

THE INTERNATIONAL COURT OF JUSTICE AND HUMAN RIGHTS

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¶ 1 I appreciate Professor Cassel's invitation to join in this distinguished company. I must tell you that I'm a bit out of place here. I'm not a scholar of either human rights law or of the International Court of Justice, although I've had some professional experience with and written on both. I'm a journeyman international lawyer, so I will deal today with some journeyman points.

¶ 2 Some of these may seem at odds with the ambitions of this symposium. However, I think it's important to have a fair understanding of the procedural and institutional factors defining the ICJ's field of action.

¶ 3 My starting point is that ICJ is not a specialized human rights institution, either in terms of its mandate, its jurisdiction, its procedures, or its personnel. Each of these elements may well limit the Court's future role in the human rights arena. I will briefly address each.²

I. The Court's Mandate

¶ 4 The only contentious cases the ICJ can hear are cases between States. Individuals have no right of direct access.³ This is an important difference between the ICJ and other human rights institutions that allow some type of direct access. This limitation reflects the State-centered view of international law prevailing when the statute of the ICJ's predecessor was drawn up after World War I. It does not mean that energetic and imaginative counsel can never get individual clients' situations before the Court, as Donald Donovan's work shows. Still, it is a significant limitation.

¶ 5 The ICJ also issues advisory opinions on legal questions if asked by the General Assembly or Security Council or by another U.N. organ or specialized agency authorized by the General Assembly.⁴ The Court has made some important contributions to human rights processes through advisory opinions, as I will mention later on.

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² For surveys of recent developments in the Court see John R. Crook, *The 2000 Judicial Activity of the International Court of Justice*, 95 AM. J. INT'L L. 685 (2001); John R. Crook, *The 2001 Judicial Activity of the International Court of Justice*, 96 AM. J. INT'L L. 397 (2002); John R. Crook, *The 2002 Judicial Activity of the International Court of Justice*, 97 AM. J. INT'L L. 352 (2003).

³ "Only States may be parties in cases before the Court." Statute of the International Court of Justice, art. 34(1), available at [http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstature.htm](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm).

⁴ U.N. CHARTER art. 96.

¶ 6 There are no limits on the sorts of inter-State legal disputes the Court can hear. However, a few types of cases have provided much of its work. More than half its cases have involved disputes over land frontiers and maritime boundaries. *South Africa* generated four advisory opinions and two judgments.⁵ The Court has also served as a sort of Constitutional court for the United Nations. Several advisory opinions have established key principles regarding powers and functions within the U.N.⁶

¶ 7 There have been a few ICJ (and PCIJ) decisions significantly contributing to human rights law,⁷ but historically they have been a small part of the docket. To give an unscientific illustration, if you look at the indexes of the five recent volumes of the *I.C.J. Reports* covering 1994-1997 sitting in my bookcase, you'll see very few references to "human rights." Those you do see are concentrated in dissenting or separate opinions of a few judges.⁸ Thus, human rights issues have been an intermittent and not especially important part of the Court's work.

¶ 8 In recent years, there have been a few more such cases, helping to stimulate this symposium. The Court's responses have varied. When faced with competing legal values, today's Court does not necessarily give human rights claims special weight or authority. It takes such claims quite seriously, but I do not see it as taking a uniformly "pro-human rights" approach.

¶ 9 In some cases, human rights values obviously have been given great weight. In the two consular notification cases by Paraguay and Germany against the United States,⁹ it clearly was of central importance to the Court that the cases ultimately involved convicted persons facing capital punishment. I think this significantly shaped both the procedures and the final result, although the Court's task was made simpler by the fact that the United States admitted the core violation of the Convention. I hope that Donald Donovan will address these cases, in which he played an important role as counsel for Paraguay and Germany. I will not go into them beyond indicating the general thought that the Court handled those cases as it did, and reached some of the results it reached, because they involved the administration of the death penalty. For the Court, this aspect was much more compelling than the arguments regarding state practice and the construction of the treaty advanced by the United States.

¶ 10 The Court has also done its part to reinforce the U.N.'s rather modest human rights machinery. A pair of advisory opinions confirmed that Special

⁵ See PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 328 (7th ed. 1997).

⁶ *E.g.*, Conditions of Admission of State to Membership in United Nations (Article 4 of Charter), 1948 I.C.J. 63 (May 28); Reparation for Injuries Suffered in Service of United Nations, 1949 I.C.J. 174 (Apr. 11); Certain Expenses of United Nations, 1962 I.C.J. 151 (July 20).

