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Human Rights in the International Court of Justice

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Abstract

In this speech delivered at the conference honouring Professor Dugard, President Higgins discusses various human rights issues that have come before the International Court of Justice, including self-determination, reservations to human rights treaties, the application of human rights instruments to occupied territories, and allegations of genocide by one state against another. President Higgins notes that in the past few decades the ICJ has been joined by regional human rights courts, commissions and treaty monitoring bodies. Similar human rights claims are surfacing in these diverse fora, but the acknowledged expertise of these specialist bodies and the desire to avoid fragmentation provide an impetus for all concerned to seek common solutions on evolving points of law.

Key words

genocide; human rights; International Court of Justice; Professor John Dugard; reservations; self-determination

John Dugard and I first came to know of each other when I was writing on the legal aspects of apartheid in the 1960s, admiring from afar all the work that he was doing, academically and otherwise, on the front line in South Africa. I regarded him then as a fine scholar and a courageous man. Proper friendship was able to flourish with John's arrival in the Netherlands, and I feel I have gotten to know him well. I have never had occasion to revise my earlier views of him.

It is a truism that since the end of the Second World War there has been both a deepening of the substantive law of human rights and a broadening of what is perceived as human rights entitlements. The rights contained in the Universal Declaration of Human Rights were expanded, elaborated, and qualified in the two Covenants on Human Rights. Comparable regional instruments on human rights appeared in Europe, the Americas, and, a little later on, Africa. Particular rights in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) have been developed in treaties dealing with a single topic, such as the Convention against Torture, or with particular rights-holders, such as women, children, or refugees. Often these developments have brought with them special courts, commissions, and treaty monitoring bodies, with their own particular competences under the instruments concerned.

* Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the Conference Honouring Professor John Dugard, Leiden University Law Faculty, 20 April 2007.

It is inevitable – and welcome – that all of this should over time have an impact on the International Court of Justice (ICJ). Article 34 of the Statute provides that the Court may only deal with cases between states.[1] 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 Opinions, and interstate cases which claim human rights treaty violations *inter se*, have provided the vehicle for this development within the Court.

Over the past twelve years, we have seen the arrival at the Court of judges with strong backgrounds in human rights. I came to the Court in 1995, after serving ten years on the UN Human Rights Committee. Then came Judge Kooijmans, who sat at the Court until 2006, and had been president of the Commission on Human Rights and a very important rapporteur on torture. Judge Buergenthal came to us in 2000. He was the former President of the Inter-American Court on Human Rights and later a member of the UN Human Rights Committee. Judge Simma came to the Court in the same year, with a background as a prominent member of the Committee under the Covenant on Economic, Social and Cultural Rights of the UN. The presence of these judges on the bench, providing a 'critical mass' of persons particularly versed in human rights law, has contributed, I believe, to human rights being viewed as in the centre of what the Court does, not at the margin. The passage of time, and the change of judicial culture more generally, have played their role, too. Human rights are now routinely addressed in judgments of the Court.

The issue of reservations to human rights treaties has occasioned much comment. A much voiced perception as the International Law Commission began work on this topic was that the 'real law' was as stated by the ICJ in 1951 in the Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[2] Under that view – a view shared by some states and certain commentators – the 1951 Advisory Opinion established that while the object and purpose of a treaty should be borne in mind both by those making reservations and by those objecting to them, everything in the final analysis is left to states themselves. According to this view, no body beyond the states themselves has anything to say on the matter. The work of the Human Rights Committee resulting in General Comment 24[3] and the judgments on reservations of various human rights courts and tribunals that departed from this approach were thus merely aberrations.

It should now be clear that the 1951 Advisory Opinion should not be read in such a restrictive way. In the recent *Congo* v. *Rwanda* case, the impact of Rwanda's reservation to Article IX of the Genocide Convention was in issue.[4] The Court found that Rwanda's reservation was not incompatible with the object and purpose of

1. Art. 34(1) reads, 'Only States may be parties in cases before the Court'.
2. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15.
3. Human Rights Committee, General Comment 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (Fifty-second session, 1994), UN Doc. CCPR/C/21/Rev.1/Add.6 (1994).
4. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Preliminary Objections, Judgment of 3 February 2006 (not yet published).

the Convention. The Court's finding on this went beyond noting that a reservation had been made by one state, which did not occasion an objection by the other. The Court added its own assessment of the reservation's compatibility. In a Joint Separate Opinion, some judges drew attention to the fact that the Court's Advisory Opinion in 1951 did not foreclose legal developments in respect of the law on reservations.[5] The Court in 1951 was answering only the specific questions put to it by the General Assembly. Since 1951 many issues relating to reservations have emerged, including whether a role as regards assessment of compatibility with object and purpose is to be assigned to monitoring bodies established under multilateral human rights treaties. A related question is the scope of powers given to courts at the centre of the regional human rights treaties that have come into being. In the Separate Opinion referred to, discernable new trends were identified in this regard. Both the European Court of Human Rights and the Inter-American Court of Human Rights have pronounced upon the compatibility of specific reservations to the regional human rights conventions; they have not thought that it was simply a matter of leaving it to the individual assessment of states parties to those conventions. (I may refer here to the *Belilos*[6] and *Loizidou*[7] cases at the European Court of Human Rights and the Advisory Opinions issued by the Inter-American Court of Human Rights[8]). The Human Rights Committee's analysis of these problems in the context of the Covenant on Civil and Political Rights has been very close to that of these regional courts. The practice of such bodies is not to be viewed as 'making an exception' to the law as determined by the ICJ in 1951 – the Judgment in 1951 was never so confined and developments are occurring to meet contemporary realities.

