HUMAN RIGHTS BEFORE THE INTERNATIONAL COURT OF JUSTICE: COMMUNITY INTEREST COMING TO LIFE?

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In my contribution to the Festschrift for my colleague and friend Rüdiger Wolfrum, and in special recognition of Rüdiger’s important work in the field of human rights, particularly as an expert member of the Committee on the Elimination of Racial Discrimination (CERD), I want to deal with a specific aspect of a topic which has become a sort of Leitmotiv in my own more recent academic work: that of the impact of human rights on the development of international law.

To start with a personal remark: I made my first acquaintance with the integration of human rights in more traditional international law in a slightly bizarre way, as it were. About 25 years ago, when ECOSOC decided to get serious about monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights of 1966 and to replace a body of governmental experts assigned to this task by a Committee of independent experts, the German Foreign Office chose me as a candidate for membership of this new institution, apparently because those in charge of human rights in Bonn at that time sympathized with the specific angle I had pursued in a few publications of mine on the subject of human rights. These early writings were devoted to the topic of the enforcement of international human rights obligations by (non-forcible) countermeasures—an aspect in line with the spirit of the time, but demonstrating a rather particular approach to “systemic integration”.1 I then served on the new monitoring body, the Committee on Economic, Social and Cultural Rights, from 1987 to 1996, that is, ten years trying to cope with the daunting task of devising a legal hold on this most doctrinally evasive category of human rights and developing the reporting procedure into a more meaningful exercise. In the context of the present paper,

what I remember is that, in the company of my fellow Committee members, an assortment of 18 “droits de l’hommistes” representing a colourful variety of backgrounds and expertise, I always felt “on guard”, so to speak, being “in charge of international law”, being the international law generalist with the task of frequently reminding my colleagues that what they were doing they were doing on the basis provided by “my” international law, and had to remain within the law’s state-of-the-art boundaries.

Following this exposure to the workings of the UN human rights machinery, I spent six years as a member of the UN International Law Commission. And while before, in the UN’s human rights community, I had regarded it as my task to function as the Committee’s “in-house” (generalist international) lawyer, in the ILC, of which at the time I was the only member with a UN human rights “past”, I soon discovered that I now felt the other way round, namely having to protect the specificity and integrity of “my” human rights from attempts by fellow ILC members, cold-blooded (former or serving) legal advisers or even politicians, to have these rights turned into “bureaucratic small-change”, to use Philip Allott’s words. To illustrate how I saw my new task, I engaged in a big–and successful–effort to defeat an attempt to include the human rights topic of non-discrimination, very much in fashion at the time, in the agenda of future work of the Commission in order to save it from being hijacked by what I regarded as these rights’ potential false friends, so to speak. While I beg the reader to take this observation with a grain of salt, what remains true is that during my time in the ILC the reflexes acquired in my ten years of human rights treaty monitoring kept me constantly on guard and sensitive to the appropriation of human rights by the international law “mainstream”.

As against this background, it will come as no surprise that since my election to the International Court of Justice I have studied the treatment of human rights by the Hague Court, the specifically “judicial” interpretation and application of these rights by what has been called “the gate-keeper and guardian” of general international law, 4

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as compared to the “softer”, more politically and policy-inspired handling of human rights in the UN Charter-based system, with particular attention, with regard to both its development over time and the current state of the matter. Also, in a large part of the existing literature on the topic, what I found was a certain positive stereotypical treatment, rather uncritical praise for the achievements of the ICJ as a protector of human rights. Thus, a reality check free of undue deference to the Court appeared to be in place.

I have been engaging in the task I set myself with two correlative questions in mind: first, has the development of international human rights law had an impact on the jurisprudence of the Court? Secondly, and vice versa, has the jurisprudence of the Court contributed to this development? In what follows I will attempt to provide some tentative (and necessarily brief) answers to these questions. In so doing, I will distinguish between two phases in the engagement of the Court with human rights matters: a–long–first phase marked by a certain restraint on the part of the Court, and the States parties to its Statute, with regard to such engagement, and following this a second phase marked by recent developments indicating a greater degree of readiness to have the Court decide straightforward human rights questions.