⁷ See Stephen M. Schwebel, *The Seminal Contributions of the World Court to the Law of Human Rights*, Address to the International Bioethics Committee of UNESCO, Fifth Sess., Proceedings (Dec. 1998).

⁸ *Report of Judgments, Advisory Opinions and Orders* of 1994 has no index entry for "Human Rights." *Report of Judgments, Advisory Opinions and Orders* of 1995 has one. The two volumes for 1996 have thirty-one, over half in Judge Weeramantry's dissent in *Legality of Use by State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. 66 (July 8). The 1997 volume cites to ten pages.

⁹ *Vienna Convention on Consular Relations* (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9); *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 104 (June 27).

Rapporteurs carrying out human rights mandates for ECOSOC's human rights bodies should be accorded the privileges and immunities of U.N. Experts on Mission under the U.N. Convention on Privileges and Immunities. They also confirmed that Special Rapporteurs are entitled to assert those privileges and immunities against their own governments.¹⁰

¶ 11 I once had the pleasure of meeting Ambassador Mazilu, whose troubles with his home authorities in Romania led to the first of these cases. He expressed deep gratitude for the Court's opinion. The second case involved the Special Rapporteur on Independence of the Judiciary, who faced extensive and expensive legal proceedings at home in Malaysia for critical comments made to the press regarding certain judicial proceedings there. The ICJ concluded that he should be immune from such suits, although the Malaysian Courts have so far apparently disagreed.¹¹

¶ 12 However, these cases do not establish a clear trend; the Court has not always received human rights claims so supportively. In the 1996 advisory proceeding on the *Threat or Use of Nuclear Weapons*, it was vigorously argued that the use of nuclear weapons would unlawfully violate the right not to be arbitrarily deprived of life under Article 6 of the Covenant on Civil and Political Rights.¹² The Court did not buy it. It agreed that Article 6 of the Covenant applied in wartime, but found that what is arbitrary must be determined through the applicable *lex specialis*—the law of armed conflict.¹³

¶ 13 Indeed, even in the *LaGrand* case, the Court seemed a bit reluctant to extend the sphere of human rights. Jurisdiction over one of Germany's claims required a finding that the Convention conferred individual rights on the LaGrand brothers as a matter of international law. This led to a lively debate whether the right to consular notification was a human right. The Court declined to decide this question. It found that the Convention by its terms conferred individual rights on the brothers, and it simply did not need to decide whether these could be viewed as human rights.¹⁴

¶ 14 The Court's recent judgment in *Arrest Warrant* is also significant.¹⁵ Human rights groups have heavily criticized the judgment,¹⁶ particularly some of the

¹⁰ Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1998 I.C.J. 177, 200 (Dec. 15); Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62 (Apr. 26).

¹¹ BBC News, *Malaysian Court Rejects U.N. Ruling* (Oct. 18, 1999), at <http://news.bbc.co.uk/1/hi/world/asia-pacific/478224.stm>.

¹² Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 240 (July 8).

¹³ *Id.* para. 25.

¹⁴ *LaGrand*, 2001 I.C.J. at 77, para. 78. This contrasts with the Inter-American Court of Human Rights' approach to Mexico's request for an advisory opinion on questions related to consular notification. That Court only had jurisdiction to render the advisory opinion if the right of consular access was a human right. The Court so found, and rendered the requested advisory opinion. *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 16 Inter-Am. Ct. H.R. (ser. A) (1999).

¹⁵ *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. 11, para. 27 (Feb. 14).

¹⁶ Human Rights Watch Press Release, *Disappointment on Belgian War-Crimes Ruling* (Feb. 14, 2002), at <http://www.hrw.org/press/2002/02/icj0215.htm>; International Commission of Jurists Press Release, *International Court of Justice's Ruling on Belgian Arrest Warrant Undermines International Law* (Feb. 15, 2002), at <http://www.icj.org/news.php3?id.article=2622&lang=en>.

dicta. What the Court actually holds in the operative part of the judgment strikes me as a plausible balance between the requirements of international accountability and of carrying on international relations. That said, I don't think the judgment does an effective job of documenting the immunity of incumbent foreign ministers under customary international law.¹⁷ It also contains dicta suggesting that former foreign ministers are absolutely immune in national courts for past official acts. This dicta is both highly problematic and not necessary to decide the case.¹⁸

¶ 15 An advantage of being a journeyman is that you can speculate fact-free about how other lawyers handled their cases. I hope that Daniel Bethlehem or others familiar with *Arrest Warrant* can tell us whether there was some agreement by the parties to narrow the scope of the case to discourage the Court from addressing the Congo's initial claim that Belgium's assertion of jurisdiction violated international law.¹⁹ Instead, the Congo (quite successfully) relied on the argument that incumbent foreign ministers have absolute inviolability and immunity.

