場次六：專題演講
Panel VI: Speech

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國際人權法在國內法院的實踐：潛力與遠景

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壹、前言

在荷蘭某個省的鎮上，有個關於地方法官的軼事，他剛駁回一項基於歐洲人權公約的抗辯。這位法官說他從未聽過這類協定。而且，他無法在他的書庫內搜尋到該文件。他進一步裁定，引用模糊的文件而非依循國內法律是論點薄弱的極致證明。這個故事回到上世紀六零年代。荷蘭已經在 1950 年代批准歐洲人權公約，不過顯然在法律專業人士，特別是這位地方法官體認到本條例的重要性與存在之前，已經持續了某段時間。如今，數十年後，國際人權法在荷蘭法制體制的所有領域幾乎都有莫大的影響力，重要性與日俱增。法律界人士無論在立法、行政或司法的管理部門上，都無法想像忽略了歐洲人權公約將會如何；特別是無法忽視公民與政治權利國際公約與經濟社會文化權利國際公約這類全球性人權機制的潛力。培養國際人權法之重要性與潛力的知識與洞察力，是現今法律學院之法律教育與訓練不可或缺的一環，不再侷限於國際法律課程內容，而是將所有法律訓練與教育分支整合到課程內。這是持續進行的過程，亦須付出時間執行。荷蘭經驗也受到所謂的「一元論者」模式影響，其意指在協約批准後，其條款成為國內法的一部分，只要這些條款可直接應用，便可在法庭上援引之。我會在本文後段回到國內的「一元論」和「二元論」模式的討論。

我一直提到這個荷蘭軼事，是因為發現其他國家也有類似的經驗。不過，說這個故事且觸及其旁支的主因在於強調國際人權法之潛力與覺醒的重要性，並且重視法律專業的訓練與教育，以作為運用國際人權法的首要條件。在發展人權文化的立場上，這類的訓練與教育，乃是替保護與實踐人權創造更好條件的一大憑藉。

貳、緒論

本文的主題為：國際人權法在國內法庭的實踐，其既可廣泛應用於各領域，也可以各種方式來處理。首先，我將簡單扼要地指出國家的地位，因為國家是國際人權義務之主要擁有權者。司法部與法庭是國家結構的一部分，在此脈絡下履行明確的功能。之後，我會處理國際與國內人權法之間的關係，尤其普世規範，

但這將以國家及區域的特殊性為基礎討論。這種概念途徑與關係隨後將帶出更技術性的司法本質之評論，攸關各種實行國際人權法的國內體制之評論。此外，我將提出國際人權法之可訴性的觀察，將國際人權法之可訴性作為國內法庭與其他公共機構的條件，以便在公民、政治、社會與文化領域應用人權準則。之後，在重點放在所有透過司法與其他公共機構來尋求正義的人，他們的權利，並會留意作為國家與國際人權體系內強化信念的工具，即修正與補償。最後，當處理國內法庭的角色時，要適當地指出維持司法獨立與公正，是公平的法律執行之基本條件。尤其處於危機與緊急狀況時，法庭體制可能在嚴重緊繃狀態下運作，此種需求是更重要的。

參、作為主要人權義務擁有者的國家

各人涉及國際人權法--且在某些群體的情況下，譬如原始民族與弱勢族群--都屬於人權持有者，而國家是主要人權義務的擁有者。國家是國際社群的主要構成成員，且作為國際人權條約之一方，致力於遵守條約規定的義務。國家不但必須能面對面地向其人民說明，也要向國際社群解釋--此處的國際社群乃指對遵循國際條約、以及對所有人類家庭成員都有尊嚴且有權利享受有價值的生活有興趣。國家是在國際人權條約下的義務持有者，應該要保護個人免受侵犯與虐待。不過國家也有義務將保護範圍延伸到私人或實體如企業團體所犯的不當行為，因為他們違反國際人權法所認可的權利。甚且，這並無任何價值，如同人權事務委員會在國家所承擔之一般法律義務的一般性意見所述--也就是關於公民與政治權利國際公約之本質(General Comment No. 31 (2004))，意即，關於國家一方應負起用在所有政府(行政、立法與司法)部門的責任，對其他任何層級(國家、地區或地方)的公共機構或政府當局也應如此。在相同的脈絡下，委員會受到維也納公約在條約法的啟發而憶及一締約國「不可行使本國法的條款，來辯護無法履行條約的行為。」

來逐步實施達成人權的實現。在確定這些原則後，接下來，便要考量預算的問題。我們可以觀察政府整體預算在健康、教育、國防等不同領域的分

有爭議的顯然是加諸於締約國的義務性質，有立即要履行的義務與需要逐步實施才能達成的義務之間可能會有差異。此兩種性質的區別是將國際權利法案切割為兩個條約--公民與政治權利國際公約與經濟社會文化權利國際公約的原因。有人主張，前者必須立即實施不得延誤，後者則是逐步或漸次地履行。這項決策回溯到上世紀 50 與 60 年代的切割人權，起初以單一份文書銘記於世界人權宣言，再切割成兩份不同的文書是事實，但有爭議的是這乃概念上的誤稱。事實上，這樣的分隔無法覺察不可分割性與所有人權的相互依存性。將義務分成立即應用的任務以及漸進認識的任務，在概念上與實際上都過分簡單。因此，監督經濟社會文化權利公約之實行的經濟社會與文化權利委員會，指出早期的一般性意

見(General Comment No. 3 (1990))中，有一些經濟社會文化權利公約的條款可立即由國內法制體系中的司法或其他公共機構運用。在稍後討論人權的可訴性時，我再回頭探討這個問題。在國家作為主要人權義務擁有者的脈絡下，應該注意觀察和經濟社會文化權利委員會的同一個一般性意見，其大意為「以最低的核心義務，確保各締約國至少在最低的權利基礎層面上，達到一個最基本的水準。因此，締約國內有較大數目的個人被剝奪基本食物、基本的主要健康照護、基本的庇護所與住家或最基本的教育，初步看來，是無法履行公約的義務。」

關於國家身為主要人權義務擁有者的責任，我只提到條約是國際人權法的來源。這在其本質上是合乎邏輯的，因為在全球與區域背景下的條約，目前都成為國際人權法文集的主要法律構成要素。條約以及特別是國際人權條約都受制於國際監督與判決，並由包含司法單位的政府部門明確執行。然而我們也要考量，無論國家是否認可人權條約，也都受到反映基本人類價值且凌駕其他標準與義務的強制性法規、緊急規範所約束。這類強制性規範並無正式地由國際與國內法庭所分類。這些緊急規範對所有人而言是基本價值，必須受到所有國際社群與國內社會所尊重，包括禁止種族屠殺、虐待、謀殺、強制失蹤、奴役與奴隸買賣、任意延長拘留、以及系統性的種族歧視。所有緊急規範都清楚且明確地收納在一般與特定的人權條約中，例如集體屠殺、虐待、失蹤與種族歧視，但其受到之重視與奉行是多於超條約義務(a supra treaty obligation)。

再者，習慣法是國際人權法源，且對國家有約束力。而藉由將國際人權法與一系列條約編入法典，加上國家愈來愈接納這些條約，國際人權習慣法之重要性看來正在衰退。然而，時常經人們廣泛引用的世界人權宣言，不只作為一個實現的共同規範，可以在前言讀到，也是人們遵循的習慣法規範，因而反映出「法律確信」(opinio iuris)之證據推翻矛盾的實務。

