
A CRITICAL ANALYSIS OF THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN THE PROTECTION OF HUMAN RIGHTS: CHALLENGES AND PROSPECTS*

Abstract

The end of the Second World War ushered in a rebirth of the substantive law of human rights and a broadening of what is perceived as human rights entitlements. It is an unavoidable and a positive development that over time has had an impact on the International Court of Justice (ICJ). Human rights encompass an array of civil, political, economic, social, and cultural rights whose promotion and protection are considered to be one of the fundamental aims of the United Nations (UN), of which the ICJ is the principal judicial organ. This paper examines the role of the ICJ in the development of International Human Rights and the attendant challenges faced by the court. The paper also proffers recommendations on how the Court can despite the challenges faced still contribute in the development of International Human Rights.

INTRODUCTION

In considering the institutional enforcement of human rights, the ICJ might not be the first international judicial institution that comes to mind, mainly because of the lack of standing of individuals before this Court and the establishment of other international courts and individual complaint mechanisms with a specific focus on human rights. Nevertheless, over the seven decades of its existence the contribution of the Court to interpreting and developing international human rights law rules and principles has been significant. Moreover, the Court will continue to be a relevant international actor, as States remain central to the international legal system and bear primary responsibility for ensuring human rights within their respective jurisdictions.

It has been rightly noted, that the protection of human rights knows no international boundaries, and the international community has an obligation to ensure that governments guarantee and protect human rights wherever they may be violated.¹ This notion has gradually captured the imagination of mankind. However, against this impressive development in conceptualization, and institutionalization of protection of human rights, practice shows that still quite a lot remains to be done to fully implement these commonly agreed human rights standards.²

Article 34 of the Statute provides that the Court may only deal with cases between states. Until comparatively recently the Court was a ‘Court of sovereign States’. But, as it is above all a court of international law, it has in recent years become also a court concerned with human rights, as human rights law has finally found its proper place within international law. Advisory

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¹ T. Buergenthal, International Human Rights in an Historical Perspective, in Human Rights: Concept and Standards, J. Symonides (ed.), Ashgate: Dartmouth, UNESCO Publishing, 2000, p. 4.

² Ibid

Opinions, and interstate cases which claim human rights treaty violations *inter se*, have provided the vehicle for this development within the Court.¹

THE INTERNATIONAL COURT OF JUSTICE (ICJ)

The ICJ was established as the principal judicial organ of the United Nations system at the end of the Second World War to carry on the function of its predecessor, the Permanent Court of International Justice (PCIJ). The ICJ is one of the main organs of the UN and the principal judicial organ thereof.³ The ICJ is the principal judicial organ of the United Nations. Its seat is at the Peace Palace in The Hague, Netherlands. It operates under a Statute, which is an integral part of the Charter of the United Nations and to which all Member States are ipso facto parties. The Court is composed of 15 judges elected to a nine-year terms of office by the United Nations General Assembly and Security Council, sitting independently of each other, and may not include more than one judge of any nationality.⁴ The composition of the Court must reflect the main forms of civilization and the principal legal systems of the world.

The ICJ primarily performs two roles. The first role is to settle in accordance with international law the legal disputes submitted to it by States. All Member States of the United Nations are entitled to apply to and appear before the Court in contentious cases. The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in one or more of the following ways:

1. By the conclusion of a special agreement between them to submit the dispute to the Court;
2. By virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty containing a provision whereby, in the event of a disagreement over its interpretation or application, one of them may refer the dispute to the Court. Over 300 treaties or conventions contain a clause to that effect;
3. Through the reciprocal effect of declarations made by them under the Statute whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration. The declarations of 69 States are at present in force, a number of them having been made subject to the exclusion of certain categories of dispute, and;
4. If a State has not recognized the jurisdiction of the Court at the time an application for instituting proceedings against it is filed, that State has the possibility of accepting such jurisdiction subsequently to enable the Court to entertain the case: the Court thus has jurisdiction as of the date of acceptance in virtue of the rule of forum *prorogatum*. In cases of doubt as to whether the Court has jurisdiction, it is the Court itself which decides (*compétence de la compétence*).

The second role of the ICJ is to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies. The advisory procedure of the Court is open solely to international organizations. The only bodies currently authorized to request advisory opinions of the Court are five organs of the United Nations and 16 agencies of the United Nations family. Upon

³ Sir R. Jennings, *International Lawyers and the Progressive Development of International Law*, in *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski*, Kluwer Law International, 1996, p. 423.

⁴ ICJ Statute, Article 3.

receiving a request, the Court decides which States and organizations might provide useful information and gives them the opportunity of presenting written or oral statements.

The sources of law which can be applied by the Court in rendering its judgments, advisory opinions, and orders, referred to as decisions, are provided as follows:⁵

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilised nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*,⁶ if the parties agree thereto.

