Studying the Law in Context: Exploring an International Dimension of New Zealand Law

By Professor Margaret Bedggood*

I. Introduction

The School of Law at the University of Waikato opened 20 years ago with a commitment to three foundational goals: to professionalism; to a bicultural focus; and to the study of the law in context. These three goals are closely connected to each other. This is particularly true of the linkage between the commitment to a bicultural ethos and to the study of the law in the context of Aotearoa New Zealand. And, as is discussed elsewhere in this volume,[1] these three goals, partly because of their innovative nature, must constantly be reconfigured and adapted to changing circumstances and developments in the law and in the wider society. Thus the third goal, the study of the law in context, cannot be divorced from the surrounding society, both our local society here in Aotearoa New Zealand but also more broadly the regional and increasingly global society of which we are a part, and the current changes and preoccupations in all of these. Of this third goal the current Co-Editors in Chief of the Waikato Law Review have written:[2] "In affirming the Faculty's commitment to law in context, the Review reflects a broad approach to legal education and legal scholarship enabling an examination of law in a social, cultural, political and economic context." This approach is inevitably reflected in the design and delivery of course curricula in the Law School.

Before we turn to the study of this context, however, I would like to highlight the innovation displayed in the setting and articulating of these goals in a law school at that time and to pay tribute to the foresight and imagination of the School's founding Dean, Professor Margaret Wilson, in that regard. These and two other factors, an emphasis on the importance of information technology and alternative dispute resolution, have marked out the Law School at Waikato from its beginnings as having a special character. By the time I joined the School in 1994, they were already well established and their advantages — as well as some of their difficulties of implementation — were apparent. After 20 years it is easy to see just how accurately forward-looking all those developments were.

The role of the Dean who follows an innovative founder is in many ways a difficult one: on the one hand that founding spirit must somehow be continued, while at the same time the initial ideas need to be consolidated and embedded. But those who are attracted to a School like Waikato, its staff and students, are for that very reason likely to be supportive and creative in that task. An example of the continuation of such an innovative approach during this period was the attempt,

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1 See this volume Peter Spiller, Principles of Professionalism in Law Teaching and Judicial Practice.

2 Letter from Waikato Law Review Editors' in Chief, 8 July 2010.

initiated especially by Campbell Robertson, then a Master's student and research and computer assistant at the School, to obtain funding for a project for the School to mount the statutes of New Zealand on-line so that they would be accessible to all without charge. At that time, 1995, this was a visionary proposition, which nevertheless found enthusiastic endorsement from the staff in computer support (Jonathan Hooper), from the library representative (Professor Barry Barton) and from the faculty (Peter Jones). Such support was not, however, forthcoming from the Law Foundation and the project fell away.

Another example which could be cited was the meticulous enrolment techniques and scrutiny developed and employed by the School. These took account not only of academic ability, although that of course remained a factor, but of the whole of relevant life experience and potential, discovered by individual interviewing if necessary. It was this process which in the initial stages I believe enabled the School to increase its percentage of Māori students without resorting to the use of a quota system.

It is perhaps not surprising, given the parallel developments in our wider society, that working towards the goal of adhering to a bicultural ethos in the Law School was, in my experience, where the most difficulties and tensions arose. There were high expectations attached to this goal, both within the School and outside, and it had been one of the factors which had assured the choice of the University of Waikato as the seat of the latest law school. But despite some difficulties and disagreements, there were some particular developments which were positive and successful. The enrolment procedures were, as I have said, instrumental in contributing to the increase in the number of Māori students in the School. In this early period also the foundations were laid for Māori perspectives, concepts and traditions to be incorporated as an integral part of several of the compulsory papers; for a separate stream or tutorial to be provided in first year courses for Māori students who wished it; and for a Māori mentoring scheme to be established.

In particular, the institution of a School Kaumatua was a major factor in the School's stability and in its progress towards this goal. The success of this role was almost entirely due to the work and dedication of the first and long-serving Kaumatua, Henry (Binga) Haggie, of Tainui, whose pride and pleasure in the School and his role in it were truly heart-warming. There were others too, including Georgina Te Heu Heu and Buddy Mikaere, whose efforts at reconciliation, when that was called for, and whose general support for the School were much appreciated.

Another concept which might, I believe, be employed in other bicultural research endeavours, was the setting up of an Advisory Board for the School's research programme, Foundation for Research Science and Technology (FRST).[3] This Board was carefully composed of Māori and Pakeha, women and men, lawyers and non-lawyers, and their influence was felt beyond the programme in their contributions to, and support for, the studies of a number of senior students in the School.