肆、國際人權法與國內人權法之間的關係

一般國際法的特色可歸於共存法(the law of coexistence law)，管制主權國家之間用來區分權利與利益，以及將重要性歸在被視為屬於國家內部司法事務之非介入性的原則。不過，共存法日益增加，並由合作法(law of cooperation)補充。引導至該方向的一個清楚訊號，來自於美國總統羅斯福在黑暗時代 1941 年所聲明的四大自由。言論自由、信仰自由、不虞匱乏的自由，以及免於恐懼的自由，是羅斯福主張在我們的時代與世代要達成的。世界人權宣言作者們的靈感來源是四大自由，也成為建立國際人權建物的規範基礎。共存法目前並未廢棄，但是無法有效地處理人類面臨的整體挑戰。合作法在全球的層級上未一個負責的社會建立一套原則與規範：地方、國家、區域與全世界。

因應一個承擔責任之社會所遭逢的困境，國際人權法與國家人權法之間的關係也不斷演化。發展、和諧地生活與和平並非必然的過程。這需要所有人類家族

的不懈努力，對於持有政經力量者尤其如此，他們是政府各部門的領導者，包含掌理司法與文教者。過去六十年的歷史展現了充滿希望的合作徵兆，尊重與融合，但過去與現今在國家與國際層面上仍然存有持續地與結構上的排他、剝奪、歧視、否定認同與拒絕自決等，否定一個負責任社會的基本價值的情況。最令人困擾及難以接受的是殘暴的大規模行動，在國際法下累積成嚴重的罪行，最惡名遠播的是集體屠殺、違反人性的犯罪、戰爭與侵略罪，都出現在國際犯罪法庭的審判。國際法與國際機構與制度皆已就定位且成形，以處理這些錯誤與惡行。

在本文的主題中，問題來自於身為司法機構的國內法庭如何維護法治、公平地分配正義、遏止虐待，並提供補償良方。對國內法庭而言，要提供一個負責的國際社會所要求之世界主要問題的解決途徑，顯然是超出其能力之外。然而，在特定個案中，國內法庭的確遭逢與世界問題密切相關的議題，例如，牽涉到在武裝戰鬥違反人道原則的行為或由無人看管的環境剝蝕引起的嚴重傷害的民視或行事責任。面對與支持和平、懲罰與補償正義，以及生態整體之法律層面的國內法庭之任務，是一項極其有趣、應獲得注意，但超出本文範疇的議題，本文主要焦點仍是在國際人權法於國內之實踐。

我所要提出的觀點是，國內法庭在國際人權法與國家人權法之間扮演重要的角色。此乃根據基本人權規範的普世性，但應適當地考慮到國家與區域特色，作為我在此處開始表達的論點。我時常引用世界人權會議在 1993 年 6 月所採用的維也納宣言(Vienna Declaration)當中的一個段落：

> 「所有人權都是普遍存在，不可分割，相互依存與相互關連的。國際社群必須以公平與平等的方式，在同樣的立足點，且賦予相同的重要性來處理人權。國家的義務在於牢記國家與區域之特質具有特殊性，也具有各種歷史、文化與宗教背景，無論其政治、經濟、與文化體制為何，都要促進且保護所有人權與基本自由。」

人權標準的普世性問題，至今仍是不同領域辯論的主題：哲學、政治、文化、社經等等。我只回溯 1990 年代蔚為主流的亞洲價值之辯論。中國、印尼、馬來西亞、新加坡、巴基斯坦與其他國家的發言人質疑國際工具的現行做法，以及西方國家在其國外政策中利用人權來掩護。他們譴責所謂的人權帝國主義，且強調社群的利益—包含義務凌駕權利、人權的社會與集體的重要性，以及安全利益。回應此種對亞洲價值的爭辯，亞洲的非政府組織在 1993 年集會，通過曼谷非政府組織人權宣言。當中有一些值得引用的內容：

> 「我們能從蘊含多元觀點的不同文化中學習，從這些文化的人道精神擷取教訓，以耕深對人權的尊重[……]。普遍的人權規範深植於許多文化中。我們確信人權之普世性基礎，也就是保護所有人類，包括特殊族群如女性、兒童、少數族群與原住民、勞動者、難民與遊民、殘障者與老人。在擁護文化多元主義時，絕不寬貸那些貶損普遍為人接納的人權，包含女權的文化實踐。」

這些辯論有時以新的標籤持續進行。因此，去年俄羅斯聯邦在聯合國人權會議中發起一個草案--「更深入了解與欣賞傳統對於尊嚴、自由與責任的價值觀。」對人權普世性的根本挑戰，起於對國家安全的主張、極權主義意識形態與體制的主張、以及宗教基本教義派的主張與訓令。

這些概念的討論以及對人權普世性相關的基本挑戰，有多少程度涉及國際人權法在國內法庭中的適用？我認為當司法人員在捍衛人權與法律規則中扮演特殊角色時，其並非在虛無中運作，而是在國家的脈絡下，以本身的歷史與政治、社會與文化背景下運作。國內法庭在解釋與適用法律時，當然要考量維也納文本所指涉的「國家與區域特殊性以及歷史、文化與宗教背景」。在此同時，國內法庭對於法律的詮釋與應用，必須認知道國家所接受的國際人權標準。理想上，對相關的國際人權標準的認知，應該暗示國內法庭須留意國際標準，無論這些標準是被激發、還是出於自發(*proprio motu*)。然而，應該要讓人充分了解規範或標準的普世性，在全世界與各方面之應用並不需要全然一致。不同的權利應加以區分。有些非常基本的權利在世界各處必須嚴格執行，其他權利在各國執行時留有一些自由裁量空間。一般說來，國際人權法提供人們法律上的保護，對國家而言是互補的保護工具與標準，但並不能取而代之。因此整體而言，人權規範的普世性在實踐上不等同於一致性。不過，正如先前指出的，在各種權利本質間有所區分。某些權利，一般指稱為核心權利或非貶損權利，在任何環境下皆不能成為中止或限制的主體，甚至就算在緊急或武裝衝突下也是如此。這些非貶損權利可見於各種人權條約中；最為著名的是公民與政治權利國際公約第 4 條第(2)款。同樣地，這些權利不能保留且必須被視為與條約之對象和目的不相容。關於保留的議題，人權委員會提出適當地一般性意見：

> 「國家不得保留從事奴役之權利、折磨、支配人們處於殘酷、不人道和有辱人格的對待或懲罰，不得任意地剝奪人們的生命，任意逮捕與拘留，不得否決思想、意識與宗教自由，不得擅自假定一個人有罪除非當事者證明自己無罪、不得處決孕婦與兒童、不得允許國家、種族或宗教仇恨發聲，不得拒絕讓適婚年齡者結婚，或是拒絕少數族群享有其文化、專業、宗教或使用自己的語言；以及擁有公平審判的權利……」(一般性意見 No. 24 (1994))。

普遍為眾人所接受的是，由於這份一般性意見攸關在公民政治權利公約下禁止保留某些權利，也延伸到不允許裁量餘地的權利。在這樣的關係上，由歐洲人權法庭所發展的「裁量餘地」原則是有意義的。歐洲人權公約的前言談及政治傳統、理想、自由與法律規章等共同的傳承，歐洲法庭卻也同時認可公約締約國可以抱持對某些蘊含強烈道德內容之議題的不同觀點，例如墮胎、安樂死、性癖好、色情描寫。尤其關於可允許的限制前提，諸如公共秩序與道德，歐洲法庭留給各國裁量餘地或是考量的空間。就某些權利而言，考量各國社會之歷史、文化與宗教傳統，裁量餘地原則作為歐洲人權法庭之法學的一項特色，可說明國際間人權

規範適用的不一致。在另一方面，這項原則並非毫無危險，因為可能會允許某些在性別或性向的差別待遇的措施繼續存在，也可能在其效應中，與另一項歐洲法庭的法律學有歧異；換句話說，公約應該是動態的、是活的，對當前人類自由與尊嚴在裁量方面的演化保持跟進的步調。