In certain areas the Court's commitment to human rights has been long-standing. The International Court has played a major and critical role in the development of the concept of self-determination. When the Court addressed this concept in the *South West Africa*, *Namibia* and *Western Sahara* cases,[9] there were still many within the UN who insisted that self-determination was nothing more than a political aspiration. The Court was the forerunner in recognizing self-determination as a legal right. In the *Namibia* case it made other important findings, too – that apartheid was objectively illegal, with claimed lack of malign intent being quite irrelevant; and that 'to enforce distinctions, exclusions, restrictions and limitations exclusively

5. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Preliminary Objections, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma of 3 February 2006 (not yet published).
6. *Belilos v. Switzerland*, Decision of 29 April 1988, [1988] ECHR (Ser. A).
7. *Loizidou v. Turkey*, Decision of 18 December 1996, [1996] ECHR (Ser. A.).
8. *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 of 24 September 1982, IACHR (Ser. A) No. 2; Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83 of 8 September 1983, IACHR (Ser. A) No. 3.
9. *South West Africa*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16; *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12.

based on grounds of race, colour, descent or national or ethnic origin . . . [constitutes] a denial of fundamental human rights'.[10]

These developments were confirmed in the Advisory Opinion on *Western Sahara*, when the Court held, after disposing of other arguments, that the population of Western Sahara had the right to self-determination. That meant the right 'to determine their future political status by their own freely expressed will'.[11]

The principle of non-discrimination was already present in the jurisprudence of the Permanent Court of International Justice, the predecessor to the current Court. The Permanent Court showed a profound insight into what was necessary to make the protection of national minorities a reality. In the *Polish Upper Silesia* case, the Court insisted that what the minority was entitled to was equality in fact as well as in law; and that, while the claim to be a member of a national minority should be based on fact, self-identification was the only acceptable method of association.[12] This principle has been of lasting importance in human rights law. Mention must also be made of the *Minority Schools* case, in which the Permanent Court determined that special needs and equality in fact 'are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority'.[13] Of equal importance were the findings on what does *not* constitute discrimination: it was not discrimination to limit minority schools to those whose minority language was in fact their mother tongue, for therein lay the key to the benefits.

General Comment 18 of the UN Human Rights Committee,[14] distinguishing non-identical treatment which is discriminatory from that which is not, has its roots in this jurisprudence of the Permanent Court of some 65 years earlier.

There is increasing reference in the jurisprudence of human rights treaty bodies to the International Court's judgments. And the Court, for its part, has begun to refer to the practice of such treaty bodies in the context of its own judicial work.

In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,[15] the Court analysed the restrictions on the right of freedom of movement provided for under Article 12(3) of the International Covenant on Civil and Political Rights. The Court drew on the work of the Human Rights Committee, noting with approval the Committee's view that restrictions 'must conform to the principle of proportionality' and 'must be the least intrusive instrument amongst those which might achieve the desired result'.[16]

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10. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16, at 57.
11. *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12, at 36.
12. *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ Rep. Series A No. 7.
13. *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v. Poland)*, PCIJ Rep. Series A No.15, at 17.
14. Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 146 (2003).
15. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136.
16. Ibid., at 193. See CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14.

We are now seeing the same human rights claims surfacing in diverse fora, including the ICJ, human rights courts, and treaty bodies. The acknowledged expertise of these specialist human rights courts and bodies, and the desire to avoid fragmentation, provide an impetus for all concerned to seek common solutions on evolving points of law. If the Court would seem to be acting cautiously in this regard, it is certainly not acting negatively.

The Inter-American Court of Human Rights suggested in its 1999 Advisory Opinion on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* that the right to consular notification under the Vienna Convention on Consular Relations was indeed a human right.[17] The International Court in the *LaGrand* case said it did 'not appear necessary' to consider this point, since it had already found that the United States had violated the individual rights accorded to the LaGrand brothers.[18] When Mexico came back to the same point in the *Avena* case, the Court said once more that whether or not the Vienna Convention rights are human rights was not a matter that the Court (unlike the Inter-American Court) needed to decide in the context of the case.[19]

The UN Human Rights Committee under the Covenant on Civil and Political Rights in 1992 took the position that where a state party to the Covenant has disintegrated, new states forming on that same territory remain bound, within their respective territories, by the obligations of the Covenant. Persons resident in the former Yugoslavia did not suddenly lose the rights guaranteed under the Covenant when they found themselves living in Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Montenegro, Serbia, or Slovenia.

