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The Contribution of International Court Of Justice in the Development of "Human Rights Jurisprudence"

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Abstract

The term protection of human rights which may mean implementation and enforcement action does not find place in the U.N. Charter. Among the United Nations agencies only the Security Council and the International Court of Justice can engage in enforcement action; only they have a competence to pass a binding resolution or issue a binding judgment. The Security Council can threaten or vote sanctions in relation to its own previous actions or that of the Court. Enforcement is thus the authoritative application of human rights. All other actions beyond promotion but short of enforcement may be considered as implementation efforts.

Human rights are, therefore, those rights which belong to an individual as a consequence of being human as a means to human dignity. These are the rights which all men everywhere at all times ought to have, something of which no one may be deprived without a grave affront to justice. They are based on elementary human needs as imperatives. Some of these human needs are elemental for sheer physical survival and health. In the protection and developments of human rights, the ICJ very often is not in a position to contribute to human rights law, put its increasing sensitivity to the fate of human being has nevertheless contributed to the humanization with individual complaints.

Introduction:

One of the purposes of the United Nations is to "bring about by peaceful means, and in conformity with the principal of justice and International Law, adjustment or settlement of international disputes or situations which might lead to a bread of the peace." In order to

achieve the above purpose, it was essential to establish a judicial arm of the Organization. At San Francisco Conference it was therefore decided to establish a Court which was named the International Court of Justice. According to Article 92 of the Charter, the International Court of Justice is the 'principal judicial organ' of the United Nations. The court carry out its functions according to the Statute which is an integral part of the Charter. It may be noted that the Statute of the Court does not lay down expressly the objectives or the functions for which it has been established.

The International Court of Justice decision reveals that it has played a significant role in the development of international human rights law. It has dealt with major questions in conformity with international human rights law.

The ICJ is not a Court for human rights in the contemporary sense of the term. Article 34 of the Statute of the Court provides that only States may be parties in cases before the Court.

The principle that only States have standing before international tribunals has long since been modified. But it continues to govern the World Court and will do so unless and until its Statute is amended.

Sir Hersch Lauterpacht has proposed an amendment of Article 34 to provide "The Court shall have jurisdiction:

(1) In disputes between States:

(2) In disputes between States and private and public bodies or private individuals in cases in which States have consented in advance or by special agreement to appear as defendents before the Court".

But there appears no disposition among the States to consider or to amend the Statute of the Court to make such provision.

It is a true statement that the question f Human Rights has appeared in many cases before the Court and in some of them the Court has rendered judgments or given advisory opinions which have significantly influenced international law bearing on human rights.

Judicial Trends

An earlier advisory opinion of the ICJ on Reservation to the ***Convention on the Prevention and Punishment of the Crime of Genocide***, related to the making of reservations to treaties. The Court declared when giving its opinion on this question that the United Nations had intended to condemn and punish Genocide as a crime under international law, involving a denial of the right of existence to entire human groups which being contrary to moral law and the spirit and aims of the United Nations, shocks the conscience of mankind and results in great losses to humanity.

In such a convention the contracting States have none of their own interests. They all have merely a common interest viz., the accomplishment of the high purposes which form the *raison d'etre* of the convention.

In doing so the Court recognized Genocide as supremely unlawful under international law, customary as well as conventional which continued to cast its shadow on its subsequent holdings on international obligations *erga omnes*.

In the advisory opinion on the ***International Status of South West Africa*** the Court held that as a result of resolution adopted by the Council of the League of Nations in 1923, the inhabitants of the mandated territories acquired the international right of petition, a right maintained by Article 80, para 1 of the United Nations Charter which safeguards the rights not only of the States but also of the peoples of mandated territories. By this opinion the ICJ invested individuals with an international right.

The advisory opinion on ***Reparation for Injuries suffered in the Service of the United Nations***, gave the United Nations the Status of a large international personality having the right to bring an international claim. This reinforced the principle that international rights do not belong to States alone.