¶ 16 Belgium emphasized that the Congo had dropped its initial attack on Belgium's assertion of universal jurisdiction, and argued that the Court could not rule on it under the principle of *non ultra petita*, that the Court should decide only the issues the parties ask it to decide.²⁰ The Court responded by essentially assuming for purposes of considering the immunity claim that there was jurisdiction, a result criticized by several judges.²¹

¶ 17 What to make of all this? A short answer is that, in cases involving seriously contending legal values from different strands of international law, the Court will make a conscientious effort to rank the claims and if need be to find a balance. However, it will not necessarily give primacy to human rights considerations.

II. Limits on the Contentious Jurisdiction

¶ 18 The second potential limit on the Court's role is its limited jurisdiction to hear contentious cases. Jurisdiction is the foundation of international adjudication; compelling facts or legal theories are no good if the Court can't hear them.

¹⁷ *E.g.*, *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. 18, 19 para. 51-53 (Feb. 14) (assuming the existence of such immunity under customary law, but present little substantiating authority). *See id.* paras. 11-13, at 5-7 (dissenting opinion of Judge ad hoc Wan den Wyngaert emphasizing the lack of discussion of state practice or *opinio juris*).

¹⁸ *Id.* para. 61. The Court does not address whether official acts could include offenses such as war crimes or crimes against humanity. Former Foreign Ministers have indeed been held accountable before international tribunals. Joachim von Ribbentrop, Nazi Germany's Foreign Minister, was among those tried, convicted and executed at Nuremberg. *See* TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, 351-53 (1992).

¹⁹ *See Arrest Warrant*, 2002 I.C.J. at 1, para. 2 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal). These Judges, all known for their prior involvement in human rights work, argued that the Court should have addressed the issue head-on. *Id.* para. 3.

²⁰ *Id.* para. 41. *See Asylum (Colom. v. Peru)*, 1950 I.C.J. 402 (Nov. 20).

²¹ Also in the "why did those handling the case do it that way" category is whether, after Mr. Yerodia ceased to be a Minister, the Belgian magistrate could have withdrawn the initial warrant and issued a new one. There may be sound reasons of Belgian law why this was not done. However, withdrawing the warrant would seem to have left Belgium with greater control of the situation and in a more satisfactory position overall.

Historically, only a few inter-State disputes posing significant human rights legal issues have gotten through the jurisdictional filters required for ICJ consideration.

¶ 19 Most importantly, in contentious inter-State cases, both parties must consent to jurisdiction. Only about a third of U.N. members accept compulsory jurisdiction based on Article 36(2) of the Statute. Many of these have significantly conditioned their acceptances. Even some States usually seen as law-abiding paragons have limited their acceptances of jurisdiction so as to protect values they see as insufficiently reflected in existing international law.²² The United States withdrew its acceptance of compulsory jurisdiction in 1984; I see no prospect that the Bush Administration or any foreseeable successor will take a different view.

¶ 20 In the 1960's, the Court was in bad odor in many quarters for rejecting important human rights claims on jurisdictional grounds. Some saw the Court's *S.W. Africa* 1966 merits judgment as its lowest point.²³ There, the Court at an earlier stage of the case found jurisdiction over claims by Liberia and Ethiopia that South Africa's apartheid administration of South West Africa violated its League of Nations mandate.²⁴ However, after a change of personnel, the Court was equally divided, giving the President, Sir Percy Spender of Australia, a deciding or "casting" vote.²⁵ He ruled that duties under the mandate were owed to the League, and that Liberia and Ethiopia did not have any legal interest in the subject matter of the dispute allowing them to challenge the apartheid regime in South West Africa.

¶ 21 Of course, States do sometimes agree to compulsory jurisdiction, either generally or under a specialized treaty regime, so a few human rights cases get through. Jurisdiction in the two Vienna Convention Consular Convention cases against the United States rested on the parties' acceptance years ago of a separate compulsory dispute settlement protocol to the Consular Convention. The United States has not accepted another multilateral treaty with mandatory ICJ dispute settlement for many years, and I suspect it will not do so again any time soon.

