by United Nations bodies to give advisory opinions — its advisory jurisdiction. The last such request was in 2003 in respect of *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*.²⁰ However, the bulk of the Court's work relates to contentious cases.

A word about the parties to and the subject matter of these contentious cases. Those matters which are active on the Court's docket come from all parts of the world: Africa, Asia, the Americas (including the Caribbean), Europe and some are intercontinental. They concern territorial and maritime disputes; environmental matters; diplomatic protection of nationals; immunities from the criminal jurisdiction of ministers and other officials; and aspects of the armed conflicts in the Balkans and the Great Lakes area. Plain differences are to be seen from the usual business of national courts, although such matters can arise in national courts and the state is very often a party there in one form or other.

But what of the law applied and the findings to be made? Are they not very different? Perhaps not as different as some might think. Cases appear to be increasingly fact intensive. They may sometimes involve technically difficult issues. Those issues may have to be resolved. Facts have to be found; often inferences have to be drawn or not from facts, especially documents, which are not in dispute, or assessments have to be made of them.²¹ The meaning of disputed texts has to be

19 The International Court of Justice <www.icj-cij.org>.

20 *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (Advisory Opinion) [2003] ICJ Reps 428.

21 For a related report see Hazel Genn, Martin Partington and Sally Wheeler *Law in the Real World: Improving our Understanding of How Law Works* (The Nuffield Foundation, London, 2006).

determined²² — as in the *Genocide Case*²³ — or disputed propositions of general law have to be resolved — as in that case and the *Diallo Case*.²⁴ And the law has to be applied to the facts. Remedies may also have to be decided upon.

If the matter before the Court is an application for interim relief, or provisional measures as it is called in the Statute, the conclusions the Court reaches may be provisional or prima facie. This was the case with the two applications last year in respect of pulp mills being built in Uruguay next to the Uruguay River which forms the border with Argentina.²⁵

Those processes seem to me to have much in common with national court processes. They may present issues of judicial method or function similar or identical to those arising in national courts. Let me mention one. Does a court of general competence have an inherent or implied jurisdiction or power to grant interim relief ahead of the merits hearing, either without explicit authority or going beyond it? One very distinguished London solicitor who, at the time was head of the international law department in a major firm and is now a member of the Court of Appeal of England and Wales, Lawrence Collins LJ, gave an affirmative answer to that question.²⁶ Issues like that, as well as the procedural matters I touched on earlier when addressing the question of *how*, raise important and fascinating issues which take me back to my first question, *who*, about the balance of skills, experiences and backgrounds to be found on the Court. I give you quotes from the 1920s without, I stress, expressing any opinion on them. Eighty-five years ago the then legal advisor to the Foreign Office found the result of the first elections to the old Court, the Permanent Court of International Justice, disappointing. "There are far too many professors and legal advisors and too few judges", he declared!²⁷ (I am not sure what is to be made of the fact that that legal adviser was elected to the

22 Generally with reference to articles 31 and 32 of the Vienna Convention on the Law of Treaties which formulates a process very similar if not identical to that followed in national courts interpreting statutes and contracts. Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

23 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, above n 12, para 160 Judgment of the majority.

24 *The Diallo Case (Republic of Guinea v Democratic Republic of the Congo)* (Judgment) (24 May 2007), paras 86-93 Judgment of the majority, where the relationship between the Court and the International Law Commission is at work.

25 *Application Instituting Proceedings: Pulp Mills on the River Uruguay (Uruguay v Argentina)* (4 May 2006) <www.icj-cij.org> (last accessed 24 October 2007).

26 Lawrence Collins *Essays in International Litigation and the Conflict of Laws* (Oxford University Press, Oxford, 1993) 188.

27 Ole Spiermann *International Legal Argument in the Permanent Court of International Justice* (Cambridge University Press, Cambridge, 2005) 288.

Court eight years later, with his French counterpart). Their election led the United States legation in The Hague to say to Washington that:²⁸

[I]t has always seemed to this legation a mistake that foreign office politicians such as [the two legal advisors I have just mentioned] should find a place on this international bench and that so many other members of the Court are professors and theoretical men rather than great lawyers and judges.

To give a contrasting American view from the same time, Professor Philip Jessup, later to be an ambassador to the United Nations and a judge of the Court in the 1960s, thought that the two legal advisors were eminently qualified in the sense that they possessed recognised practical experience in international law, a matter which had just been emphasised by the Assembly of the League of Nations.²⁹ That reading of the qualifications required for a judge, you will understand, is being directed at the academic community!