這個關於普世性的基礎問題，就如同與一致性有區別般，不僅被認知為概念與政策的議題，也被當成一般人權論述的一部分。而此問題也和具體個案與情況如何有效詮釋和應用人權法密切相關，乃國內法庭在履行國際人權法時的基本考量。

伍、國內履行國際人權法之體制

顯然國際人權法只能訴諸於國內法庭，若我們限定為條約法，則其範圍是與國內法律合併的人權條約。在這個層面，要區別所謂*一元論*體制與*二元論*體制是相當明確的。在一元論體制中，不需要立法轉化，國際法規範就能形成一部分的國內法。在二元論體制中，二元性的特色因國際法與國內法是兩種不同體制的事實而突顯出來。因此，在二元論體制中，國際法規範必須在成為國內法律秩序前，經由立法程序來轉換。荷蘭是一元論國家，允許法庭判決國內法律條款若與國際法律規範不同，就因此不適用，我傾向於相信一元論體制比二元論體制更令人偏愛，因為一元論可以更直接與有效地實踐國際所認可的規範。在此同時，我體認到這樣的假設可能多少純屬我個人偏見，且需要分別針對眾多一元論與二元論國家詳盡地分析兩者之措施與成果。許多方面都須仰賴各種國家脈絡中的司法態度與傳統。一元論體制中的法官會對援用國際法規範感到不安與勉強。他們可能認為自己在這方面缺乏充分的專業知識，然而只要他們將國內法律的解釋與應用，使其終歸成為自身法律教育與訓練中重要的一部分，便更會覺得自己站在穩固與熟悉的法律基礎上。在另一方面，一元論體制會在國內法庭的能力與意志上加諸沉重的聲明，以援用國際人權法規範，而二元論體制可能也有缺陷，因為現有的立法或法案，無法將條約的條件與實際上符合這些條件的國內法律合併。一般而言，並不存在偏愛這兩者之一且廣受國際接納的法律輿論。對兩種體制有決定性影響的是，國家充分且忠誠地遵循其義務，以對條約之條款產生效應。就這個理由而言，重要的是國家達成其義務的方式，是在獨立的國際監視與監控之下。因此才有一系列國際人權條約提供獨立監督的特定工具與機制。

事實上，在聯合國人權促進與保護體系中，有九個條約主體負責監督與調查的任務，也可能接收已明確接納申訴步驟的國家的違反條約之受害者的請願。詳盡地討論人權條約主體活動細節乃超出本論文範疇。我希望強調條約監督的重要性，且此監督乃是基於締約國提供之全方位國家報告資訊以及來自其他來源的補充—尤其是可信與可靠的公民社會組織，此個案可能意指的國家人權委員會。這將促使監督主體開始與締約國的公開對話，並分析目前的進展，以及在相關的人

權條約下完成其義務期間所面對的困難。這些對話與分析將導致結論性的觀察，其給與國家對於如何對條約遵守與實踐之建議。這些結論性的觀察也是國家與國際層面在後續控制時所運用的工具。回到國內法庭之角色，重要的是所有政府部門，包含司法部都要熟悉和本國相關之國際監督機制的結論與建議，以便能充分地將這些結論與建議納入考量。此外，大多數條約主體已經發展出經由謹慎準備與起草對於某些整體或個別條約條款的一般性意見。這些一般性意見包含有益的見解，並針對整體與個別條款提供解釋與應用的方針。同樣地，國際人權法在國家層面，尤其是在法庭上的施行，期待這些一般性意見能廣為人知，並且成為研究與分析的主題。另外，就國際法學與區域司法主體而論，由條約主體在個人申訴以及歐洲、美洲與非洲區域人權法庭之判決形成「觀點」的判例法，對於解釋國際人權法也具可觀的重要性，有時主要的意涵是要透過國內法庭在國家層次保障人權。

在本節開端，我將國際人權規範與國內法律層面的接軌，區分為一元論體制與二元論體制。我提出兩種體制的優缺點，並觸及國內法庭的角色。然而，回到區分的主題，要牢記這樣的差異可能只有實際結果，因為國際人權規範是「直接適用」或「自我執行」的，因而自然人或法人可直接仰賴之，且司法部門可直接適用。條約條款是否可以直接適用或自我執行，要視條約起草者的意圖而定，也要看條約條款的本質為何而定，尤其若以充分精確的語言表達，則無須要求立法，至少在一元論體制下更是如此。假如國際人權規範尚未能直接應用，此時一元論與二元論的分割並無意義，因為這類的人權規範需要國家立法制定，與國家層次的憲制類型無關。

陸、國際人權之可訴性

討論在國內法庭履行國際人權法時，基本上是假設法庭在分權原則下是獨立、不偏袒、且有能力解決違反權利的案件。為了讓法庭履行權利，權利必須具有可訴性。我們已經觸及關乎權利可直接適用的問題。可直接適用的問題和可訴性的議題密切相關。長久以來，許多律師與政治家爭辯只有某些權利能歸為人權，因為屬於人權的權利能夠在法庭前行使，並被法庭採用；因此，人權是可訴與可仲裁的。沒有人會否認公民與政治權利，例如生活的權利、免於折磨或殘忍與不人道對待的自由、隱私權、言論與宗教自由，皆為可訴的權利。然而，論到經濟、社會與文化權利，像是工作、健康、食物、水和住屋與教育，當中的爭論是在履行這些權利時，法庭可以管轄歧視的議題，卻不能管轄對這些權利的侵害。過去主要的觀點認為某些國家的經濟、社會與文化權利，並非適當的人權，而是人的渴望。與此背景背道而馳的是，亦為意識形態分歧的觀點，決策是將國際人權公約的結構分為兩部，雖然兩部條約都有前言，其內容皆為「按照世界人權宣言，只有在創造了使人可以享有其經濟、社會及文化權利，正如享有其公民

和政治權利一樣的條件的情況下，才能實現自由人類享有免於恐懼和匱乏的自由的理想」。

當然，經濟、社會與文化權利的實踐要比公民與政治權利需要更充分的財務與物質資源，因而國家當局需要承擔義務，國家之立法與行政方面尤甚，以便讓這些資源得以運用。當我們正在討論法庭作為人權的引導者與法治之角色時，永遠要牢記政府其他部門有履行人權公約義務的責任。不過，人們愈來愈認知與實行的是，法庭不能在經濟、社會與文化權利處於緊要關頭時，保持漠不關心的態度。本文前面曾提出經濟、社會與文化權利的一般性意見，大意是一些經濟社會文化權利公約的條款能夠馬上應用，因而歸在可仲裁權利的類別(一般性意見 No. 3 (1990))。委員會列出這些條款：不分男女皆平等地享有經濟社會文化權利公約中所陳述的一切經濟、社會與文化權利(第三條)；不分種類同等價值的工作提供同等的酬勞(第 7 (a)(i)條)；組織工會和參加他所選擇的工會的權利(第 8 條)；應為一切兒童和少年採取特殊的保護和協助措施，不得因出身或其他條件而有任何歧視 (第 10 (3)條)；接受免費基本義務教育的權利(第 13 (2)(a)條)；父母擁有為其兒女選擇最低教育標準之學校的自由(第 13 (3)條)；不介入個人與主體建立與引導教育機構的自由(第 13 (4)條)；尊重科學研究與創造性活動中不可或缺的自由(第 15 (3))。不過，我們應該承認這些經濟社會文化權利公約的條款在其內容與本質上、就其非歧視性的原則而論、以及作為政治自由之表達，是具有強烈的可訴性特點。但將可訴性附加到經濟、社會與文化權利上，還有另一種說法，即這些權利是與公民與政治權利密切相關，也因而具備法庭的司法評論與法律判決的能力。事實上，民眾之健康、食物與水的基本權利遇到危機時，公共當局卻無法採取必要措施來為絕大部分人口或拘留/服刑者擔保這些權利，這類國家行為可能對生存權利產生反效果，或者可能構成不人道或有辱人格的待遇。同樣地，將人從庇護所逐出或破壞庇護所可能等同於殘酷、不人道或有辱人格的待遇，或是侵害隱私、家庭生活與住家的權利。當這類措施涉及對經濟、社會與文化權利的侵害，可能會構成公民與政治權利，導致司法糾正，對於受害者之權利則適當地補償，其形式包括賠償、彌補、昭雪、或是償還。法律意見的認知與接納更有成效，不只公民與政治權利如此，經濟、社會與文化權利亦然，至少在最低核心義務方面是司法擔保或補償的主題。近來，經濟社會文化權利公約之任擇議定書中也表達這種認知與演化，公民政治權利公約之第一任擇議定書，個體與群體可以因經濟社會文化權利公約所列出之權利受到傷害，而提出請願。這種認知與更為人所接納的經濟與社會權利，也在國內法律體制中的經驗反映出來。有一種有趣的解釋來自於最近在荷蘭法庭的判決，當時的法官裁定因為居民無法負擔水供應公司的帳單，而切斷供應給住戶的飲用水是不合法的，此乃侵犯飲用乾淨水質的基本人權。的確，這是一個具爭議性的法庭裁決，但也是重要的創新之舉。