In the ***Corfu Channel Case*** the Court referred to the obligation of a coastal State towards certain general and well recognised principles namely elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime

communications and obligations of a State not to allow knowingly its territory to be used for acts contrary to the rights of other States.

In the *Asylum Case*, the Court observed, "Asylum protects the political offender against any measures of a manifestly extra-legal character which a Government might take against its political opponents". The basic consideration of the Court's opinion is the protection of the individual against the violation of his rights as a human being.

The Court, in its advisory opinion on the ***Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*** answered the questions put by General Assembly concerning the obligations of those States to implement dispute settlement procedures of the Peace Treaties. It was alleged that in dealing with the question of the observance of human rights and fundamental freedom in these three States the Assembly was interfering or intervening in matters essentially within the domestic jurisdiction of the States. The basis for the allegation was derived from Article 2, para 7 of the United Nations Charter. The Court held after taking Article 1, para 3, Article 55 and Article 56 of the United Nations Charter into consideration, that any question of breach of these treaty obligations-if they obligation-equally would not be matters essentially within the domestic jurisdiction of a State. The conclusion has been important to the contemporary international law of human rights in view of the fact that later the Court held that these Charter provisions do give rise to international obligations.

In ***South West Africa Cases***, brought by Ethiopia and Liberia against South Africa, it was alleged that the practice of apartheid in South West Africa constituted a violation of South Africa's mandatory obligation to promote to the utmost, the well being of the inhabitants of the territory. Rejecting South Africa's preliminary objections as to the jurisdiction of the Court in 1962 the Court in its final judgment in 1966 held that applicants had not established any legal right or interest appertaining to them in the subject matter of the dispute. It also held that the arguments of Ethiopia and Liberia amounted to a plea that the Court should allow the equivalent of an 'acrio popularis' or right resident in any member of a community to take legal action in vindication of a public interest. The Court held that such a right did

not find place in international law though it may be known to exist in certain municipal systems of law.

As such the stage of merits, which had generated exceptionally extended and detailed arguments over human rights issues could never be reached. Schwelb's comment upon the holding of the Court is that what is a flagrant violation of the purpose and principles of the charter when committed in Namibia is also such a violation when committed in South Africa proper or, for that matter, in any Sovereign Member State.

In ***Barcelona Traction, Light and Power Company Limited***, case when holding the applicants claim inadmissible the Court distinguished between the obligation of a State towards the international community as a whole and those arising vis-a-vis another State in the field of diplomatic protection.

By it the Court has found that the rules concerning basic rights of the human person are the concern of all states, that obligations flowing from these rights run erga omnes, that is towards all States. Thus, it follows that, when one State protests that another is violating the basic human rights of the latter's own citizens, the former State is not intervening in the latter's internal affairs, it rather is seeking to vindicate international obligations, which run towards it as well as all other States.

In the ***Nottebohm Case***, the issue was whether Liechtenstein could exercise diplomatic protection vis-a-vis Guatemala on behalf of Nottebohm. The Court held that in view of the absence of any bond of attachment between Nottebohm and Liechtenstein, the latter was not entitled to extend its protection to Nottebohm vis-a-vis Guatemala and that, accordingly, its claim was inadmissible.

Still the law of international claims has been replete with limitations on the exercise of diplomatic protection which may have precisely such a result but the question still remains if the fundamental human rights indeed are of fundamental importance should their pursuance on the international plane be so limited by traditional rules of diplomatic protection.

In its advisory opinion in the ***Western Sahara Case***, the Court expressed its support to the applications of the principle of self- determination through the free and genuine expression of the will of the people of the territory.

In the case concerning ***United States Diplomatic and Consular Staff in Tehran***, the Court held unlawful the detention of the hostages, occupation of the embassy of the United States and rifling of the embassy archives. It also held that:

> "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".

