The International Court of Justice's Growing Contribution to Human Rights and Humanitarian Law

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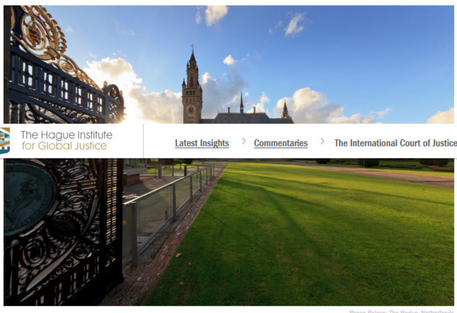

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Peace Palace, The Hague, Netherlands

Today we celebrate the inauguration 70 years ago of the International Court of Justice (ICJ) and reflect upon its growing contribution to stronger implementation of international human rights and humanitarian law throughout the globe.

It was 70 years ago today, on 18 April 1946, that the League of Nations adopted a resolution terminating its judicial arm – the Permanent Court of International Justice (PCIJ) – to make way for the establishment of the International Court of Justice within the framework of the newly established United Nations Organization, successor to the League. The day before, Professor K.H. Bailey of Australia, serving as the League's advisor on this transition, underlined that: "Just as the dissolution of the League of Nations follows upon the establishment of the United Nations, so the dissolution of the Permanent Court of International Justice follows upon the establishment by the United Nations of a new International Court of Justice". He observed that: "Men, conscious that they are, after all, mortal, may, when they hear the word 'dissolution', think that the Permanent Court is dead. In substance, the contrary is the truth". Legally, the ICJ was a new institution, but functionally, its Statute, procedures and jurisprudence from the start borrowed heavily from and continue to be very much inspired by the PCIJ's rich legacy.

It has to be said that since 1946, the ICJ's contribution to human rights promotion and protection was scarcely noticeable, but this changed dramatically over the last decade or so with a series of rulings where the Court emphasized international human rights and humanitarian law and principles.

So why has the ICJ's contribution to human rights and humanitarian law picked up only recently?

First and foremost, the ICJ was never intended to function as a human rights court nor was it ever structured as one. Only States can bring contentious cases to it, in contrast to human rights venues, such as the European Court of Human Rights or Inter-American Court of Human Rights to which individuals can and do bring allegations of human rights violations against Governments. Even where a State brings a case, as Greece did in 1924 in Mavrommatis, to protect one of its nationals' rights against encroachment by Great Britain, the PCIJ made clear that the "State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law", not that individuals enjoyed any direct legal standing before the Court.

Second, the Court's slow recognition of human rights in the 1950s and 1960s can be explained partly by the fact that international human rights law itself did not exist prior to 1945, except for international labour law which is anchored in the post-World War I establishment of the International Labour Organization and international minority rights protection based on certain post-World War I peace treaties. In 1945, the UN Charter included human rights promotion among the Organization's main purposes in Article 1(3), and in Articles 55 and 56, the Charter obliges member States to take joint and separate action in cooperation with the Organization to promote human rights, thus elevating human rights to a matter of international legal concern. Yet it still took many years from the time of the adoption of the Universal Declaration of Human Rights on 10 December 1948, and adoption of the UN Convention on the Prevention and Punishment of the Crime of Genocide the day before, for the international community to build up the corpus of international human rights law as we recognize it today. During the 1950s and 1960s, the ICJ could hardly apply international human rights law that was still at a very early stage of normative development.

Third, the ICJ's weak recognition of human rights issues, even after international human rights law had become much more established in content and legal status, could be explained by the Court's own reticence to adopt a more activist stance. This reticence might have arisen from a concern to reassure States, few of whom had brought any disputes at all to the Court during this period, of the Court's fidelity to clearly established legal norms, and a healthy skepticism to apply norms de lege ferenda too readily. Perhaps too, many Judges might simply have been out-of-touch with the growing international human rights movement of the early 1960s that was gaining force with the expansion of the General Assembly's membership. A clear example where the Court avoided pronouncing upon a major human rights issue was its 1966 ruling in the South West Africa case. In 1960, Liberia and Ethiopia alleged that South Africa's apartheid policy violated its responsibilities under the League of Nations mandate it was administering and which continued under the UN Charter's Trusteeship system. The ICJ simply dismissed the case on grounds that neither Ethiopia nor Liberia had a material interest in the issue, and in doing so, lamentably it missed a golden opportunity to establish itself as the world's guardian of justice in the fight against systematic State-sponsored human rights abuse. Years later, in the Nicaragua Case, 1986, the ICJ ruled that U.S.-backed Contra insurgents committed violations of international humanitarian law that were imputable to the U.S., but the ICJ largely overlooked the wider human rights implications. Similarly, in the 1995 East Timor Case, the ICJ refused to recognize that violation of obligations erga omnes could confer upon a State, in this case Portugal, which was not directly involved in the dispute, legal capacity to claim against Australia to protect the rights of East Timor as a beneficiary. East Timor was then under Indonesia's illegal control and could not itself protect its own permanent sovereignty over national resources. The following year, in an advisory opinion, the ICJ rejected the argument that the use of nuclear weapons violated the right to life as guaranteed under the International Covenant on Civil and Political Rights. Yet another disappointment for many human rights advocates came with the ICJ's ruling in 2000 on the Arrest Warrant Case which upheld the diplomatic privileges and immunities of an incumbent Foreign Minister of the Democratic Republic of Congo in the face of a Belgian arrest warrant. The warrant was based on Belgium's universal jurisdiction law that allowed it to prosecute anyone accused of genocide, war crimes or crimes against humanity committed anywhere.

Since 2004 however, ICJ rulings seem to signal greater willingness on the part of the Court to apply established norms of international human rights and humanitarian law in disputes brought before it. In 2004, the ICJ ruled in an advisory opinion on the legal consequences arising from a wall that Israel constructed in Palestinian territory under Israeli occupation, in particular in and around East Jerusalem, that Israel violated several important provisions of the Fourth Geneva Convention, 1949, and of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights as well as of the UN Convention on the Rights of the Child. In the 2009 Ahmedou Sadio Diallo Case, brought by Guinea against the Democratic Republic of Congo, the ICJ drew upon the UN Human Rights Committee's jurisprudence to find violations of both the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, as well as the Vienna Convention on Consular Relations. In another landmark case, Belgium brought Senegal to the ICJ to ensure that Belgium's rights under the UN Convention against Torture were fulfilled by Senegal, also a party to the Convention, to ensure that Hissène Habré, former President of Chad allegedly responsible for perpetrating serious violations of the human rights of tens of thousands, would either be prosecuted for these crimes or extradited to another country for prosecution. The ICJ found that Senegal had breached its obligations under the UN Torture Convention, and "that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him."

Let's hope that the observation of Bruno Simma, former ICJ Judge and eminent human rights authority, is correct that: "… the human rights genie has escaped from the bottle. Since human rights considerations permeate more and more into areas of international law, even of the traditional, inter State, kind, issues of, and related to, human rights will necessarily present themselves also to the Court with increasing frequency." (Bruno Simma, "Human Rights Before the International Court of Justice: Community Interest Coming to Life?", in The Development of International Law by the International Court of Justice, Oxford, 2013 at 598.)

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