To all these forward-looking and visionary people the School owes a debt of gratitude.

II. Part I - The Study of the Law in Context: Aotearoa New Zealand in the global setting

I now turn to the focus of this essay, the study of the law in context and the ways in which that has altered, and in many ways widened, in its scope in these last two decades. The study of law in Aotearoa New Zealand had been focussed traditionally, at least in the period when I was a student

3 Later Te Mātāhauariki.

in the 1970s and a teacher in the 1980s, on the history and operation of domestic law, although that has also always been within the context of its English common law heritage and background, the more so where that has remained the focus and template for New Zealand law on any particular topic. Most present-day law students could, for example, give a fair account of the English law of negligence, except as it pertains to personal injury by accident, and even then they could probably recall some version of the facts of *Donaghue v Stevenson*.[4] But few could even begin to discuss current English land law, although perhaps they would recognise Australian land law, and similarly Australian labour law until the New Zealand 'reforms' of the 1990s. In some sense then the study of law here has always had an 'international' context, that of Empire, or Commonwealth, or, to a lesser extent, other common law systems.

The context which I wish to examine in this essay is not only wider but in some senses different from that historical one: so much of our law is now set within a truly international, and not just comparative or historically derivative, context, where principles and rules are generally agreed globally, and where these then govern our legal norms and processes. Two decades ago the Law Commission estimated that the amount of statute law in New Zealand which was determined by international agreement was 25 per cent.[5] That figure would assuredly now be even higher. Although it has become a cliché to talk about the extent and effect of globalisation, it is nevertheless the case that in all branches of law — from war and peace to trade, finance, commerce, communications, the environment, human rights, labour relations — much of the content derives from the terms of multilateral treaties to which New Zealand is a party. The extent and importance of that growth is probably reflected in the enhanced interest and participation in the process of treaty ratification which Parliament has now assumed.[6] Within this broader compass of international influence, the expanding effect of international human rights law (IHRL), both in itself and in a number of related areas, is becoming increasingly significant.

Yet, despite the binding treaty provisions which effect that change, that dimension is often ignored, resisted or simply poorly understood within the domestic context, in contrast to some other areas of law, such as maritime law, where no such tension or resistance appears to exist. One can only speculate on the reasons for this reluctance: in this area especially where perceived moral and cultural issues arise, they might include concerns about sovereignty;[7] common law unfamiliarity with rights in general; and various myths about human rights.

It is important then that future lawyers, who play a not inconsiderable role in the shaping of policy and practice, should have a thorough knowledge of this background to local law. The examples which follow demonstrate areas where that international human rights dimension has become, or is becoming, an intrinsic part of the law, and hence must be part of the legal curriculum, if this indifference or hostility is to be overcome and the law and its institutions are to truly reflect our global context, and our future lawyers and judges be equipped to administer that law in accordance with our international treaty obligations.

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4 [1932] AC 562.

5 *Treaties: What are they, what do they do, how are they made and how are they given effect?* (NZLC 1991).

6 The present (since 1998) procedure is set out in the Cabinet Manual. See Cabinet Office *Cabinet Manual 2008* [7.112]-[7.122].

7 See below Part II.

A. *International Human Rights Law: Its Effect on Human Rights Law, Institutions and Practice in the Domestic System*

In my early years as a law student and teacher, there was little if any attention paid to IHRL, and certainly not a course devoted to it, nor to human rights in the domestic system. By the time I joined the Human Rights Commission in 1989 that was beginning to change[8] and when I came to the Waikato Law School in 1994 Paul Hunt[9] was already teaching an optional fourth year half course on IHRL. In 1995 we combined our complementary experiences and expertise to create a full course on the national and international protection of human rights, which stressed the connections between the two, and which was at the time, and for some considerable time remained, the only such course in a New Zealand law school.

The study of human rights law in Aotearoa New Zealand was then in its infancy, as was its use by policy makers, lawyers and judges – the New Zealand Bill of Rights Act had been passed in 1990 and the judgment in the *Tavita* case[10] was delivered in 1993. The emphasis too was almost entirely on civil and political rights. The course was therefore very much an introductory course, in a societal climate where human rights were still largely unknown or unacknowledged as such, or indeed actively resisted. (One of Paul's useful tactics was to ask the members of the class in turn to bring to class a cutting from the day's newspaper (this is in pre-internet days) which raised a human rights issue.)