In 1970, the Security Council requested an advisory opinion of the Court on the ***Legal consequences for States of the continued presence of South Africa in Namibia despite a Security Council Resolution holding, as a consequence of General Assembly Resolution 2145 (XXI) that presence to be illegal***, the Court found that the continued presence of South Africa being illegal. South Africa is under obligation to withdraw its administration from Namibia immediately and thus to put an end to the occupation of the territory.

According to the Court, under the Charter of the United Nations, the former mandatory had pledged itself to observe and respect in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish and to enforce distinction, exclusion, restriction and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights, is a flagrant violation of the purposes and principles of the Charter.

These holdings are of fundamental importance to the contemporary character of international law governing human rights.

Egon Schwelb says that "the Court leaves no doubt that in its view the Charter does impose on the members of the United Nations, legal obligations in the human rights field".

In ***Military and Paramilitary Activities in and Against Nicaragua***, the Court held that:

> "While the United States might form appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be appropriate method to monitor or ensure such respect".

The Court concluded that the protection of human rights can not be compatible with the mining of ports, the destruction of oil installations and support for the Contras and held that any argument derived from the protection of human rights in Nicaragua could not afford a legal justification for the conduct of the United States.

The *Electronica Sicula S.P.A. (ELSI)*, is a State taking up the claim of its nationals in the Court and espousing it in an area of human rights i.e., property rights. The Court found no violation of such rights as established by treaty and it also found a claimed arbitrary act to be absent, which it defined as an act contrary not to "a rule of law" but "to the rule of law".

In its advisory opinion in ***Mazilu Case (Application of Aigicie VI, Section 22 of the Convention of the Privileges and Immunities of the United Nations***, the Court held that a special rapporteur of a Sub-Commission of the United Nations Human Rights Commission was entitled to privileges and immunities of a United Nations expert on mission-even in circumstances in which he had not been permitted to leave Romania to perform its function.

THE MORE RECENT PICTURE : THE COURT'S NEW CASE LAW

Within the last few years, the picture has begun to change : human rights cases have fared more prominently on the Court's docket than they did before. This is true not only from the viewpoint of sheer numbers, but also from that of quality. While in the long first period described above human rights considerations essentially arose in incidental ways and played subordinate or marginal roles, the Court has now begun to tackle human rights

issues in more straightforward ways and has turned to deciding cases focusing squarely on allegations of human rights violations. This development embraces international humanitarian law.

In the Advisory Opinion on ***Nuclear Weapons*** 1996, in which the issue of whether, and in what circumstances, the threat or use of nuclear weapons could result in violations not only of international humanitarian law but also of human rights law properly so called, constituted one of the angles from which the ICJ approached the question posed to it by the General Assembly. The Court's replies on the matter may not strike the reader as particularly comprehensive or penetrating, but the remarkable fact is that here the court for the first time squarely facing and developing a view on a human rights question.

In the Advisory ***Wall Opinion*** in which the Court found that Israel's construction of the separation barrier on occupied Palestinian territory. Amounted to an entire series of violations of obligations *erga omnes* and *juris cogentis*, prominent among them obligations arising from human rights treaties to which Israel is a party as well as from international humanitarian law.

In the case of ***Cango v. Uganda*** Judgment 2005 the first judgment in the court's history in which a finding of human rights violations, combined with findings of violations of international humanitarian law, was included in the *dispositif*. While this finding only followed its regarded as validly court look the opportunity to explain that even the peremptory nature of substantive obligations of the Genocide Convention could not compensate for, or replace, the lack of consent, expressed by Rwanda's reservation, to have the court decide on the allegation of genocide. Five members of the court, found this position unsatisfactory enough to write a joint Separate Opinion.