柒、獲得實際賠償的權利

極具重要性的是，侵犯人權的受害者有權利在國家正義機制前，訴求對於補償與賠償的主張。為了這個目的，國際人權法中的賠償日漸發展為獲取正義的條件。作為國際規範過程的一環，實際賠償權利的法律基礎穩固地在國際人權法主體中，起初是在世界人權宣言(第 8 條)與公民與政治權利國際公約(第二條，第三段)。正如後者所闡明：「任何人在聲明此類賠償時，應有權利由有權能的司法、行政或是立法當局裁定，或是由其他國內法律體制之適任當局裁定。」雖然司法機制，尤其是法庭，不一定是提供賠償或補償的國家機關，卻天生就在適當的位置上行使此功能。人權委員會監督公民與政治權利國際公約，在一般性意見中就提到：「.....司法部門可以用許多不同的方式以有效地確保人們可享有公約所承認的權利。其中包含：直接執行公約、實施類似的憲法或其他法律規定，或是實施國內法時對公約做出解釋」(一般性意見，No. 31，第 15 段)。

行使實際賠償權利的一個主要先決條件，是擁有取得實際賠償管道的能力或更權利。這是一件重要的事情，在法律與許多國家實際措施方面，有效的補救措施是罕見，甚至是無效的，當受害者屬於最貧困與最邊緣化的社會族群時更是如此。在司法主體前，他們通常缺乏工具、資源與知識以提出補償與賠償的主張。因此，他們無法負擔律師費，而且在許多國家中，事實上佔用法庭的高額費用對人口中較為貧困者來說是過高的。這種情況公然違背正義的基本規範，因此更加需要強調增強—透過法律與財務支援的方式，也透過散播可能的救濟管道的資訊—個人與族群擁有平順與平等接觸正義的權利，尤其為了那些持續受到虐待、忽視、剝奪與歧視之人們。

取得實際賠償的權利有雙重意義，具有程序與實質方面的特點。程序方面的特點在於國家須提供不受阻礙的工具與平等接觸管道的國內救濟措施。國際人權法的判決者，例如人權委員會曾經裁決，當核心權利在危急關頭時，例如生存權與禁止折磨或殘忍、不人道或有辱人格的對待，國家有義務進行即時與公平的調查，並根據國際公約條款將罪犯繩之以法，給受害者應有的交代。在許多情況下，當法律批准免罪，或事實上免罪凌駕於嚴重侵犯人權，受害者實際上無法尋求正義或擁有實際賠償的資源。當國家當局無法調查事實、建立罪責時，很難讓受害者或其親人依據實際的法律訴訟獲取充足的補償與賠償。

實際賠償權利的實質層面基本上反映在一般法律原理上，即抹滅犯錯的後果。在這方面，人權委員會在之前所引用的一般性意見中表示，實際的賠償以適當的財務補償來承擔罪責，形式包括償還、康復，以及以下的補救措施：如公開道歉、公開紀念、不再重犯的保障措施、相關法律措施的改變、以及將違反人權者繩之以法(一般性意見 No. 31, 第 16 段)。在這方面，人權委員會含蓄地運用聯合國嚴重侵犯人權法之受害者賠償與補償權利基本原理、方針與嚴重侵害國際人道法。這些聯合國的補償原理在 2005 年獲同意採用，詳加說明受害者對賠償的權利：(a)平等與有效的正義取得管道；(b)充足、有效與立即的傷害補償；以及(c)關於侵權與補償機制之相關資訊的取得管道。最重要的是各種補償形式的描

述：歸還、賠償、彌補、康復、贖罪與不再重犯的保障。詳細討論這些補償原則超出本論文的範圍，但眼前的目的在於開始一個受害者導向的人權觀點，作為人類連帶責任的主張。國家當局與國家機關，包含法庭與其他司法機制，皆應接受建議，謹記補償原則。

捌、法庭作為正義之守衛

在本論文中，司法部門與其角色以各種方式出現。我們已經指出所有法律專業人士，包含司法部門與所有預備從事法律者，需要對人權法律進行密集地法律訓練與教育。我們已觸及法庭在支持和平、正義與永續環境的所扮演的角色。我們從基本人權規範之普世性切入討論，以國家和區域特性，與各種文化與宗教的背景為基礎，迅速完成人權法律的解釋與評論。除此之外，我們審視法庭的功能，探討在國際人權規範下，國家憲政與法律秩序中所謂的一元性與二元性體制。我們請求法庭與法律專業人士的知識能夠通達，由國際監督主體對國際人權規範的解釋，其解釋呈現於一般性意見與建議、觀察結論以及判例法。我們也提到法庭有責任判定人權的可訴性，且觀察到這方面愈來愈傾向考量除了公民與政治權利，經濟、社會與文化權利以外的可訴權利。最後，我們強調法庭在確保實際賠償、補償與彌補人權受到侵犯的受害者時所扮演的角色，因此適當地在心裡保持受害者導向的觀點。

作為司法部門之一部分的法庭，顯然扮演人權保護者與保障者的基本角色。世界人權宣言已經宣布法律之前人人平等、清白的假設，以及由法律所建立的無私法庭來做公平與公開的審判與聽證。這是。兩部公約都保障這些權利的行使。基於這些權利與原則，聯合國於 1985 年通過〈司法獨立之基本原則〉。事實上，為了適當且公平地運作，司法獨立是基本的條件。基本原則明確地規定，司法獨立應由國家保證，並且涵蓋在憲法或國家律法之中。司法獨立暗示，司法程序不應受到任何不適當或未經授權的介入。基本原則也規定，在決定事務時，司法應該無私地基於事實，並且根據法律，不受到限制、不當影響、勸誘、壓力、威脅或干涉。關於司法獨立尚有許多其他相關層面，例如任用原則與程序、財務自治與適當的資源，以及倫理規範與責任。

在危機發生時，例如公共危險、武裝衝突、國內政局不穩與公民不安的狀態，必須特別注意司法所扮演的重要角色。在這類情況下，行使與享有人權是在極度危險中，司法部門可能面對重大壓力。在這些條件下，他們身為人權保護者與保障者的角色，甚至要比在「正常」情況中更不可或缺。因此，在危機發生期間，司法負有更深入與重要的責任。基於這個理由與背景，可敬的國際法律人協會在三年前通過〈危機時期法官與律師角色之宣言和行動計畫〉。