The Human Rights Committee also expressed the view that successor states were automatically bound by obligations under international human rights instruments from the respective date of independence, and that observance of the obligations should not depend on a declaration of confirmation made by the government of the successor state.[20] This argument was advanced by the Applicant before the International Court in the early days of the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro).*[21] In the event, it was not the ground of jurisdiction selected by the Court. It thus remains open as to what position the Court would today take on this point of law.

One cannot discuss the ICJ and human rights without mentioning three recent cases: the Advisory Opinion on the *Palestine Wall*,[22] *Congo* v. *Uganda*,[23] and *Bosnia*

17. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999, IACHR (Ser A.) No. 16.
18. *LaGrand (Germany v. United States of America)*, Merits, Judgment of 27 June 2001, [2001] ICJ Rep. 466, at 494.
19. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Merits, Judgment of 31 March 2004, [2004] ICJ Rep. 12, at 61.
20. UN Doc. E/CN.4/1995/80, 28 November 1994, p. 4.
21. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment of 11 July 1996, [1996] ICJ Rep. 595.
22. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 15.
23. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment of 19 December 2005 (not yet published).

and Herzegovina v. *Serbia and Montenegro*.[24] Human rights and humanitarian law were at the centre of each of these cases. The first addressed an element of the immensely complex Israel–Palestine dispute. The second concerned allegations of massive human rights violations set against the backdrop of the history of violence in the Great Lakes Region. And the third concerned what is widely regarded as the most serious violation of human rights – the commission of genocide.

The Court's Advisory Opinion on the *Palestine Wall* delivered in 2004 found that the 'wall' or 'security barrier' built by Israel violated various international obligations, that the wall must be dismantled immediately, and that Israel must make reparation for any damage caused to Palestinian property. The Court examined the relationship between international humanitarian law and international human rights law, and found that both branches of international law would have to be taken into consideration. It further held that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories (this reasoning was later applied in the *Congo* v. *Uganda* Judgment).[25] As you well know, an Advisory Opinion is *not* without legal effect. The *Palestine Wall* Opinion was an authoritative statement of the applicable law, and contributes to the framework for peace in the Middle East.

In 2005 the Court delivered its Judgment in the *Congo* v. *Uganda* case. The DRC claimed that Uganda, during its military intervention in Congolese territory, was responsible *inter alia* for large-scale massacres of civilians, acts of torture and other forms of inhuman treatment, unlawful seizure of civilian property, and the abduction and forcible conscription of children. The Court closely examined the extensive evidence submitted by both parties and concluded that atrocities had been committed by Ugandan troops. There was the interesting and difficult legal question of the legal definition of belligerent occupation, which had an impact on the extent of Uganda's responsibility for human rights violations. The Court found that Uganda established and exercised authority in one province, Ituri, as an occupying power. As a result, the Court had to deal with two separate areas to which different legal regimes applied. In Ituri, Article 43 of the 1907 Hague Regulations imposed on Uganda a duty to restore and ensure public order and safety while respecting the laws of the Congo. Uganda could therefore be held responsible not only for its own acts and omissions in that region, but also for any lack of vigilance in preventing violations of human rights and humanitarian law by other actors in that territory, including rebel groups. On the rest of the Congolese territory invaded by Uganda, not qualified as occupied, that specific duty of vigilance did not apply and Uganda could only be held responsible for the acts and omissions of its own forces.[26]

The *Bosnia and Herzegovina* v. *Serbia and Montenegro* Judgment, delivered two months ago, was the first legal case in which allegations of genocide had been made by one state against another. The International Court was acutely sensitive to its

24. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007 (not yet published).
25. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 15, at 180.
26. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *supra* note 23, at 60.

responsibilities. The Court – as it always does – meticulously applied the law to each and every one of the issues before it. The concept of genocide has caught the public and political imagination. While this is a positive development, great care has to be taken, by commentators and governments alike, not to assume that all massive violations of human rights constitute genocide. The Convention requirement of special intent – intent to destroy, in whole or in part, the group as such – remains the essence of genocide, and what distinguishes it from crimes against humanity. Further, the concentration on 'genocide' should not lead down a path whereby crimes against humanity, or a finding of a violation of the Genocide Convention by failure to prevent genocide, come to be perceived as somehow 'insignificant'. The Court's Judgment in the *Bosnia* case seeks not only to answer the claims before it, but also systematically to elaborate and explain each and every element in the Convention, believing this latter task is also a necessary contribution to clarity and understanding.

As a member of the selection board for the vacant chair at Leiden after Pieter Kooijmans came to the Court, I am pleased to have had a small part in the arrival of Professor Dugard in the Netherlands. John and Ietje have together hugely enhanced our lives here in the Netherlands. John Dugard has tirelessly, impartially, and courageously contributed to the promotion and protection of human rights in many capacities: as a professor on four continents, as a legal scholar of the highest calibre, as a judge ad hoc at the International Court, and as a Special Rapporteur to the Human Rights Commission. The affection in which he is held is apparent all around us. It is a pleasure to pay tribute to him.