The course covered an introduction to the modern human rights legal framework, that is the Universal Declaration of Human Rights,[11] subsequent treaties (New Zealand had by then ratified all of the existing major human rights treaties[12]), the workings of the United Nations system, and a number of specific topics such as the rights of women, Bills of Rights and indigenous rights. These were then linked to the domestic protections, legislative, administrative and judicial, in place or suggested in New Zealand. The course was innovative and forward-looking in a number of ways: in its focus on economic, social and cultural rights (esc rights) as well as on civil and political rights; in its exploration of group rights and the issue of self-determination, which had been a hot topic at the 1993 Vienna World Conference on Human Rights;[13] in its examination of national mechanisms other than courts; and in its, albeit then tentative, analysis of the Treaty of Waitangi as a human rights document.

The teaching of human rights at Waikato Law School has continued to build on these developments and to incorporate new ones as the reach of IHRL has expanded. Besides the undergraduate

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8 In 1990 Paul Rishworth and I presented a course in IHRL at the University of Auckland.

9 Now Professor of Law at the University of Essex.

10 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

11 GA Res 217 A(III) (1948).

12 International Convention on the Elimination of All Forms of Racial Discrimination, (adopted 21 December 1965, entered into force 4 January 1969) (ratified 1972); International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) (ratified 1978); International Covenant on Economic, Social and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) (ratified 1978); Convention on the Elimination of All Forms of Discrimination against Women, (adopted 18 December 1979, entered into force 3 September 1981) (ratified 1985); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) (ratified 1989); Convention on the Rights of the Child, (adopted 20 Novmber 1989, entered into force 2 September 1990) (ratified 1993).

13 See the Vienna Declaration and Programme of Action, adopted 25 June 1993, <http://www2.ohchr.org/english/law/vienna.htm>.

course, there is now a well-subscribed paper in the Master's programme and an interest in human rights topics at master's and doctoral thesis level. The inclusion of esc rights has expanded to address the rapid developments in this area since 1990; the importance of non-discrimination as a cross-cutting theme is reflected in an emphasis on groups such as children, women, refugees and migrants and those with disabilities; the study of international mechanisms now includes more analysis of the treaty reporting process and of the Human Rights Council and its Universal Periodic Review process;[14] while the study of group rights has expanded and in the particular case of indigenous peoples' rights has now spawned separate courses.[15]

At the same time, the recognition of human rights in the domestic context has increased, even if it has proceeded less rapidly and is still far less widely accepted than one would wish. Such recognition can be seen in the increased out-put of the Human Rights Commission, evident, for example, in its 2004 status report on human rights in New Zealand[16] and its subsequent 2005 National Plan of Action;[17] in more local academic publications related to human rights; more citation in case law; more use by non-governmental organisations (NGOs) in cases,[18] submissions and reports, including to the UN Treaty bodies and Special Procedures[19] and, at least in some contexts, such as the need to address the rights of persons with disabilities in conformity with the Convention on the Rights of Persons with Disabilities (CRPD),[20] more acknowledgment at government level. All of these can be and are reflected in the law curriculum.

B. Human Rights Standards in Other Areas of Law

Moreover, human rights law, both international and domestic, has now a place in other law courses; although in some cases the content may have been there before, it would not necessarily have been recognised and described as 'human rights'.

(1) The Treaty of Waitangi and indigenous rights globally

The first example where this has occurred is also an indication of the crossover between the various goals of the School: for a knowledge of the development of indigenous rights internationally is an essential counterpoint to any study of our own history and the fashioning of the law for a nation with two founding cultures; and the 25 year development of indigenous rights at the international level has been paralleled by and coincident with "Treaty" developments in Aotearoa New Zealand. While there is a basis for such rights in common law, that too has been developed here only very recently, although recognition of its existence seems to have been generally assumed.[21]

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14 A/Res/60/251. See <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

15 For example, Indigenous Peoples' Rights which is offered at the Undergraduate level and Indigenous Peoples and International Law which is offered at the Postgraduate level.

16 The report is at <http://www.hrc.co.nz/report>. It is currently being reviewed, see Review of Human Rights in New Zealand 2010 at <http://www.hrc.co.nz/home/hrc/humanrightsenvironment/reviewofhumanrightsinnewzealand2010/reviewofhumanrightsinnewzealand2010.php>.

17 See <http://www.hrc.co.nz/report/actionplan/0foreword.html>.

18 Such as the Child Poverty Action Group.

19 For example, Action for Children and Youth Aotearoa, Aotearoa Indigenous Rights Trust, Caritas Aotearoa New Zealand, Human Rights Foundation, National Council of Women, and Peace Movement Aotearoa.