我們在這份提案中已經強調司法的重要角色，國內法庭的角色在履行國際人權法時是一個基礎條件。早在 18 世紀，法國哲學家孟德斯鳩發起三權分立(*Trias*

Politica)，是分權的政治寶典：行政權、立法權與司法權。這三種權力—有些可能比較有權力—各司其職，皆各有其責任來促進與保護國際人權。不過，在最後的分析中，永遠要記住獨立且公正的司法，乃是公平行使正義的首要條件，也是支撐人類尊嚴與權利之固有價值的基石。

The implementation of international human rights law in domestic courts; potentials and prospects

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I. An anecdote

There is an anecdote of a local judge in a provincial town in The Netherlands who dismissed a plea that relied on the European Convention on Human Rights. The judge said that he had never heard of such a Convention. Moreover, he could not trace the text in his library. He further ruled that invoking such an obscure document rather than relying on national law was the ultimate proof of the weakness of the argument. This story goes back to the sixties of the last century. The Netherlands had already ratified the European Convention on Human Rights in the fifties but apparently it lasted quite some time before members of the legal profession, notably this local judge, became aware of the existence and the significance of this Convention. At the present time, after many decades of growing significance of international human rights law with a major impact on nearly all fields of the Dutch legal system, it is unthinkable that the legal profession, whether in the legislative, administrative or judicial branches of governance, would be ignorant of the European Convention on Human Rights and, I add with some caution, of the potentials of worldwide human rights instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Developing knowledge and insights on the significance and the potentials of international human rights law is now an indispensable ingredient of legal education and training in Law Schools, not any more limited to the curricula of international law courses but integrated in the curricula of all branches of legal training and education. This is an ongoing process and has taken time. The Dutch experience was also influenced by what is called the “monist” model which implies that after ratification of a treaty its provisions become part of domestic law and may be invoked before the courts insofar as these provisions are directly applicable. I will return to the domestic models of “monism” and “dualism” later in this presentation.

I have been referring to this Dutch anecdote and experience in the awareness that

similar experiences are shared in the practice of other countries. However, the main reason for telling this story and touching upon its wider ramifications is to stress the importance of awareness building about the potentials of international human rights law and to highlight training and education of the legal profession as a prerequisite for making use of international human rights law. Such training and education, also in the perspective of developing a culture of human rights, is one of the proven means to create better conditions for human rights protection and enforcement.

II. Overview

The subject matter of this presentation, viz. the implementation of international human rights law in domestic courts, is broad in scope and can be approached in various ways. I plan first of all to briefly point to the position of the State which is the primary holder of international human rights obligations. The judiciary and for that matter the courts are part of the State structure and carry out distinct functions in that context. Thereafter I will deal with the relationship between international and domestic human rights law with emphasis on universality of standards but with due regard to national and regional particularities. This conceptual approach and relationship will be followed by some remarks of a more technical-juridical nature about the various domestic systems of implementing international human rights law. Further, I will make some observations on the justiciability of international human rights law as a condition for domestic courts and other public institutions to apply human rights standards in the civil, political, economic, social and cultural fields. Thereafter, mindful of the rights of all those who seek justice through judicial and other public institutions, attention will be paid to remedies and reparations as a means to strengthen faith in the national and international human rights system. Finally, when dealing with the role of domestic courts, it is appropriate to point to the need of upholding the independence and the impartiality of the judiciary as an essential requirement for the fair administration of justice. This counts even more in times of crisis and emergency when the court system may operate under severe tensions.

III. The State as the primary human rights duty-holder

While in international human rights law individual persons – and in some cases collectivities such as indigenous peoples and minorities – are the rights-holders, it is the State that is the primary duty-holder. States are still the main constituent members of the international community and States, as parties to international human rights

treaties, have committed themselves to comply with the obligations these treaties entail. For that matter States must be held accountable primarily vis-à-vis their own populations but also towards the international community which has a collective interest that international treaties are complied with and that all members of the human family enjoy a worthy life in dignity and rights. The State as duty-holder under international human rights treaties is under the obligation to protect persons against violations and abuses by its own agents. But the State has also the duty to extend this protection against acts committed by private persons or entities such as business corporations insofar as they are in violation of rights recognized in international human rights law. Further, it is worth noting, as the Human Rights Committee stated in a General Comment on the Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights (General Comment No. 31 (2004)), that obligations engaging the responsibility of a State Party apply to all branches of government (executive, legislative and judicial) as well as to other public or governmental authorities at whatever level (national, regional or local). In the same context the Committee recalled in the light of the Vienna Convention on the Law of Treaties that a State Party "may not invoke the provisions of its internal law as a justification for its failure to perform a treaty".

Now it may well be argued that the nature of obligations imposed on States Parties may differ as between obligations of immediate application and obligations that are conducive to progressive application. This distinction was one of the reasons for dividing the International Bill of Rights into two separate treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It was argued that the former treaty was to be applied without delay whereas the latter was subject to progressive or gradual implementation. The decision dating back to the fifties and sixties of last century to divide human rights, initially enshrined in the Universal Declaration of Human Rights in a single instrument, into two distinct instruments is a reality but remains contested as a conceptual misnomer. In fact, this separation fails to appreciate the indivisibility and interdependence of all human rights. The classification of obligations into undertakings of immediate application and of progressive realization is conceptually and practically too simplistic. Thus, the Committee on Economic, Social and Cultural Rights which monitors the implementation of the ESCR Covenant has pointed out in one of its early General Comments (General Comment No. 3 (1990)) that there are a number of provisions of the ESCR Covenant which would appear to be capable of immediate application by judicial and other public organs in national legal systems. I will come back to this question somewhat later in this presentation when the justiciability of human rights will be discussed. For the moment in the context of the

State as the primary human rights duty-holder, due attention should be paid to a basic observation in the same general comment of the Committee on Economic, Social and Cultural Rights to the effect that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant".

With reference to the obligations of the State as the primary human rights duty-holder, I only mentioned treaties as a source of international human rights law. This is in itself logical because treaties, in global and regional settings, have now become the principal legal components of the comprehensive corpus of international human rights law. Treaties and in particular the core of international human rights treaties are subject to international monitoring and adjudication and are phrased in such a manner as to lend themselves to specific implementation by national branches of government, including the judiciary. But we have also to take into account that States, irrespective whether they have ratified human rights treaties, are also bound by what have been termed *ius cogens* norms, imperative norms which reflect essential values of humankind and prevail over any other standards and obligations. These *ius cogens* norms are not formally classified but over the years they have been confirmed by international and domestic tribunals and courts. These imperative norms which are basic to all humanity and which have to be respected by all organs of the international community and national society include the prohibitions of genocide, torture, murder, enforced disappearances, slavery and slave trade, prolonged arbitrary detention, and systematic racial discrimination. It is true that all these imperative norms are also clearly and explicitly included in general and specific human rights treaties, such as those relating to genocide, torture, disappearances and racial discrimination, but their respect and observance is in addition a *supra* treaty obligation.

Further, much could be said about customary law as a source of international human rights law and binding upon States. Again, with the codification of international human rights into a series of treaties and with the growing acceptance of these treaties by States, it appears that the importance of customary international human rights law is on the decline. It is nevertheless not without significance that the Universal Declaration of Human Rights is frequently and widely invoked, not only as a common standard of achievement, as can be read in its preamble, but also as a customary law standard to be complied with, thus reflecting evidence of "opinio iuris" that overrides incompatible practice.