A. HUMAN RIGHTS BEFORE THE COURT IN A FIRST PHASE:
HESITATION AND RESTRAINT

I. The Case Law of the Court

After the re-birth of the Court in 1945/46, expectations by observers and potential clients of the Court as to the contribution of what now had become the “principal judicial organ of the United Nations” to the realization of the UN’s human rights agenda must have been rather

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low. This was probably due to patterns which had become discernible in the case law of the ICJ’s predecessor, the Permanent Court of International Justice, touching upon issues which we would now regard as at least human rights-related. While this case law had displayed some remarkably progressive “sparks” in several advisory opinions rendered on the basis of the League of Nations’ system of protection of minority (group) rights, the Permanent Court’s jurisprudence in contentious cases can only be described as pronouncedly deferential to national sovereignty; limitations of sovereignty were not to be presumed, treaty provisions stipulating such limitations were to be interpreted restrictively, Lotus, and so forth.7

As against such foreboding, the new Court’s case law dealing with, or at least somehow touching upon, human rights issues in specific ways over time turned out to be richer, and certainly less negative, than expected. As a matter of course, opportunities for the Court to devote itself to human rights questions will depend almost totally on the nature of the cases brought to The Hague. It was natural, therefore, that case law with human rights elements would develop in tandem with the widening and thickening of international human rights as a growth industry within post-World War II international law. However, just as human rights as a body of law and institutions at the global (UN) level took several decades to develop beyond standard-setting and extend to—still very limited—implementation, the role of the Court as an interpreter and applier of human rights law unfolded gradually and in rather meandering ways. Thus, in what I would like to call a first phase in the engagement of the ICJ with human rights, while we find a certain number of cases in which human rights arguments played some role, sometimes in circumstances in which one would not expect human rights issues to arise at all, the actual purport of human rights in these cases,

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6 Philip Alston brought to my attention a Report of the Australian delegation to the Second Session of the UN Commission on Human Rights in December 1947, according to which in the course of the discussion on implementation of the future “Bill of Human Rights”, the United Kingdom proposed to invest the ICJ with the power to give advisory opinions on human rights, which could be submitted for action to the General Assembly. The report adds: “Subsequent discussion demolished this view” (document on file with the author).

7 I still remember the story told by my civil law teacher at the University of Innsbruck, Professor Franz Gschnitzer, who as a high-ranking Austrian politician had been involved in the negotiations between Austria and Italy on a satisfactory autonomy regime for South Tyrol in the late 1950s and early 1960s, how Italy had at a certain point proposed to let the ICJ decide whether Italy was in compliance with the so-called “Gruber–De Gasperi Agreement” of 1947, and how Austria reacted by doing everything it could to get this proposal off the negotiating table.
as well as the contribution of the Court’s jurisprudence to their development, was rather limited. If I tried to run through the relevant judgments and advisory opinions rendered during this first phase in chronological order and, in doing so, group the case law according to the relevance of human rights considerations, three clusters may be distinguished (with some decisions falling into more than one of them).

In the first group of decisions, human rights considerations appear in more or less incidental ways; the legal reasoning in the cases concerned essentially turns round matters which have nothing to do with human rights, or in regard to which human rights play a mere subordinate role and are thus mentioned more or less obiter, not necessarily in an entirely positive, fully welcoming sense. I would consider Corfu Channel (1949), Barcelona Traction (1970), Tehran Hostages (1980) and the Vienna Consular Convention cases, LaGrand (2001) and Avena (2004), as belonging to this group. In the first-mentioned case, playing in the context of naval warfare and thus touching upon international humanitarian law rather than human rights law in the strict doctrinal sense and dealing with the duties of coastal States in maritime zones under their jurisdiction, the Court strengthened its confirmation of a duty on the part of these littoral States to clear their territorial seas of mines with a remarkably humanitarian appeal, referring to “obligations [...] based on [...] certain general and well-recognized principles”, among them “elementary considerations of humanity”.8 In its Barcelona Traction Judgment, the Court, at the outset of its discussion on diplomatic protection of shareholders, suddenly turned to a distinction between bilateralist obligations arising in that area and a new category of obligations erga omnes, among which it counted the prohibition of genocide and obligations deriving from “the principles and rules concerning the basic rights of the human person”, before returning to the international legal aspects of company law.9 In the Tehran Hostages case, the ICJ condemned the treatment of the detained US diplomatic and consular personnel as incompatible, inter alia, “with the fundamental principles enunciated in the Universal Declaration of Human Rights”.10 I will consider LaGrand and Avena in a later, more specific,