20 International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, (adopted 13 December 2006, entered into force 3 May 2008) (ratified 2008).

21 See *Ngati Apa et al v the Attorney General*, CA173/01, CA75/02, 19 June 2003, at [46]-[7].

So while admittedly there have been many ground breaking developments in the New Zealand context, such as the establishment of the Waitangi Tribunal and of the whole Treaty claims settlement process, at the same time Māori have been significant players and shapers in international fora on indigenous rights, from the early days of the Working Group on Indigenous Populations[22] through to the Permanent Forum on Indigenous Issues,[23] the drafting and eventual adoption of the Declaration on the Rights of Indigenous Peoples (DRIP)[24] and the Expert Mechanism on the Rights of Indigenous Peoples.[25] This background has been apparent in, for example, the controversy over the rights to the foreshore and seabed, in the recent visits of two Special Rapporteurs on Indigenous Rights and in the Treaty of Waitangi claim known as the flora and fauna claim, WAI 262. In these and in many aspects of study around the Treaty of Waitangi, recognition of its connection with the concept of rights has become more common, beyond those hapu/iwi organisations and NGOs concerned specifically with the rights of indigenous peoples, for example in recent work by the Human Rights Commission.[26]

It will be interesting to see how much influence these international developments will have on policy making and on the development of the law with regard to various Treaty issues and particularly the concept of self-determination in our local context, now that the DRIP has been endorsed, at least in part, by Aotearoa New Zealand[27] and has been, for various local political reasons, far more widely commented on than is usually the case with human rights instruments. Inevitably, any developments here will affect our own pedagogy: as far as teaching and research are concerned, this dynamic international background is already evident in Waikato in the setting up of separate papers on indigenous rights[28] and in its incorporation into what are essentially comparative jurisdictional studies, such as Dr Robert Joseph's work on post-settlement structures in Canada and Aotearoa New Zealand.[29]

(2) Immigration, specifically refugee law

Immigration policy and the legal framework which enables it are very much seen as the prerogative of each state, as is the granting of citizenship. But immigration is of course a global phenomenon and there are aspects of the law which are of particular global concern, as it relates to refugees, including asylum seekers, and migrants. New Zealand has ratified the 1951 Refugee Convention[30] and the 1967 Protocol[31] and accepts an annual quota of refugees, but the Convention and Protocol themselves do not spell out in any detail many of the rights of these refugees, including their rights to work, healthcare, housing, social security and education, although these

22 <ECOSOC Res 1982/34>, <http://www2.ohchr.org/english/issues/indigenous/groups/groups-01.htm>.

23 <ECOSOC Res 2000/22>, < http://www.un.org/esa/socdev/unpfii/index.html>.

24 A/Res/61/295, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/61/295&Lang=E>.

25 A/HRC/Res/6/36, <http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/index.htm>.

26 See, for example, the Human Rights and the Treaty of Waitangi page, <http://www.hrc.co.nz/home/hrc/humanrightsandthetreatyofwaitangi/humanrightsandthetreatyofwaitangi.php>.

27 "National Govt to support UN rights declaration" John Key, 20 April 2010 (includes Questions and Answers), <http://www.beehive.govt.nz/release/national+govt+support+un+rights+declaration>.

28 Above n 15.

29 R Joseph, The Government of Themselves: Indigenous Peoples' Internal Self-Determination, Effective Self-Governance and Authentic Representation: Waikato-Tainui, Ngai Tahu and Nisga'a (PhD Thesis Dissertation, University of Waikato, New Zealand, 2006).

30 Convention relating to the Status of Refugees, (28 July 1951, entered into force 22 April 1954).

31 Protocol relating to the Status of Refugees, (18 November 1966, entered into force 4 October 1967).

entitlements are mentioned in more detail in non-binding communications of the United Nations High Commissioner for Refugees (UNHCR).[32]

In the 1990s the law as regards asylum seekers in New Zealand was unclear and the processes for dealing with them were ill-defined and almost entirely administrative. As a result firstly of the Gulf War in 1991, and more particularly after the attacks in New York and Washington in 2001 and subsequent reaction to those both overseas and here in New Zealand, there arose a number of human rights issues concerning this group, especially the increased use of detention and then the introduction of the security risk certificate process.[33] These concerns culminated in the case of Ahmed Zaoui. This case and the security risk certificate process itself led to some trenchant criticism both from the New Zealand courts[34] and from the United Nations Committee Against Torture (CAT),[35] essentially calling for the observance of fundamental human rights. Some of these concerns have now been addressed in the new Immigration Act which came into force in November 2010. But others, including the contentious questions of detention and of the use of classified information in refugee proceedings, remain unresolved. New Zealand has not ratified the Migrant Workers Convention,[36] with its comprehensive coverage of the rights of all migrants, both legal and illegal, and every so often cases arise which raise concerns about the treatment of migrant workers here.