IV. The relationship between international and domestic human rights law

For long general international law could be characterized as the law of coexistence governing the demarcation of rights and interests between sovereign States and attributing primary importance to the principle of non-intervention in matters considered to belong to the domestic jurisdiction of States. Progressively, however, the law of coexistence was complemented by the law of cooperation. A clear signal into that direction were the Four Freedoms proclaimed by US President F.D. Roosevelt in the dark year of 1941. Freedom of expression, freedom of worship but also freedom from want and freedom from fear were to be attained, as Roosevelt pleaded, in our time and generation. These Four Freedoms were among the sources of inspiration to the authors of the Universal Declaration of Human Rights which grew into the fundament whereupon the whole normative fabric of the international human rights edifice is being built. The law of coexistence is not obsolete these days, but it falls short to deal effectively with the overall challenges humankind is facing. The law of cooperation sets out principles and rules for a responsible society at all levels of our globe: local, national, regional and worldwide.

In response to the plight of a responsible society the relationship between international and domestic human rights law is evolving. This is not an automatic process of growing together and living in harmony and peace. It requires strenuous efforts on the part of all sectors of the human family, in particular those holding political and economic power, those who are leaders in various branches of government, including the judiciary, and those who carry educational and cultural responsibilities. The history of the last sixty years shows hopeful signs of cooperation, respect and inclusion, but still there were and there are persisting and structural situations of exclusion, deprivation, discrimination, denial of identity and refusal of self-determination which negate the essential values of a responsible society, nationally and internationally. Most troubling and unacceptable are atrocious large-scale practices amounting to serious crimes under international law, notably genocide, crimes against humanity, war crimes and the crime of aggression as brought under the jurisdiction of the International Criminal Court. International law and international institutions and systems are in place and in the making to cope with these wrongs and these criminal evils.

The question comes up in the light of the theme of this presentation what domestic courts as judicial organs can do to uphold the rule of law, to administer a fair distribution of justice, to stop abuses and to offer redress and remedies. Obviously it is beyond the capacities of domestic courts to offer solutions for the major world

problems related to the requirements of a responsible international society. However, it does happen that in specific cases domestic courts are seized with issues that are closely linked with world problems such as the criminal implications of the violation of principles of humanitarian law in armed conflict or the civil and criminal liability for serious harm caused by unattended environmental degradation. The tasks of domestic courts facing legal aspects in relation to upholding peace, retributive and reparative justice and ecological integrity, are a subject of major interest and deserve due attention but arise above the scope of this presentation with its focus on the domestic implementation of international human rights law.

The point I would like to raise and that has a bearing on the role of domestic courts is the relationship between international and domestic human rights law in the light of the universality of basic human rights standards but with due regard to national and regional particularities: As a point of departure I take here an often quoted paragraph from the Vienna Declaration adopted by the World Conference on Human Rights in June 1993. This paragraph reads:

> "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

The basic question of the universality of human rights standards was and still remains a subject of intense discourse with many perspectives in mind: philosophical, political, legal, cultural, socio-economic, etc. Let me only recall the debate on Asian values which took prominence in the nineties of the last century. Official spokespersons from China, Indonesia, Malaysia, Singapore, Pakistan and other nations questioned prevailing approaches in international instruments and the manner Western nations were making use of human rights in their external policies. They denounced so-called human rights imperialism and put emphasis on the interests of the community, on duties above rights, on social and collective dimensions of human rights, on security interests. In response to this Asian values debate, Asian NGOs gathered in 1993, adopted the Bangkok NGO Declaration on Human Rights. It is worth quoting some phrases from this text:

> "We can learn from different cultures in a pluralistic perspective and draw lessons from the humanity of these cultures to deepen respect for the human

> rights […….]. Universal human rights standards are rooted in many cultures. We affirm the basis of universality of human rights which afford protection to all of humanity, including special groups such as women, children, minorities and indigenous peoples, workers, refugees and displaced persons, the disabled and the elderly. While advocating cultural pluralism, these cultural practices which derogate from universally accepted human rights, including women's rights, must not be tolerated."

This debate continues, sometimes under a new label. Thus, the Russian Federation initiated last year in the UN Human Rights Council an item: "better understanding and appreciation of traditional values of dignity, freedom and responsibility". Fundamental challenges to the universality of human rights are certainly posed by claims of national security, claims of totalitarian ideologies and systems and by claims and prescriptions of religious fundamentalism.

To what extent are these conceptual discussions and these fundamental challenges to the universality of human rights relevant to the implementation of international human rights law in domestic courts? I submit that the judiciary, while its members have a special role in safeguarding human rights and the rule of law, is not operating in a vacuum but in a national context with its own constitutional history and its own political, social and cultural settings. The interpretation and application of laws by domestic courts certainly carries the imprint of what the Vienna text referred to as "national and regional particularities and various historical, cultural and religious backgrounds". At the same time domestic courts, in their interpretation and application of laws, must be mindful of the relevant international human rights standards as accepted by the State of which they are a structural component. Ideally, being aware of the relevant international human rights standards should imply that domestic courts pay due attention to international standards whenever these standards are invoked or on their own initiative (*proprio motu*). It should, however, be well understood that the universality of norms or standards should not necessarily mean uniformity in their application everywhere and worldwide. In this regard a distinction has to be made between the various rights at stake. Some very fundamental rights must be implemented strictly everywhere, whereas other rights may leave a certain discretion as regards their national implementation. It is generally assumed that international human rights law is meant to provide legal protection to persons wich is complementary to national means and standards of protection and which is not a substitute thereof. Therefore, by and large universality of human rights norms cannot be equated with uniformity in their implementation. However, as already indicated, a distinction has to be made between the nature of the various rights. Some rights, commonly referred to as core rights or non-derogatory rights, may never be the

subject of suspension or limitation under any circumstances, not even in times of emergency or armed conflict. These non-derogatory rights are listed in various human rights treaties; notably also in Article 4 (2) of the International Covenant on Civil and Political Rights. Similarly, reservations with regard to these rights are not allowed and must be considered incompatible with the object and purpose of the treaty. On this issue of making reservations, the Human Rights Committee stated appropriately in a general comment:

> "A State may not reserve the right to engage in slavery, to torture, to subject people to cruel, inhuman and degrading treatment or punishment, to arbitrary deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women and children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profession, their own religion, or use their own language; and the right to a fair trial ....." (General Comment No. 24 (1994)).

It is generally accepted that this general comment, inasmuch as it deals with the prohibition to make reservations to certain rights under the CPR Covenant, also extends to rights that do not allow a margin of appreciation. In this connection the doctrine of "margin of appreciation" developed by the European Court on Human Rights is relevant. While the preamble of the European Convention of Human Rights speaks of a common heritage of political traditions, ideals, freedom and the rule of law, the European Court nevertheless recognizes that countries parties to the Convention may hold different views on certain issues with strong moral implications, such as abortion, euthanasia, sexual habits, pornography. In particular with regard to permissible limitation grounds, such as public order and morals, the European Court leaves a margin of appreciation or discretion to individual States. This doctrine which is a particular feature in the jurisprudence of the European Court of Human Rights, may serve as an illustration of non-uniform application of international human rights norms as far as certain rights are concerned, having regard to the variety in historical, cultural and religious traditions of national societies. On the other hand, this doctrine is not without hazards inasmuch as it may allow the continuation of discriminatory practices on the grounds of gender or sexual orientation and may in its effects be inconsistent with another feature of the jurisprudence of the European Court, viz. that the Convention should be a dynamic and living instrument that holds pace with current evolutions in the appreciation of human freedom and dignity.

This fundamental question of universality as distinct from uniformity was raised not only as a conceptual and policy issue to be perceived and discussed as part of general human rights discourse. This question is also highly relevant for the effective interpretation and application of human rights law in concrete cases and situations and for that matter a basic consideration for domestic courts in implementing international human rights law.