8 Corfu Channel (United Kingdom v. Albania), ICJ Reports 1949, 4, 22.
10 United States Diplomatic and Consular Staff in Tehran (United States v. Iran), ICJ Reports 1980, 3, 42.
context as showing that there were instances in which the Court actually avoided taking up human rights questions, even though such a categorization of matters in dispute was offered to it on a silver platter, as it were. What the before-mentioned cases belonging to this first group have in common is that the Court referred to human rights in a context distinct from that branch of the law, with these references lighting up the sky for a short moment before the Court returned to more mundane matters.

The situation is similar in the second cluster, although here human rights considerations occupied somewhat more space, but still these considerations were more in the nature of an occasion for the Court, a trigger, to engage in discussion of matters different from human rights, even though the subjects might somehow be linked technically. Let me exemplify my point by reference to the Court’s Advisory Opinion on Reservations to the Genocide Convention (1951).11 This Opinion, while hinging on a treaty which could be called the first human rights instrument created within the United Nations, yielded relatively little with regard to the specific legal features of the Genocide Convention; instead in a formidable exercise of judicial law-making it crafted major parts of what subsequently became the contemporary regime of reservations to multilateral treaties in general. I would submit that a similar triggering, but ultimately ancillary, role was played by human rights in the Court’s Advisory Opinions on the Interpretation of Peace Treaties (1950), focusing on the operability of treaty provisions on dispute settlement;12 in the three Advisory Opinions rendered on certain technical aspects of the supervision by the UN of the international status of South West Africa (1950, 1955, 1956);13 in the 1986 Nicaragua Judgment’s refusal to accept the use of force on the part of the United States as an appropriate method to ensure respect for human rights;14 as well as in the two Advisory Opinions by which the Court confirmed the immunities of

12 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinions, First Phase, ICJ Reports 1950, 65; Second Phase, id., 221.
UN Special Rapporteurs in the field of human rights and thus strengthened the UN’s human rights machinery, that is, in the *Mazilu* case (1989)\(^{15}\) and ten years later again in *Cumaraswamy* (1999).\(^{16}\)

The third group consists of a number of cases in which the Court developed the right of self-determination of peoples. I mention them here because in the human rights doctrine developed and pursued by the United Nations, the realization of self-determination in the context of decolonization was regarded as the *conditio sine qua non* for the enjoyment of individual human rights. Thus in several decisions and opinions on *South West Africa*, the Court dealt with this right with regard to some more technical questions on international supervision,\(^{17}\) but also drawing certain substantive conclusions, carrying both positive\(^{18}\) and decidedly negative\(^{19}\) messages for the anti-Apartheid and wider human rights community. These cases were followed by the Advisory Opinion on the *Western Sahara*,\(^{20}\) which met with general acclaim, quite contrary to the reception of the ICJ’s refusal, 20 years later, to take on the merits of the *East Timor* case despite paying lip-service to the right of self-determination as an entitlement *erga omnes*.\(^{21}\) The most recent judicial pronouncements on the right to self-determination are to be found in the Advisory Opinions on the *Wall* of 2004\(^{22}\) and on the *Kosovo Declaration of Independence* of 2010,\(^{23}\) yielding very different results in the eyes of the protagonists of a progressive reading of this right. Since the present paper is devoted to the impact of individual human rights on the jurisprudence of the Court and *vice versa*, I will in what follows leave the case law on self-determination aside.