ICJ AND INTERNATIONAL HUMAN RIGHTS PROTECTION

The ICJ has played a significant role in the development of the international protection of human rights.⁷ Being one of the main organs of the UN and its principal judicial organ, the ICJ, has played and will continue to play an important role in the continuous endeavour of achieving the aims enumerated in the UN Charter. The aims as formulated in the Charter subsequently detailed and incorporated into the International Bill of Human Rights – a term including the Universal Declaration of Human Rights (UDHR) of 1948 and the two International Covenants of 1966 – and other international human rights instruments. Some human rights treaties⁸ contain provisions specifically referring disputes to the Court.⁹ Other human rights treaties,¹⁰ have a provision permitting referral to the Court after the exhaustion of the pre-condition to resort to the treaty-specific dispute settlement procedure.¹¹ The adoption of numerous instruments on the international law of human rights and the importance attached to the protection and promotion of human rights contributed to an upsurge in the case law of the Court dealing with issues concerning human rights. Thus, the Court has had an abundant opportunity to contribute an important jurisprudence to the international law of human rights in such diverse fields.

⁵ Article 38 of the Statute

⁶ According to what is equitable and good : on the merits of the case

⁷ The Development of Human Rights Law by the Judges of the International Court of Justice (Oxford: Hart Publishing, 2007)⁸

⁸Such as the Convention on the Prevention and Punishment of the Crime of Genocide 1948.

⁹ Article IX Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 227, which specifically submits disputes relating to the ‘interpretation, application, or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any other acts enumerated in Article III’ to the Court at the request of any of the parties to the dispute.

¹⁰Such as the International Convention on the Elimination of All Forms of Racial Discrimination 1965

¹¹ Article 22 International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195, which states: ‘Any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.’

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The contribution of the ICJ to the substantial and procedural aspects of human rights protection include the right of peoples to self-determination, the right to asylum, the prohibition of genocide and its corollaries, the duty to prevent and the duty to punish perpetrators, the prohibition of torture, the prohibition of slavery and of racial discrimination as part of customary international law, and the protection of UN human rights rapporteurs. It is pertinent at this point to analyze some of the main contributions of the ICJ to interpreting and developing human rights within the broader context of public International law.

Diplomatic protection and consular relations

Most of the cases that have been brought before the ICJ have centered on the protection of individuals through the tools of diplomatic protection and consular relations.¹² The LaGrand case, the Avena and Other Mexican Nationals case, and the Diallo case are some of the cases that stand out for the elaborate legal findings made by the Court therein.

Diplomatic protection

The instrument of diplomatic protection is one of the oldest means used by States to protect their citizens and their citizens' property from abuse in foreign domestic jurisdictions.¹³ As a rule, the exercise of diplomatic protection is dependent on the prior exhaustion of domestic remedies. In this regard, the ICJ has clarified that the link of nationality, which is a requirement for a State being able to exercise diplomatic protection, is not within that State's sole discretion. ICJ has further added the need for a genuine link between the State and the person acquiring its citizenship.¹⁴ With regard to the protection of the interests of shareholders, the position taken by the Court in the Barcelona Traction case and reaffirmed in the Diallo case is that such interests are subsumed under the corporation's interest and must be protected by the latter's State of nationality. It has been rightly opined that the exercise of diplomatic protection is more effective for the protection against human rights violations than for the protection of investment abroad.¹⁵ It is truism that the exercise of diplomatic protection remains within the discretion of a State and international law does not impose an obligation in this regard, many contemporary constitutions include provisions concerning the protection of nationals abroad, which would include the exercise of diplomatic protection in the case of serious violations of human rights.

Consular Relations

The inter-State disputes on consular relations are important for having clarified the procedures to be followed and ensuing rights of nationals under the Vienna Convention on Consular Relations (VCCR) when detained or arrested abroad.¹⁶ The urgency of these cases brought

¹² Sandy Ghandhi, Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case, 11(3) (2011) Human Rights Law Review, pp. 527-555.

¹³ The Development of International Law by the International Court of Justice (Oxford University Press, 2013), pp. 87-106.

¹⁴ See Nottebohm Case (Liechtenstein v. Guatemala), ICJ Reports 1955, p. 23.

¹⁵ 4 Annemarieke Vermeer-Künzli, Diallo: Between Diplomatic Protection and Human Rights, 4(3) (2013) Journal of International Dispute Settlement, p. 499.

¹⁶ LaGrand (Germany v. United States of America), ICJ Reports 2001, p. 514, para. 125 and p. 516, para 128(7); and Avena and Other Mexican Nationals (Mexico v. United States of America), ICJ Reports 2004, p. 72 and para 153(9).

against the US was accentuated by the fact that the nationals of Uruguay, Germany, and Mexico were on death row and on the verge of being executed. The Court found that the right of individuals to be informed of their rights under Article 36 of the VCCR to have contact with their consulates and to benefit from arranged legal assistance were violated and that the US should, by means of its own choosing, provide for legal review and reconsideration of their convictions and sentences. The ICJ further extended the legal protection under Article 36 of the VCCR to other foreign nationals similarly affected, by noting that while its ruling has concerned only Mexican nationals, this cannot be taken to imply that the conclusions reached by it in the judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.⁴⁰ These disputes also highlight the fact that providing individuals with the necessary legal protection under Article 36 of the VCCR requires a good cooperation between domestic law enforcement agencies and consular officers.