V. Systems of domestic implementation of international human rights law

It is obvious that international human rights law can only be invoked before domestic courts insofar as – if we limit ourselves to treaty law – human rights treaties are incorporated into domestic law. In this respect it is clarifying to distinguish between what are called *monist* systems and *dualist* systems. In a monist system international law norms form part of domestic law without the need of legislative transformation. In a dualist system the duality is characterized by the fact that international law and national law are two separate systems. Therefore, in the dualist system international law norms must be transformed by legislative enactment before they become part of the domestic legal order. Coming from the Netherlands which is a monist country and allows the courts to rule that provisions of domestic law may be at variance with international law norms and therefore not applicable, I am inclined to believe that monist systems are to be preferred over dualist systems inasmuch as monism may secure a more direct and effective realization of internationally recognized norms. At the same time I am aware that such an assumption may be somewhat biased on my part and would need a thorough analysis of practices and outcomes in a variety of countries that are governed by monist and dualist systems respectively. Much depends on the attitude and the traditions of the judiciary in the various national contexts. It may well be that judges functioning within the monist system feel uneasy and are reluctant to apply norms of international law. They may consider that they lack sufficient expertise in this respect and that they are on more solid and familiar legal ground as long as they interpret and apply domestic law which after all was an important part of their legal education and training. On the other hand, while the monist system would lay a heavy claim on the capacity and willingness of domestic courts to apply international human rights norms, the dualist system may also bring about deficiencies insofar as it fails to see to it that existing legislation or legislative acts aimed at incorporating the requirements of a treaty into domestic law actually meet these requirements. Generally speaking, there is no widely accepted international legal opinion that favours either of the two systems. It is decisive for

both systems that the State complies fully and faithfully with its obligation to give effect to the provisions of a treaty. For this reason it is important that the manner in which a State is meeting its obligations is subject to independent international scrutiny and monitoring. Therefore, a series of international human rights treaties provide for specific means and mechanisms of independent supervision.

In fact, within the United Nations human rights promotion and protection system, nine treaty bodies carry out tasks of monitoring and inquiry and may also receive, with regard to States that have explicitly accepted complaint procedures, petitions from persons who claim to be victims of the violation of the treaty. It would go beyond the scope of this paper to discuss in detail the ins and outs of the human rights treaty bodies' activities. I wish only to stress the importance that treaty monitoring be based on a full scope of information provided by national reports of States Parties supplemented by information from other sources, notably reliable and credible civil society organisations and, as the case may be, national human rights commissions. This will enable the supervisory body to enter into a constructive public dialogue with States Parties and analyse progress made as well as difficulties encountered in meeting their obligations under the respective human rights treaties. Such dialogue and analysis will lead to concluding observations with emphasis on recommendations addressed to States Parties with a view to improving their record of treaty compliance. These concluding observations are also serving as tools for follow-up control, domestically and internationally.

Coming back to the role of domestic courts, it is important that all branches of government, including the judiciary, make themselves familiar with the conclusions and recommendations of international supervisory mechanisms relating to their country so as to duly take these conclusions and recommendations into account. Moreover, most treaty bodies have developed the practice of drawing up, after careful preparation, general comments relating to some overall aspects or individual provisions of the treaty. These general comments contain useful insights and provide guidance for the interpretation and application of a treaty as a whole and its individual articles. Again, for the implementation of international human rights at the domestic level, notably by the courts, it serves a useful purpose that these general comments become widely known and be the subject of study and analysis. Further, insofar as jurisprudence of international and regional judicial bodies is concerned, case law in the form of "views" by treaty bodies on individual complaints and judgments by regional human rights courts in Europe, the Americas and Africa are also of considerable significance for the interpretation of international human rights law, sometimes with major implications for securing human rights at the national level through domestic courts.

I started this part of my presentation by making a distinction between countries that follow a monist system or a dualist system as regards the incorporation of international human rights norms into domestic law. I mentioned in this respect some advantages and disadvantages of both systems and I touched upon the role of domestic courts. Coming back to this distinction it should be kept in mind, however, that this distinction may only have practical consequences insofar as international human rights norms are "directly applicable" or "self-executing" and thus lend themselves to be directly relied upon by natural or legal persons and to be directly applied by the judiciary. Whether a treaty provision is directly applicable or self-executing may depend on the intention of the drafters of a treaty and also on the nature of a treaty provision, in particular if it is couched in language which is sufficiently precise and would for that reason not require, at least in monist systems, implementing legislation. Therefore, insofar as international human rights norms are not directly applicable, the monist dualist divide is not relevant because such human rights norms would require national legislative enactment anyway, irrespective of the type of constitutional arrangements at the national level.

VI. The justiciability of international human rights

When discussing the implementation of international human rights law in domestic courts, it must be a basic assumption that courts under the principle of separation of powers are independent and impartial and capable to provide remedies in case of violations of rights. In order to be implemented by the courts, rights must be justiciable. We touched already upon the question to what extent rights are directly applicable. This question of direct applicability is closely related to issue of justiciability. For long, many lawyers and politicians argued that only those rights may qualify as human rights insofar as they can be invoked before the courts and applied by the courts; thus, human rights as adjudicatory or justiciable rights. No one would deny that civil and political rights, such as the right to life, freedom from torture or cruel and inhuman treatment, the right to privacy, freedom of speech and religion, are justiciable rights. However, when it comes to economic, social and cultural rights, such as the right to work, health, food, water, housing and education, it was argued that courts may well be in a position to rule on issues of discrimination regarding the implementation of these rights but not on violation of the rights themselves. It was a prevailing view in some countries that economic, social and cultural rights were not properly human rights but rather human aspirations. It was against this background that, also in view of ideological divisions, the decision was made to structure the International Covenants on Human Rights in two separate

instruments, albeit with the preambular proviso in both treaties that “in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want only can be achieved if conditions are created whereby everyone can enjoy his economic, social and cultural rights as well as his civil and political rights”.

It is of course true that the realization of economic, social and cultural rights, more than civil and political rights, requires the availability of adequate financial and material resources and thus entails an obligation for State authorities, notably the legislative and executive powers of the State, to make such resources available. While we are discussing the distinct role of courts as guardians of human rights and the rule of law, we should never forget the responsibilities of the other branches of government to implement human rights treaty obligations. But there is a growing awareness and practice that the courts cannot remain indifferent when economic, social and cultural rights are at stake. Earlier in this presentation, reference was made to a general comment of the Committee on Economic, Social and Cultural Rights to the effect that a number of provisions of the ESCR Covenant are capable of immediate application and thus fall in the category of justiciable rights (General Comment No. 3 (1990)). The Committee listed among these provisions: the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the ESCR Covenant (article 3), equal remuneration for work of equal value without distinction of any kind (article 7 (a)(i)), the right to form trade unions and join the trade union of his/her choice (article 8), special measures of protection and assistance for all children and young persons without discrimination (article 10 (3)), the right of compulsory and free primary education (art. 13 (2)(a)), the liberty of parents to choose for their children their own schools which conform to minimum educational standards (art. 13 (3)), non-interference with the liberty of individuals and bodies to establish and direct educational institutions (art. 13 (4)), respect for the freedom indispensable for scientific research and creative activity (art. 15 (3)). It should be acknowledged, however, that these provisions of the ESCR Covenant have, by their content and nature, in terms of the principle of non-discrimination and as expressions of political liberties, strong justiciable dimensions. But there is also another line of argument for attaching justiciability to economic, social and cultural rights insofar as these rights are closely interrelated with civil and political rights and thus capable of judicial review and legal adjudication by the courts. In fact, where basic rights to health, food and water are at stake and public authorities deliberately fail to take the necessary measures to guarantee these rights to significant parts of the population or to persons in detention or imprisonment, such State behaviour may have adverse effects on the right to life or may constitute inhuman or degrading treatment.