\(^{18}\) Cf. id.


On the other hand, what may deserve to be mentioned in conclusion of my short tour d’horizon of the jurisprudence of the Court turning “around” or otherwise somehow technically connected with human rights, are the two Judgments in which the United States was found in breach of the obligation deriving from the 1963 Vienna Convention on Consular Relations to inform detained foreign nationals of their right to seek consular assistance from their home country: LaGrand (2001) and Avena (2004). In the LaGrand case, Germany had argued that the entitlement of a foreigner to be informed of this right without delay under Article 36, paragraph 1, of the Vienna Convention was not only an individual right but had over time assumed the character of a human right proper, akin to an international guarantee of a fair trial. Though admittedly progressive, this position reflected the approach which not only the UN General Assembly had adopted already in the 1980s, but which above all the Inter-American Court of Human Rights had followed in an advisory opinion on the question rendered in 1999 upon the request of Latin American countries most strongly affected by the practical application of the death penalty in the United States. In its LaGrand Judgment of 2001, the Hague Court avoided pronouncing on the issue (and thus taking any stand on a position taken by another international court but remaining controversial between the Parties to the case before it). Having found that the United States had violated the rights accorded by the Convention to the LaGrand brothers as individual rights, it declared that it did not need to examine Germany’s additional argument claiming human rights status for these entitlements. This diffidence did not deter Mexico, in the Avena case brought in 2003, from reconfirming the German argument with even greater emphasis and attaching farther-reaching consequences to it, by claiming that the Article 36 right “is a fundamental human right that constitutes part of due process in criminal proceedings, […] this right as such is so fundamental that its infringement will ipso facto produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right.” The Court

25 LaGrand (note 24), at 494.
26 Avena (note 24), at 60–61.
replied first, in confirmation of LaGrand, that whether or not the Vienna Convention rights were human rights was a matter which it did not have to decide, and then went on to observe “that neither the text nor the object and purpose of the Convention, nor any indication in the travaux préparatoires, support the conclusion that Mexico draws from its contention in this regard”.

It should have become clear why I count the LaGrand and Avena Judgments, despite their being so recent, among the case law belonging to a phase marked by a certain degree of hesitation and constraint on the part of the ICJ vis-à-vis human rights—even though I submit that the Court’s avoidance of an answer to the question of the human rights character vel non of the individual right of consular assistance was due less to problems of principle with such characterization than to the fact that the United States had made a rather unattractive effort in its oral pleadings in LaGrand to have the Opinion rendered by the Inter-American Court of Human Rights on the Article 36 rights appear as a quantité négligeable, thus presenting the ICJ with a Pandora’s box it did not want to open. Remember that this happened at a time when the Hague Court, as a matter of general policy, avoided by all means possible supporting its own conclusions by reference to the findings of other international courts and tribunals, before in 2007 it changed its position diametrically in the Genocide case, der Not gehorchend, nicht dem eignen Triebe.

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27 Id., at 61.
28 In earlier publications on the LaGrand/Avena saga [B. Simma, Eine endlose Geschichte? Artikel 36 der Wiener Konsularkonvention in Todesstrafenfällen vor dem IGH und amerikanischen Gerichten, in: P.-M. Dupuy et al. (eds.), Völkerrecht als Wertordnung. Common Values in International Law. Essays in Honour of Christian Tomuschat, 423, at 436 (2006); B. Simma / C. Hoppe, The LaGrand Case: A Story of Many Miscommunications, in: J.E. Noyes et al. (eds.), International Law Stories, 371, at 388–389 (2007); B. Simma/C. Hoppe, From LaGrand and Avena to Medellin—A Rocky Road Toward Implementation, 14 Tulane Journal of International and Comparative Law 7, at 11–13 (2005)], I commented on the ICJ’s reactions to the Mexican contentions in Avena on the human rights character of the Article 36 rights and the consequences of their violation in a way which might have led to misunderstandings. Let me therefore clarify that in para. 124 of its Avena Judgment the Court repeated what it had already stated in LaGrand, namely that it did not have to decide whether or not these rights qualified as human rights. What it did not find a basis for in its interpretation of Article 36, paragraph 1, subparagraph (b), however, were the far-reaching conclusions Mexico had drawn from the alleged character of the Article 36 rights as fundamental human rights, to the effect that violations of these rights would ipso facto vitiate the entirety of criminal proceedings suffering therefrom. This is what I meant when in the Tulane Journal 2005 (supra) I wrote that in para. 124, the ICJ “curtail[ed] the potential reach of a human right to consular notification".
II. The Background and Context of the Earlier Case Law