Again as regards the teaching of the law in its context, a course on immigration and refugee law has had to address these issues and will continue to need to monitor local developments, such as recent suggestions that the processing of asylum seekers 'off-shore' as adopted by the Australian Government should be considered here, against broader IHRL standards and parallel developments in comparable jurisdictions.[37]

(3) The ILO and the teaching of labour law

In the 1970s and 1980s the teaching of labour law (or, as it is also described, industrial or employment law) was in its infancy. As it expanded in that period, some attention was paid to the United Kingdom origins of, for example, the trade union movement and there was some comparative analysis with similar jurisdictions. Little, if any, reference was made to the international background or, specifically, to the work of the International Labour Organisation (the ILO),[38] despite New Zealand's involvement in and support for that organisation from its beginnings. Nor were work rights usually considered in the context of wider human rights programmes, again despite the close involvement of the ILO with the drafting of articles 6, 7 and 8 (the "work rights" sections) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[39]

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32 <http://www.unhcr.org>.

33 Immigration Act 1987, s 114.

34 *Zaoui v Attorney-General* (No 2) [2005] NZSC 38.

35 Concluding observations of the Committee against Torture: New Zealand, CAT/C/NZL/CO/5, <http://www2.ohchr.org/english/bodies/cat/docs/cobs/CAT.C.NZL.CO.5.pdf> and Conclusions and recommendations of the Committee against Torture: New Zealand, CAT/C/CR/32/4, <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.32.4.En?Opendocument>.

36 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (adopted 18 December 1990, entered into force 1 July 2003).

37 Other human rights breaches resulting from the 'war on terror', such as torture and excesses of surveillance, can be addressed in general human rights courses.

38 <http://www.ilo.org>.

39 Above n 12.

In this there has been a marked change, possibly occasioned by the ILO's rapprochement with human rights discourse, notably in its 1998 Declaration on Fundamental Freedoms and Rights at Work,[40] which designated four categories, viz, equality and non-discrimination, freedom of association and the right to collective bargaining, the abolition of child labour and of forced or compulsory labour, and seven (subsequently eight) matching ILO Conventions,[41] as fundamental human rights. Another factor has been the ILO's establishment of much more user-friendly access to its documentary data-base through its excellent website. Again these developments are being taken on board in the teaching of employment law and in the establishment of separate courses on international labour law and industrial relations.

It would be possible to add to this list of areas and hence those courses which have been and are being affected by the expansion and recognition of IHRL, by including for example trade law, environmental law and the law of armed conflict. But these few examples will serve to illustrate the expanding compass of IHRL influence.

III. Part II - Future Directions in International Human Rights Law

The rapid expansion of human rights coverage over these last 20 years would suggest that further developments and refinements are to be expected. Predicting what those might be is a fairly hazardous enterprise, but the law teacher must to some extent attempt it. In the particular field in which I work, namely esc rights, a number of developments are already discernible. It is no longer possible, if it ever was, to consider these rights aside from their wider context, that is their link to development and to the eradication of poverty and the obligations of states in that wider context, and the growing acknowledgment of the need to recognise the responsibility of other non-state actors in that regard.

Historically the discourses of human rights and development have remained silo-ed, pursuing parallel but separate paths. Gradually, in the last two decades, that has changed. While there may still be scepticism about a right to "development" and little endorsement, particularly by "developed" states, of the 1986 Declaration on the Right to Development,[42] the concept of a "rights-based approach" to development and to the giving of aid has become increasingly favoured by development agencies[43] and by some branches of the United Nations machinery.[44] Such an approach seeks to incorporate into development planning and implementation, a recognition of esc rights as rights, of the underlying requirements of non-discrimination and of the new "democracy rights" to information, consultation and participation of those directly affected, and of the accountability as duty bearers of donors and development agencies. Human rights groups, for their part, have had

40 Adopted 18 June 1998, <http://www.ilo.org/declaration/lang--en/index.htm>.

41 Freedom of association and the effective recognition of the right to collective bargaining - ILO C87 Freedom of Association and Protection of the Right to Organise Convention, 1948, and ILO C98 Right to Organise and Collective Bargaining Convention, 1949; elimination of all forms of forced or compulsory labour - ILO C29 Forced Labour Convention, 1930, and ILO C105 Abolition of Forced Labour Convention, 1957; effective abolition of child labour - ILO C138 Minimum Age Convention, 1973, and ILO C182 Worst Forms of Child Labour Convention, 1999; and elimination of discrimination in respect of employment and occupation - ILO C100 Equal Remuneration Convention, 1951, and C111 Discrimination (Employment and Occupation) Convention, 1958.