Similarly, evictions and destruction of shelter may amount, or often do amount to cruel, inhuman or degrading treatment or to a violation of the right to privacy, family life, and home. Such practices where the violation of economic, social and cultural rights, can be framed in terms of civil and political rights, may well lead to judicial remedies and to the right of victims to adequate reparation in the form of restitution, compensation, rehabilitation or satisfaction. The awareness and the acceptance of the legal opinion are gaining ground that not only civil and political rights but also economic, social and cultural rights, at least as minimum core obligations, are the subject of judicial guarantees and remedies. This awareness and evolution is also finding expression in the recent adoption of an Optional Protocol to the ESCR Covenant which, as a counterpart to the First Optional Protocol to the CPR Covenant, provides for the right of petition by individuals or groups of individuals claiming to be victims of a violation of any of the rights set forth in the ESCR Covenant. This awareness and the wider acceptance of the notion of justiciability of economic and social rights are also reflected in experiences in domestic legal systems. An interesting illustration is a recent court decision in The Netherlands in which the judge ruled that the cutting off of drinking water supply to a dwelling because the dweller had persistently failed to pay the bill to the water supplying company, was unlawful as a violation of the basic human right to clean water. Truly, a controversial court decision but nevertheless a significant trendsetter.

VII. The right to an effective remedy

It is of crucial importance that victims of human rights violations have a right to pursue their claims for redress and reparation before national justice mechanisms. For this purpose remedies in international human rights law progressively developed as a requirement to obtain justice. As part of an international normative process the legal basis for the right to an effective remedy became firmly anchored in the elaborate corpus of international human rights law, initially in the Universal Declaration of Human Rights (Article 8) and in the International Covenant on Civil and Political Rights (Article 2, par. 3). As the latter Covenant stipulates: “any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State”. Although judicial mechanisms, notably the courts, are not necessarily the only organs of the State to provide remedy and redress, they are by nature well-placed to exercise this function. The Human Rights Committee, monitoring the International Covenant on Civil and Political Rights, noted in this regard in a general comment: “. . . the enjoyment of the rights recognized under the

Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretative effect of the Covenant in the application of national law" (General Comment No. 31, par. 15).

A major precondition for the exercise of the right to an effective remedy is the facility or rather the right to have access to an effective remedy. It is a matter of concern, that in law and in actual practice of many countries effective remedies are scarce or of no avail, in particular where victims belong to the most destitute or marginalized groups of society. They often lack the means, the resources and the knowledge to bring any claims for redress and reparation before judicial bodies. Thus, they cannot afford legal counsel and in many countries the high fees to be paid for seizing the courts are in fact prohibitive for the poorer sectors of the population. This state of affairs defies basic standards of justice and underscores the need to strengthen – by way of legal and financial assistance and by the dissemination of information about available remedies – the right of individuals and groups to have smooth and equal access to justice, in particular for the benefit of those who are victims of persistent abuse, neglect, deprivation and discrimination.

The right to an effective remedy has a dual meaning. It has a procedural and a substantive dimension. The procedural dimension is subsumed in the duty of the State to provide effective domestic remedies by means of unhindered and equal access to justice. International human rights adjudicators, such as the Human Rights Committee, have ruled, in particular when core rights are at stake such as the right to life and the prohibition of torture or cruel, inhuman or degrading treatment, that States have the duty to proceed to prompt and impartial investigation of the facts, to bring to justice persons found criminally responsible and to extend to the victim(s) treatment in accordance with the provisions of the International Covenant. In many situations where impunity is sanctioned by the law or where *de facto* impunity prevails victims of gross violations of human rights are effectively barred from seeking justice and having recourse to effective remedies. Where State authorities fail to investigate the facts and to establish criminal responsibility, it becomes very difficult for victims or their relatives to rely on effective legal proceedings aimed at obtaining just and adequate redress and reparation.

The substantive dimension of the right to an effective remedy is essentially reflected in the general principle of law of wiping out the consequences of the wrong committed. In this respect the Human Rights Committee stated in the earlier cited general comment that the effective remedy entails reparation by way of appropriate financial compensation which may involve restitution, rehabilitation and by measures

of satisfaction, such as public apologies, public memorials, guarantees of non-repetition, changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations (General Comment No. 31, par. 16). In this respect the Human Rights Committee implicitly draws upon the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. These UN Reparation Principles, adopted by consensus in 2005, spell out in detail the victim's right to remedies in terms of: (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms. Most significant is the description of the various forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. It goes beyond the scope of this paper to discuss in detail these Reparation Principles but for present purposes it is submitted that they set out a victim-oriented perspective of human rights as an affirmation of human solidarity. State authorities and State organs, including the courts and other judicial mechanisms, are well advised to take these Reparation Principles to heart.

VIII. The courts as guardians of justice

In this paper the judiciary and its role have come up in a variety of ways. We have pointed to the need of intense legal training and education in human rights law for all members of the legal profession, including the judiciary and all those who are preparing themselves for a legal career. We have touched upon the role of the courts in upholding peace, justice and a sustainable environment. We discussed the role of the courts in the light of the universality of basic human rights standards, with due regard to national and regional particularities and various historical, cultural and religious backgrounds as a basis for an expeditious interpretation and appreciation of human rights law. Further, we reviewed the functioning of the courts in so-called monist and dualist systems of giving effect to international human rights norms in the domestic constitutional and legal orders of the States. We pleaded for a close familiarity by the courts and all members of the legal profession with the interpretation of international human rights standards by international supervisory bodies as evident in general comments and recommendations, concluding observations and case law. We also noted that it is incumbent upon the courts to rule on the justiciability of human rights and we observed in this regard an increasing tendency to consider, in addition to civil and political rights, economic, social and cultural rights as justiciable rights. Finally, we underscored the role of the courts in

assuring effective remedies, redress and reparations for victims of human rights violations, thus duly keeping in mind a victim-oriented perspective.

It is obvious that courts as part and parcel of the judiciary have an essential role to play as protectors and guarantors of human rights. Already the Universal Declaration of Human Rights, enunciated the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Both International Covenants guarantee the exercise of these rights. It was with these rights and principles in mind that the United Nations adopted in 1985 the Basic Principles on the Independence of the Judiciary. In fact, in order to function properly and impartially, the independence of the judiciary is an essential condition and, as the Basic Principles clearly prescribe, the independence of the judiciary shall be guaranteed by the State and enshrined in the constitution or the law of the country. The independence of the judiciary implies that there shall not be any inappropriate or unwarranted interference with the judicial process. The Basic Principles also prescribe that the judiciary shall decide matters before them impartially on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences. There are many other aspects of relevance to the independence of the judiciary, such as appointment criteria and procedures, financial autonomy and adequate resources as well as standards of ethics and accountability.

Special attention should be given to the critical role of the judiciary in times of crisis, such as public emergencies, armed conflicts, internal political instability, and state of civil unrest. Under such conditions the exercise and enjoyment of human rights is in jeopardy anyway and the judiciary may come under enormous stress. Their role as protectors and guarantors of human rights is in these circumstances even more indispensible than under “normal” conditions. It is therefore in times of crisis that the judiciary carries an enhanced and crucial responsibility. For this reason and against this background the respected International Commission of Jurists adopted three years ago a Declaration and Plan of Action on the Role of Judges and Lawyers in Times of Crisis.

We have highlighted in this presentation the crucial role of the judiciary and for that matter the role of domestic courts as an essential condition for the implementation of international human rights law. Already in the 18th century the French philosopher De Montesquieu launched the *Trias Politica* as a political doctrine of the separation of powers: the executive power, the legislative power, and the judicial power. These three powers – some may be more powerful than others – carry their own distinct responsibilities which all encompass the promotion and protection

of international human rights. Yet, in the final analysis, it must always be kept in mind that an independent and impartial judiciary is a major condition for the fair administration of justice and for upholding the intrinsic values of human dignity and rights.