The preceding review of the Court's jurisprudence has shown a certain growth in the number of human rights-related cases, and maybe also an increasing openness on the part of the Court to accept and deal with submissions and arguments in this regard during an early but protracted phase. However, the relevance and relative weight of human rights-related discourse in the case law described above differ greatly. If we wanted to test such relevance by determining when and how often the term “human rights” appeared in the dispositif of a decision, the result for the earlier period still under consideration would be thoroughly negative: that happened for the first time only in the Congo v. Uganda Judgment rendered in 2005, to which I will turn later.

An examination of the reasons for such relative abstinence on the part of the Court in human rights questions will have to consider a few rather basic facts about its jurisdiction, its reach, as it were. It is important to note that these facts pertain not only to what I have called the early phase in the Court's treatment of human rights; they are as relevant to the present situation as they were before, even though their influence appears to be somehow reduced.

The first, and actually the most basic, but also the most fundamental, reason is to be seen in the principle that the Court's jurisdiction is not compulsory; it presupposes the Parties' consent. In the case of human rights treaties, the most important expression of such consent is to be found in compromissory clauses providing for ICJ jurisdiction. However, among the major human rights treaties, only five contain such a clause.29 Of these five treaties, only the oldest, namely the Genocide Convention of 1948, allows immediate, direct access to the Court. This Convention is the only major UN human rights treaty which did not establish a treaty body for the supervision of performance by States parties30—where such monitoring bodies do exist in

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30 For a human rights-friendly view on the consequences of this feature for the legitimacy and admissibility of reservations excluding the jurisdiction of the ICJ as the only institutional means of supervising performance by States parties to the Genocide Convention see the Joint Separate Opinion of Judges Higgins, Kooijmans,
addition to a compromissory clause providing for ICJ jurisdiction, the question arises whether recourse to the treaty-based procedures before the respective monitoring body must be had before a case can be brought to the Court. This very question will soon be decided by the Court in its decision on Preliminary Objections in the Georgia v. Russia case, turning around the allegation of violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965.31

The second reason for the relative dearth of human rights cases before the ICJ is a structural one. In a way, we are looking at the “wrong relationship” here: approaching human rights problems, above all the issue of violations, from an inter-State perspective can only bring to the fore, and solve, certain limited aspects of these problems. The ICJ will deal with violations of human rights as matters of State responsibility, and State responsibility is typical “law by states for states”.32 The individuals who are victims of human rights violations will remain invisible; if a State decides to espouse their claims, the spirit of Mavrommatis will prevail.33 The task of the ICJ, however, is the settlement precisely of inter-State disputes; only States can sue each other before the Court, while individuals have to watch from the gallery in the Great Hall of Justice. Whether we like it or not, it is a fact that the preparedness of States to bring “pure”, genuine human rights scenarios before the Court has always been extremely limited, and my rather firm assumption is that this will remain the case—the few swallows I will mention in the next chapter have yet to make a summer.