42 A/Res/41/128, <http://www2.ohchr.org/english/law/rtd.htm>.

43 NGOs such as Oxfam, for example, and Government agencies such as DFID.

44 Such as UNDP: see their 1990 Human Development Report, for example, <http://hdr.undp.org/en/reports/global/hdr1990>.

to come to terms with learning to measure their achievements in more precise ways,[45] with indicators, benchmarks and budget analyses, and to accept and welcome the need to work in partnership with experts in other fields, such as health-care and environmental protection.

Much of this collaboration has occurred in the context of the need, from the perspective of both development and human rights, to work towards the eradication of inequality and of poverty, especially extreme poverty, both locally and globally. For the human rights specialist, this requires coming to terms with ways of measuring poverty and with questions like 'is extreme poverty a violation of human rights in itself or the sum of violations of a number of esc rights (work, health, housing, social security, education)', all of which require a thorough knowledge of the progress which has been made regarding those rights, their definition, implementation and enforcement, in international, regional and domestic courts and policy-making.

One international context where the eradication of poverty has been a prime focus has been in the Millennium Development project, encapsulated in the Millennium Development Goals (MDG).[46] These originally, and surprisingly, made almost no reference to human rights at all, despite the obvious cross-over between these goals and a number of esc rights. More recently, especially in the setting of targets under the various goals and in academic commentary, these connections have been recognised, and with them an acknowledgment of the advantages which the incorporation of the components of a rights based approach might bring to the achievement of these goals.[47]

Two issues concerning obligations are also of increasing interest and importance. The international human rights framework, largely for historical reasons, is predicated on responsibilities and obligations resting on states and only on states. But it is well recognised that, in many ways in the globalised world of the 21st century, rights are violated and/or could be protected by a range of other powerful actors for whom states have at best only an indirect responsibility, which they may often not be in a position to exercise. One question therefore exercising the human rights community is how these non-state actors can be brought within the international framework of human rights responsibility and protection: for example, how might multi-national enterprises (MNEs), international financial institutions (IFIs), the World Trade Organisation (WTO) or armed opposition groups be made more directly accountable.[48]

The other intriguing question relates to the human rights obligations of states themselves beyond their own territorial borders. A requirement or at least exhortation to "international cooperation and assistance" between states dates back to the United Nations Charter,[49] and indeed arguably to the 1919 Constitution of the ILO,[50] and has been followed through especially recently in the work of the UN Treaty Bodies and of the Special Procedures.[51] Here again there is a close

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45 See for example T Landman and E Caralho *Measuring Human Rights* (Routledge, London, 2010).

46 <http://www.un.org/millenniumgoals>.

47 See for example P Alston, "A Human Rights Perspective on the Millennium Development Goals" paper prepared as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development (2007); M Salomon, *Global Responsibility for Human Rights. World Poverty and the Development of International Law* (OUP, Oxford, 2007); Carmona below n 57.

48 See for example P Alston (ed) *Non-State Actors and Human Rights* (OUP, Oxford, 2005).

49 Charter of the United Nations, (adopted 26 June 1945, entered into force 24 October 1945).

50 Constitution of the International Labour Organisation, (entered into force 28 June 1919) <www.ilo.org>.

51 See, for example, CESCR General Comments 15 and 18, Report of Paul Hunt, Special Rapporteur on the Right to Health, UN Doc A/HRC/7/11/Add2 (2008).

correlation between human rights and development requirements, where the needs of 'developing' states and the offerings of 'developed' states can come together.