The Prohibition of Genocide Under International Law

The Court has addressed several aspects of the prohibition of genocide under international law, including the issue of reservations to the Genocide Convention, the duty to prevent genocide and the duty to cooperate with international criminal courts, and the definition of protected groups.

Reservations to the Genocide Convention

With regard to reservations to the 1948 Genocide Convention, the ICJ has cautiously reminded States that given that the intention of the General Assembly was that as many States as possible should join, the object and purpose of the Genocide Convention would limit both the freedom of making reservations and that of objecting to them.¹⁷ Additionally, the Court has underscored the universality of this Convention, as well as its humanitarian and civilizing purpose, by emphasizing that in such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.¹⁸ Importantly, the Court has anchored the general principles underlying the Genocide Convention in customary international law by finding that these principles are recognized by civilized nations as binding on States even without any conventional obligation.

Human Rights Protection in Armed Conflict Situations

The scope of application of human rights in armed conflict situations has received increased attention in the last decades. Since the end of the Cold War, there have been many international and non-international armed conflicts,¹⁹ some of which have resulted in disputes brought before the Court.²⁰ Through these cases the Court has developed the principle of elementary

¹⁷ Reservations to the Genocide Convention, Advisory Opinion, ICJ Reports 1951, p. 24.

¹⁸ Reservations to the Genocide Convention, p. 23.

¹⁹ see 'Armed Conflict Database' at <https://acd.iiss.org>, and 'Data on Armed Conflict' at www.prio.org/Data/Armed-Conflict.

²⁰ See the contentious cases of contentious cases on Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), and Proceedings instituted by Ukraine against the Russian Federation with regard to alleged violations of the International Convention for the Suppression of the

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considerations of humanity, has clarified the general principles concerning the provision of humanitarian assistance to those in need, and has dealt with the relationship between international human rights and humanitarian law.

Challenges of The International Court Of Justice

The role and potential contribution of the Court to enforcing human rights has suffered from jurisdictional and other limitations, despite calls by the General Assembly to increase the number of States accepting ICJ's compulsory jurisdiction. The challenges of the ICJ will be analyzed under two sub headings to wit jurisdictional and enforcement issues.

Jurisdictional issues

Only States may be parties in cases before the ICJ.²¹ Such a restriction is an inherent clog in the wheels of the ICJ towards contributing to interpreting and developing international human rights rules and principles, given that individuals cannot bring a case before the Court. The exclusion of individuals and other non-State actors from contentious proceedings before the Court has been an impediment imposes a severe limitation upon the courts effective functioning in the development of international human rights, which by their very nature are concerned with protecting the rights and the well-being of the individual. It is pertinent to state that although individuals do not have standing before the ICJ there are quite a few cases where States have taken up a case on behalf of their nationals.

Furthermore, the lack of compromissory clauses in most of the human rights treaties and the limited number of States accepting the Court's compulsory jurisdiction reduce considerably its ability to enforce effectively international human rights norms.

Enforcement of Judgments/Decisions

The enforcement of the judicial decisions of the ICJ through the United Nation itself or any of its organs is inadequate and not enough. The existence of inadequate measures and process for the enforcement of ICJ decisions is attributable to the growing concern and trepidation of non enforceability of ICJ decision hence the need to seek an approach and arrangement that will address this flaw.

Furthermore, the advisory proceedings as provided by the statute²² enables the Court to clarify different issues of international law which are relevant for guiding the work of the UN main organs and specialized agencies. These proceedings, which are open to States and relevant international organizations, allow the Court to take a broader perspective on international law, less constrained by the jurisdictional and other limitations generally present in contentious cases. However these Advisory Opinions of the ICJ are widely regarded as authoritative, they are not legally binding.

Financing of Terrorism of 9 December 1999 and the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (Ukraine v. Russian Federation)

²¹ Article 34 of the Statute

²² Particularly Articles 65-58 of the ICJ Statute

International human rights treaties provide for specific means of enforcement and supervision, which in many respects differ fundamentally from more traditional concepts of dispute settlement such as those employed at the ICJ. In particular the existence of human rights courts and individual complaints procedures has made it possible for individuals to bring allegations of violations of their rights under those conventions before specialized international judicial and quasi-judicial bodies, a development which would not have been possible within the context of the ICJ. While this plethora of different forums where individuals can assert their rights is an important tool both for the protection and the promotion of human rights, this development brings certain risks relating to overlapping jurisdictions, such as forum shopping and conflicting decisions.²³

CONCLUSION AND RECOMMENDATIONS

The history and development of International human rights cannot be effectively discussed without the mention of the ICJ. Albeit there are some issues that have become a clog in the wheels of the ICJ in the development of development of international human rights.

In the light of the above it is recommended as follows:

1. That Article 34 of the Statute of the ICJ be amended to expand the scope of the status of the parties that can appear before the court to include individuals.
2. That the advisory opinion of the ICJ be made binding and not merely authoritative.
3. The issue of enforcement of the decisions of ICJ should be looked into and considered binding on member states.

²³Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press: New York, 2003.