In the case concerning the ***Application of the Convention on the Prevention and Punishment of the Crime of Genocide***, having regard to the application filed by the Republic of Bosnia and Herzegovina, instituting proceedings against the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violation by Yugoslavia of the Convention on the Prevention and Punishment of the Crime of Genocide the Court made an order

unanimously providing that the Government of the Federal Republic of Yugoslavia should immediately, in pursuance of its undertaking in the convention on the prevention and punishment of the crime of Genocide, take all measures within its power to prevent commission of the crime of Genocide.

By 13 votes to 1 it further provided that the Government of Federal Republic of Yugoslavia should, in particular, ensure that any military, paramilitary or irregular armed Units which may be directed or supported by it as well as any organisation and persons which may be subject to its control, direction or influence do not commit any acts of Genocide, of conspiracy to commit Genocide, of direct and public incitement to commit Genocide, or of complicity in Genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group.

The Court also directed that the Government of Federal Republic of Yugoslavia and that of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute or render it more difficult of solution.

In the case the ICJ decisions relevant in the human rights context came the Court's 2007 Judgment in the *Genocide* Case which had been brought by Bosnia-Herzegovina against Serbia as early as 1993. Like the two African cases just described this litigation constituted called a juridical *Nebenkriegsschaupatz*, collateral action within the context of a wider political-military dispute.

In the case of ***Ahmadou Sadio Diallo*** decided by the Court in November 2010 from the viewpoint of the handing of human rights-related matters by litigants as well as by the ICJ itself, *Diallo* displays very different characteristics. At first glance in a case of diplomatic protection, rather old fashioned as such, protection exercised by Guinea through bringing an application to the court, But a closer look reveals features which are pertinent. The case arose from the mistreatment of a Guinean businessman in the DRC, mistreatment which Diallo experienced both personally, by being illegally arrested and detained in the Congo and ultimately expelled from the country, and through the consequences which these and

other measures of the Congolese authorities had on the fate of two companies which he controlled, regarded by the Claimant as a case of indirect expropriation.

In the case of ***Georgia v. Rassia***, brought in 2008 with Georgia claiming that Russia, by actions of its own organs as well as of the *de facto* authorities in South Ossetia and Abkhazia on and around Georgian territory, culminating in the armed conflict in August 2008, had breached the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) of 1965 with all due regard to judicial confidentiality, two features of this litigation deserve to be mentioned.

In the case of ***Belgium against Senegal*** in February 2009 relating to the obligation to prosecute or extradite appears to me the most clean-cut, "unpolitical", as it were, human rights case so far brought before the Court. If a fully fledged "droits de l'hommiste" were to express it somewhat colloquially : this is a human rights case which is almost too good to be true.

The Court's recent case law with a brief look at a very particular category of ICJ human rights cases, namely instances in which the Applicant bases (part of) its claims on human rights norms, while the Respondent counters with defences resting on other, more traditional, premises of international law. The configuration in which this antinomy has presented itself to the Court so far has consisted of encounters between claims to criminal responsibility of individual perpetrators accused of war crimes or crimes against humanity or to delictual responsibility of the States behind these crimes, on the human rights side, and, on the other, of the claim to jurisdictional immunity of these States, or of the responsible State organs. What these cases demonstrate is that, also in the ICJ, human rights arguments are far from winning the upper hand in all instances.

Conclusion

The International Court of Justice is singularly capable of devising solutions for practical, more technical, legal problems which arise at the interface between human rights and more traditional international law, thus paving the way for the acceptance of human rights

arguments and, more generally, supporting and developing the framework of human rights protection.

The Court has already made considerable contributions in this regard, albeit with varying degrees of success or "constructiveness", depending on the viewpoint of the (either human rights-minded or "statist") observe.

That the influence of the Court on the evolution of international law of human rights has been considerably and predominantly constructive is apparent from the Survey of the cases that the ICJ has treated-the question of human rights and allied matters. Although there appears no prospect that the Court will become in the near future a Court of Human Rights, it can still be expected that the Court's contribution to the progressive development of the international law of Human Rights will continue unchecked.

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