The interesting question here though, for the human rights lawyer, is just how far any of this exhortation to co-operation and assistance can be said to place an obligation on states, either to request help, in the case of developing states, or to provide it, in the case of developed states. As to the latter, it would seem reasonable to argue that once a state is acting as a donor, then it has an obligation in that role to adhere to any human rights obligations it may have otherwise entered into, such as to act without discrimination, and to be accountable for the planning and performance of its programmes.[52] Beyond that, can it be said that states, or the international community as a whole, have a general, unspecified obligation to give aid, even, say, the 0.7 per cent of GDP which states have pledged to work towards under the (non-binding) MDGs? At this stage, probably not, although some have so argued[53] and the Nobel Prize winning economist, Amartya Sen, has supported the idea of "imperfect" obligations being laid, in this context, on "anyone who is in a position to help".[54] Perhaps less controversial is the suggestion[55] that states have obligations as members of various international finance (the IFIs) or trade (the WTO) organisations to respect, protect and fulfil their human rights obligations when considering policies and programmes under those regimes and that state representatives should speak out to uphold these. Whether, as mentioned above, those organisations have themselves any direct human rights obligations remains a matter of controversy.

One recent development of potential importance has been the adoption by the UN General Assembly on 10 December 2008, after twenty years of discussion, of an instrument enabling a number of complaints processes for breaches of any of the rights in the ICESCR, an Optional Protocol (OP).[56] The existence of such complaints processes, similar to those available in relation to other human rights treaties, can be expected to affirm, once and for all, the justiciability of esc rights and thus to facilitate the development of jurisprudence and enforceability mechanisms for breaches of esc rights and generally to raise the profile of these rights as "real" rights. In addition to the more common individual complaints process, this OP allows for an enquiry process initiated by the Committee on Economic, Social and Committee (CESCR) itself and for it to transmit findings or recommendations directly to the UN and other relevant interested bodies, thus giving the CESCR a clearer entrée into the development field.[57]

Another development in a related area might perhaps also prove of assistance in the context of development and international cooperation. The 'responsibility to protect' (R2P) doctrine[58] was

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52 Hunt, ibid; Carmona, below n 57.

53 Hunt, ibid.

54 A Sen, *Development as Freedom* (OUP, Oxford, 1999); *The Idea of Justice* (Allen Lane, London, 2009).

55 See sources cited notes 51 and 57.

56 A/Res 63/117. The OP will come into force when it has received 10 state ratifications. At present (October 2010) there are 3.

57 See further for example MS Carmona *The obligations of 'international assistance and co-operation' under the International Covenant on Economic, Social and Cultural Rights. A possible entry point to a human rights based approach to MDG 8,* (2009) 13 International Journal of Human Rights, at 86-109; MA Bedggood "Who is my neighbour? International obligations and the contribution of human rights theory and practice" in J Boston, A Bradstock and D Eng (eds) *Ethics and Public Policy: Contemporary Issues* (VUW Press, Wellington, forthcoming 2010).

58 International Commission on Intervention and State Sovereignty *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, IDRC 2001): See also, <http://www.responsibilitytoprotect.org> for the ICISS report and UN documents.

developed in the context of humanitarian intervention, for example in relation to the events in Darfur. What is notable is that it has led to a reconceptualisation of the concept of 'sovereignty' to include not only the traditional negative component of a state's right to non-interference, but also a positive component of a state's duty to protect its peoples. If that duty is not observed then the "international community" has an obligation to intervene. The concept has also been extended beyond the immediate context of "humanitarian intervention", to encompass a responsibility on the international community to prevent atrocities occurring, to react with measures short of military intervention and to rebuild after any intervention. The United Nations Secretary General has also emphasised a three-pillar strategy for advancing R2P, recognising the primary responsibility of the state itself, the commitment of the international community to assist that state and a timely response when a state is failing to provide protection.[59]

It has been suggested, somewhat tentatively as yet, that this doctrine might be adapted to support the role of the international community, and hence of states, in coming to the aid of those states or their peoples where the home state is simply unable to address all of their esc rights. While it is acknowledged that such an expansion or transformation of the R2P doctrine is not immediately likely, it does contain elements which might be adapted to the development enterprise.[60]

Another direction in which IHRL may develop is in an extension of the grounds on which discrimination may be considered unlawful. The general concept of non-discrimination in international law is now approaching a ius cogens norm, as witnessed by recent statements of the Inter-American Court, the ILO and the CESCR.[61] The latter body has begun, somewhat tentatively, to extend the cloak of anti-discrimination protection to encompass "sexuality" rights,[62] a move already taken in some domestic jurisdictions[63] and endorsed and described by a meeting of international human rights experts[64] and recently by the United Nations High Commissioner for Human Rights,[65] although not yet by the United Nation's "political" bodies, the General Assembly or the Security Council.