¶ 22 The *D.R. Congo* established jurisdiction against Belgium in the *Arrest Warrant* case based on both parties' acceptances of compulsory jurisdiction.²⁶

III. The Court's Procedures

¶ 23 Litigation in the ICJ can be slow, cumbersome, and expensive, particularly if parties vigorously contest jurisdiction and admissibility and other issues. The Court has taken some steps to reduce complexity and delay,²⁷ but

²² A notable example is Canada's condition on its acceptance of jurisdiction at issue in *Fisheries Jurisdiction (Spain v. Canada)*, 1998 I.C.J. 432 (Dec. 4). Under the *Norwegian Loans* case, a respondent State can invoke against the applicant a qualification or limitation contained in the applicant's acceptance of the Court's jurisdiction. *Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 9 (July 6).

²³ *South West Africa (Eth. v. S. Afr.)*, 1966 I.C.J. 6 (July 18).

²⁴ *I.C.J. Reports 1962*, at 319.

²⁵ See MALANCZUK, *supra* note 5, at 328-29.

²⁶ *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. 11, para. 27 (Feb. 14).

²⁷ See Crook, 95 AM. J. INT'L L. at 691; Crook, 96 AM. J. INT'L L. at 410-411; Crook, 97 AM. J. INT'L L. 352.

problems remains. The Court also has rather rudimentary procedures for presenting and assessing disputed evidence in cases with complicated disputed facts.

¶ 24 Where the Court presses and the parties cooperate, simple cases like *Arrest Warrant* can move rather quickly; it was only sixteen months between filing and judgment in that case. But more complex and fiercely contested cases can drag on for years. Bosnia filed a substantial case alleging genocide against Yugoslavia in March 1993. Less than a month later, the Court issued a strongly worded provisional measures order directing Yugoslavia to take all measures within its power to prevent genocide, an order it reaffirmed five months later.²⁸ However, Bosnia-Herzegovina chose to plead its case very broadly, and the respondent contested it vigorously. Today, years after the case was filed, and after substantial proceedings on provisional measures, on jurisdiction and admissibility, and on counterclaims, the case is still pending.

IV. Membership of the Court

¶ 25 It probably is not a smart thing for journeyman international lawyers to generalize about the members of the Court, but I will hazard some thoughts anyway. This seems a fair matter for discussion, since backgrounds and experiences inevitably shape the way judges approach cases before the Court.

¶ 26 Although not written down, the U.N. custom is for a national of each of the Permanent Members of the Security Council to sit on the Court, with the ten remaining seats divided among jurists from the U.N.'s five regional groups. This system has brought judges from various countries and backgrounds to the Court, but it tends to favor experience in foreign relations, especially in U.N. settings. At least four current judges were legal advisers of their national foreign ministries,²⁹ two were Foreign Ministers,³⁰ two were their country's permanent representatives to the U.N. in New York,³¹ and others previously represented their governments at diplomatic conferences or as legal advisers. Of the fifteen judges, at least three (Judges Buergenthal, Higgins, and Kooijmans) were particularly known for their work in human rights law prior to joining the Court.³² Judge Herzegh also was known for his work on humanitarian law and in the Red Cross Movement.

¶ 27 The point? That judges come to the Court from a variety of backgrounds, often involving extensive government service. Those with extensive human rights backgrounds are a minority. This is not to say that the others will not give human rights claims full understanding and fair appreciation. It is simply to say that they may be receptive to other types of claims as well.

²⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 325 (Provisional Measures of Sept. 13).

²⁹ President Guillaume, Judge Shi, Judge Fleischhauer (who also served as UN Under Secretary-General for Legal Affairs and Legal Counsel), and Judge Al-Khasawneh.

³⁰ Judges Kooijmans and Rezek.

³¹ Judges Koroma and Elaraby.

³² Judge Buergenthal served, inter alia, on the Inter-American Court of Human Rights and on the Human Rights Committee; Judge Higgins on the Human Rights Committee; Judge Kooijmans was the U.N.'s Special Rapporteur on Torture.

V. Conclusion

¶ 28 Each of the aspects of the ICJ I've mentioned—its broad mandate, its limited jurisdiction, its procedures, and its personnel—will affect and may limit the ICJ's role in developing and applying human rights law. The Court has a general mandate, where human rights claims and claims derived from other areas of the law may well compete and have to be reconciled.

¶ 29 This is not a bad thing. In my view, wishful thinking and sloppy legal analysis tend to be too common in international human rights law. At the end of the day, the process of testing and refining of claims through litigation before the only true World Court should help to produce a body of human rights law that is more broadly accepted and effective.