Again, I stress that I do not express any opinion on those views, except that they are perhaps rather one-dimensional: great, even good, lawyers may well have a valuable mixture of relevant skills and experiences and may be able to inform their practical work with theory and vice-versa, and to be clear at the time they put their pen to paper, whether they are preparing a pleading, drafting a treaty, writing a legal article, or whether they are drafting a judgment, opinion or award. The responsibilities and the opportunities offered by our different professional roles call for different responses, if the resulting document is to persuade and to contribute.

Those various references to academics and the different things that lawyers do, provide a link to my final comment which is about the role of universities — or at least about the members of law and related faculties and departments. What are they for? How can they best carry out their heavy and exciting responsibility to advance, disseminate, and maintain knowledge by teaching and research, to use the terms of the New Zealand university statutes?³⁰ These days I think about these questions as I work with the outstanding young lawyers who are judges' clerks (a short time ago in Wellington and now in The Hague) and their colleagues, many from New Zealand and Australia; with my judicial colleagues and counsel; with law and constitutional reformers; with private practitioners and government lawyers; with academic colleagues, students and many others; and whenever I think about the tasks I struggle with. After 50 years I have some ideas, but certainly no final answers.

28 Ibid.

29 Ibid, 309.

30 See for example Victoria University of Wellington Act 1961, s 3.

One short answer I would give for law and those other parts of the humanities of which I know a little, is the importance of getting some early understanding of the relevant principles and processes, and the balance between them. As well as an understanding of the wider context in which the principles and processes operate and getting a sense of how each of those elements may change. Sometimes the changes may be, or may appear to be, revolutionary, as for instance in demography, ecology, science, technology, travel, philosophy or policy. But be careful about such claims since the reality may be different; for instance, notwithstanding all the talk about globalisation, for a major group of states the proportions of foreign trade and foreign investment is about the same today as it was 100 years ago.

A second answer is that while getting the facts right is necessary, it is not sufficient. They have to be addressed in context in relation to a theory, a theory which also must be tested again and again in its own terms and against the relevant facts. I recall Gertrude Stein's last words. She had had no answer to her question — what is the answer? She asked — what is the question? and then she died.³¹ Or recall Karl N Llewellyn's related proposition that "technique without morals is a menace but morals without technique is a mess".³² Or a Chinese saying, to be found on the wall in the office of Harold Koh, Dean of the Yale Law School: "[t]heory without practice is as lifeless as practice without theory is thoughtless".³³

A third answer is that while fundamental principles must be understood early and continue to be understood, at least so long as we recognise that they may be challenged and may indeed be wrong, the "details of [substantive knowledge or] the professional practice of today may most probably be antiquated tomorrow".³⁴ On that basis, it is the *how* rather than the *what* which is critical.

I have just been quoting New Zealand's greatest university administrator and Victoria's first dean of law, Richard Cockburn MacLaurin, speaking nearly 100 years ago as he took up the Presidency of Massachusetts Institute of Technology, and I end with him. He addresses one critical, perhaps unique, role of the university. In his immensely busy life, he managed to find time to write a parody of a report from a learned body on university research, a report, he said, written from the point of view of a man who is used to reporting on the efficiency of a glue factory or a soap works. One

31 Janet Malcolm "Someone Says Yes to It" (13 June 2005) *The New Yorker* 148.

32 Quoted in Cass R Sunstein *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, Cambridge (Mass), 1990) xi.

33 Harold Koh "Dean's Welcoming Speech" (Yale Law School, New Haven, 30 August 2006).

34 Richard Cockburn MacLaurin, "The Inaugural Address" (Massachusetts Institute of Technology, 7 June 1909).

"gauge of efficiency" used in the report was the cost of student research. The relevant official calls upon Mr Isaac Newton:³⁵

Superintendent of Buildings and Grounds: Your theory of gravitation is hanging fire unduly. The director insists on a finished report, filed in his office by 9 am Monday next, summarized on one page, typewritten, and the main points underlined. Also, a careful estimate of the cost of the research a student hour.

Newton: But there is one difficulty that has been puzzling me for fourteen years, and I am not quite —

Superintendent of Buildings and Grounds (with snap and vigor): Guess you had better overcome that difficulty by Monday morning or quit.

35 H G Pearson *Richard Cockburn MacLaurin: President of the Massachusetts Institute of Technology 1909-1920* (MacMillan, New York, 1937) 176; Sir Kenneth Keith "The Law, the Constitution and Legal Education in the Twenty-First Century" (2000) 31 VUWLR 83, 102.