To return to the task of studying the law in context: part of that task is surely to look forward and attempt to recognise trends such as these with a view to promoting or reacting to them within the broader context of IHRL. In addition to giving thoughtful consideration to such possible extensions and developments, we must allow for the unexpected: who would have predicted the resurgence of fundamentalist religion and its clash with human rights? Or the 'war on terror', with its resultant resiling from commitment to the protection of well established civil and political rights? In cases such as these, the best preparation must be an understanding of the basic tenets of human rights and fundamental freedoms, and the need to uphold them.

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59 "Implementing the Responsibility to Protect", Report to the UN General Assembly, 12 January 2009, A/63/677.

60 E Aba and M Hammer, "Yes we can? Options and barriers to broadening the scope of the responsibility to protect to include cases of economic, social and cultural rights" One World Trust, Briefing paper 116, 2009 and MA Bedggood, above n 57.

61 "Juridical Condition and Rights of Undocumented Migrants" Advisory Opinion OC-18/03, Inter-Am Ct HR (Ser A) No 18, [101] (2003); CESCR, General Comment 20, 2009; for the ILO see above n 41 and accompanying text.

62 General Comment 20, ibid.

63 Including New Zealand.

64 The Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity 2007 (Yogyakarta Principles). See <www.yogyakartaprinciples.org>.

65 Navanethem Pillay, United Nations High Commissioner for Human Rights "Ending violence and criminal sanctions based on sexual orientation and gender identity" Press Release 17 September 2010, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10367&LangID=e>.

IV. Concluding Reflections

The study of the law in context, as it relates to IHRL, works, as it were, in two ways. The international context and law may be changing but should, or how should, those changes be reflected in the local society around us? Then also the law, as well as needing to reflect changes in society, can help to shape them, always providing that it does not attempt to move too far ahead of the values and ethos of that society. In this matter of IHRL and its relationship to domestic law, what is the law's role and how best can we prepare its practitioners to carry out that role?

As regards those developments, mentioned above, which are already clearly accepted as part of IHRL, such as those concerning the rights of indigenous peoples or of asylum seekers or of workers, these clearly need to be part of the law curriculum. Consideration needs to be given as to how those concepts can be adapted for incorporation into policy and practice in Aotearoa New Zealand, with due consideration for the uniqueness of its laws, history and institutions — that is how can those concepts be adapted to make them acceptable and hence enforceable here? So, for example, does the new Immigration Act sufficiently protect the rights of asylum seekers as outlined in the Refugee Convention, the CAT and the documents of the UNHCR? Does the current industrial regime, let alone changes recently proposed to it, adhere to the rights enshrined in the ICESCR to which New Zealand has long been a party, or to those ILO Conventions which it has ratified, or those by which it is nevertheless bound? More broadly, are esc rights sufficiently protected in our legal system, and, if not, how could their status be improved? These are all crucial questions for lawyers, for policy makers and for civil society, and therefore for the law student.

As regards those developments which are identified above as future possibilities, these need to be at least discussed as part of the law curriculum, given the time lag from study to the use of the skills acquired, to anticipate what might need to be done in the New Zealand context to implement them, should they come to pass, or to assist in making that happen. In a number of these areas the lawyer will be led into cross-disciplinary research and into a need to be able to identify the extent and limits of the role of law in policy making. Again for example, what are the underlying requirements for states as donors and do New Zealand's aid programmes conform to these, given its ratification of various relevant human rights instruments? Are our representatives to the World Bank, the IMF and the WTO properly briefed on their emerging responsibilities? What are New Zealand's rules as to the regulation of those MNEs either registered or operating in New Zealand? How far have our international obligations been taken into account in investment decisions taken by arms of the New Zealand Government? What is the Government's position on the adoption of the OP to the ICESCR, or to the development of the R2P doctrine?

In some instances it happens that domestic law is in advance of IHRL, as is the case with New Zealand law on the illegality of discrimination on the ground of sexual orientation. Here the question might be: what is the New Zealand Government doing to advance the adoption of a similar norm at the international level? In a similar recent example, New Zealand's representatives took a leading role in the development of the CRPD, where the domestic law had already recognised disability as a ground on which discrimination is illegal.

All of these aspects are legitimate questions for discussion in a course on human rights law and in the various other courses where human rights are a component. They introduce a rather more contentious issue which cannot be avoided in the teaching and study of many branches of the law: how far is that study of the law a study of the underlying values of a society and their reflection, however unacknowledged, in its structures? Does IHRL reflect an agreed set of global values and

do these mesh with our own? And what should change if they do not? What then is the role of the teacher of IHRL in promoting those values or in attempting to tease out the connections between them and the law and its institutions in Aotearoa New Zealand? This may be the most challenging question in our teaching of the law in its international context.