The situation is of course different in the case of international humanitarian law. In essence, IHL displays inter-State structures of

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33 Mavrommatis Palestine Concessions, PCIJ 1924, Series A, No. 2, 12: “By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a 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. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant”.
That is why, despite the increasing human rights-friendliness of the iCJ, serious “droits de l’homme”-istes have never given up the idea of a real, genuine, World Court of Human Rights; see, most recently, the Research Reports by M. Scheinin (“Towards a World Court of Human Rights”) and M. Nowak / J. Kozma (“A World Court of Human Rights”) produced within the framework of the Swiss Initiative to Commemorate the 60th Anniversary of the Universal Declaration of Human Rights (on file with the author).
to see how the establishment of a Human Rights Chamber of the present Court could overcome any of the hurdles thus described.\textsuperscript{35} And, of course, this is the moment at which regional human rights courts are supposed to, and will, come into play; while they face plenty of challenges of their own, they do not suffer from the just described inherent limitations to which the ICJ is subject.

Returning to the Court’s role as an instrument designed for use by and between States, in contentious cases—and these instances constitute an overwhelming majority of the ICJ’s workload, the Court’s findings will depend on and essentially be limited by the submissions ultimately formulated by the parties; the situation resembles that of domestic civil litigation, characterized by the judicial deference to party autonomy coined in the prohibition of going \textit{ultra petita partium}. In this regard, the Court is thus “hostage” to the Parties; it is the parties who remain the masters of the proceedings.

Further, while it is true that, at the level of policy, contemporary international law posits a community interest in the respect for human rights (admirably accommodated, for instance, in the International Law Commission’s 2001 Articles on State responsibility).\textsuperscript{36} States have hitherto not shown great willingness, to put it mildly, to enforce such interest by litigating in the ICJ human rights disputes as such, even though, both doctrinally and technically, the possibility of doing so exists.\textsuperscript{37}

Such hesitation by States to pursue community interests and enforce compliance with obligations \textit{erga omnes}, particularly those flowing from human rights norms, by judicial means is no specific phenomenon before the ICJ, however. At the universal (UN) level, not a single inter-State complaint has ever been brought before a treaty body on the


basis of the International Covenant on Civil and Political Rights or any of the other human rights treaties, even though several of these treaties provide for this possibility. Inter-State litigation has also been extremely rare before regional human rights courts, and, in the cases where it has happened, it was there, too, almost always connected with an international political dispute, in other words it formed one of the Nebenkriegsschauplätze I referred to earlier.

B. The More Recent Picture: A Qualitative Leap?

I. 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.

The story begins with the Nuclear Weapons Advisory Opinion of 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.38 The Court’s replies on the matter may not strike the reader as particularly comprehensive or penetrating, but the remarkable fact is that here we have the Court for the first time squarely facing and developing a view on a human rights question, even though only in the abstract.

The step from the abstract to the concrete was accomplished in the Wall Opinion of 2004,39 in which the Court found that Israel’s construction of the separation barrier on occupied Palestinian territory

39 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (note 22), at 184–192.
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.

The Court’s next step was that from the advisory to the legally binding. It was accomplished in the *Congo v. Uganda* Judgment of 2005\(^\text{(40)}\)–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*.

In another of the cases brought by the Democratic Republic of the Congo against those of its neighbours which were involved in the Great Lakes wars from the late 1980s to the early 1990s, namely *Congo v. Rwanda*, the Claimant, *inter alia*, alleged violations of the Genocide Convention by Rwanda, but the Court decided that it did not have jurisdiction on that basis because Rwanda, the very country in which the most horrendous post World War II genocide had taken place in 1994, had excluded the legal effect of the Convention’s compromissory clause by way of a reservation, which the Court regarded as validly made.\(^\text{(41)}\) While this finding only followed its earlier jurisprudence,\(^\text{(42)}\) the Court took 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, among them myself, found this position unsatisfactory enough to write a joint Separate Opinion.\(^\text{(43)}\)

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\(^\text{(40)}\) Armed Activities on the Territory of the Congo (note 37).


\(^\text{(43)}\) Supra, note 30. Our criticism proceeds from the observation that it is highly problematic for a State to make a reservation excluding recourse to the monitoring or judicial machinery embodied in a human rights treaty, especially if such recourse constitutes the only option available to have questionable reservations to that treaty evaluated in an objective manner. The Separate Opinion notes the importance of the role of the ICJ for the achievement of the purposes of a treaty such as the Genocide Convention, where, in the absence of a treaty body exercising supervisory functions, States are the only monitors of each others’ compliance with their treaty obligations and the only impartial third party they can call in case of a dispute in this regard is the Court. For a critical view on this Opinion cf. H. Thirlway, The International Court of Justice, 1989–2009: At the Heart of the Dispute Settlement System?, 57 Netherlands International Law Review 347, at 366–371 (2010).
Next in the line of 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 what I earlier called a juridical *Nebenkriegsschauplatz*, collateral action within the context of a wider political-military dispute. This becomes clear if we confront both the submissions listed in Bosnia’s original application, squeezed–unsuccessfully–through the needle’s eye of the Genocide Convention, and the concept of one single, overarching “genocide” comprising the entirety of the hostile activities of the Serbs and the Bosnian Serbs in Bosnia-Herzegovina put forward by the Claimant at the stage of the hearings 13 years later, with the actual outcome of the case: the Court following the findings of the ICTY, according to which one single incident of genocide, albeit of the utmost gravity, had occurred at Srebenica in July 1995, and declaring Serbia in breach of the obligation of prevention embodied in the 1948 Convention. Be this as it may, the case remains a human rights case, like the still-pending second *Genocide* case, this time brought by Croatia against Serbia in 1999, in regard to which the Court engaged in a truly remarkable effort to arrive at jurisdiction in 2008.

Once we leave these politically-charged instances, we arrive at the Case of *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo) decided by the Court in November 2010. From the viewpoint of the handling of human rights-related matters by litigants as well as by the ICJ itself, *Diallo* displays very different characteristics. At first glance, we have to do with 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 to our topic. 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

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46 *Ahmadou Sadio Diallo* (note 24).
Congoese authorities had on the fate of two companies which he controlled, regarded by the Claimant as a case of indirect expropriation. I will not go into what I will call the international economic (company/shareholders) law aspects involved in the case as opposed to the human rights law on which Guinea relied concerning the treatment of Diallo personally, namely the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights. What is noteworthy in our context, however, is that, while in Guinea’s original application allegations of violations by the DRC of obligations arising under international economic law had enjoyed priority over the claims of violations of Diallo’s human rights, this underwent a marked change after the Court had in 2007 declined jurisdiction over the most important company and shareholders’ law claims. From now on, the human rights aspects rose like a phoenix from the ashes of the case, if I am allowed this rather unflattering metaphor, and enjoyed equal rank, if not priority, both in the Parties’ pleadings and in the final Judgment of the Court. In a way, the case also emancipated itself from the dogmatic straitjacket of diplomatic protection: the Judgment goes on speaking of Diallo’s individual human rights as such and does not even try to translate them back into rights of Diallo’s home State à la Mavrommatis; it engages in straightforward assessments of breaches of human rights treaty provisions and in so doing expressly refers to, and follows, the jurisprudence of UN and regional monitoring bodies, without engaging in any of the exercises in coyness that had marked the Court’s relationship with other international courts and tribunals before (that is, until the Genocide Case). The only occasion at which an element of diplomatic protection resurfaces is with regard to the question of reparation for the injuries suffered by Diallo: such reparation is to be determined through negotiations between the Parties, for which the Court sets a rather tight deadline of six months; thus, an inter-State mechanism is used by which the affected individual as the bearer of the human rights in question is represented at the diplomatic level by his State of nationality; while the individual is the holder of the rights, the judicial enforcement of these rights remains entrusted to the State (faute de mieux, one could say, because in the case at hand, no other, specialized implementation machinery is available). I would

48 Ahmadou Sadio Diallo (note 24), at para. 164.
submit that in thus squaring the procedures of diplomatic protection and human rights as direct rights of the individual under international law, the Court in Diallo has made an important contribution to the reconciling of these two areas of the law in a progressive sense, further away from the spirit of Mavrommatis and in line with the recent efforts of the ILC. 49

Thus far go the recent human rights cases already decided by the Court. Our search for new trends in the ICJ’s human rights-related jurisprudence would be incomplete, however, if we did not include in our consideration a number of pertinent cases which are still pending. First among them is the case of Georgia v. Russia, brought in 2008, 50 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. On the one hand, this is a case which, like the Balkan Genocide cases I have mentioned before, turns exclusively round a particular human rights treaty; within an inter-State, and in this sense purely bilateralist, framework the Applicant accuses the Respondent of having committed violations of its obligations under CERD—a constellation which should make the academic protagonists of a so-called “objective” nature of human rights treaty obligations reconsider their views. 51 On the other hand, however, Georgia v. Russia is as far from constituting what earlier on I called a “pure” human rights case as one can get, because if ever there was an instance of ICJ litigation presenting all the features of a legal Nebenkriegsschauplatz, this is it.

Moving from one extreme to the other, the case introduced by Belgium against Senegal in February 2009 relating to the obligation to prosecute or extradite 52 appears to me the most clean-cut, “unpolitical”, as it were, human rights case so far brought before the Court. If a fully

49 Cf. the Separate Opinion of Judge Cançado Trindade in the Mavrommatis Case (note 33), at paras. 222–242.
51 Cf. on this view B. Simma, From Bilateralism to Community Interest in International Law, 250 Recueil des Cours 217, at 364–375 (1994).
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. Belgium has come to the Court to vindicate its right as a State party to the 1984 UN Convention against Torture (CAT) as well as under customary international law to secure that Hissène Habré, the former dictator in Chad and alleged perpetrator of acts of torture during his violent reign in Chad in the 1980s, now present in Senegal, will either be prosecuted by Senegal, or, failing such prosecution, will be extradited to Belgium—in other words, that Senegal fulfill its obligation of aut dedere aut judicare. The Applicant does not frame its request in terms of diplomatic protection of Belgian nationals except very marginally; while the Application mentions that at the domestic level the case was triggered by complaints to the Belgian courts made, among others, by a Belgian national of Chadian origin and taken up by the Belgian judiciary in the exercise of the passive personality principle, this link retreats far into the background in Belgium’s further pleadings. Rather, Belgium construes its claims as deriving from the right of any State party to CAT to see to it that any other State party fulfill the obligation correlative to this right, to either prosecute or extradite. The Applicant regards this obligation as arising erga omnes partes to the Convention. It thus bases itself on an exclusively inter-State construction of CAT, which, by the way, perfectly fits the structure of the Convention itself: CAT contains nothing but a set of obligations for its States parties and nowhere mentions the individual human right to be free from torture; it rather presupposes this right as consecrated in other human rights treaties like the ICCPR as well as in rules of general international law juris cogentis on combating impunity for international crimes. Significantly, Senegal appears to agree with Belgium’s view of the situation in conventional as well as customary international law. Again, what we have before us here is an understanding of the rights and obligations arising for States parties to human rights conventions which does not lose itself in lofty constructs of “objective” obligations under such treaties, with the respective rights belonging exclusively to individuals, or the like; rather it retains the emphasis on mutually-bound States parties and their responsibility to keep the treaties alive.

Speaking of responsibility in the sense of State responsibility for internationally wrongful acts, this, however, is a point on which

53 Id., at para. 3.
Belgium's humanitarian zeal appears somewhat premature: in its written reply to questions put to it at the end of the hearings on provisional measures by Judge Cançado Trindade, the Applicant explains its litigant status in terms of such State responsibility, namely as that of an “injured State”, more precisely, a “specially affected” State, within the meaning of Article 42 of the ILC’s 1981 Draft Articles, “since the non-performance of the 1984 Convention affects it as a State Party to that Convention”.54 Strictly speaking, however, what Belgium pursues in its application is not the invocation of State responsibility. Such invocation presupposes the prior commission of an international wrong. However, the facts of Belgium’s case have not reached that stage yet; rather, what its claim does, moving at the level of “primary rules”, is to request Senegal to perform its obligations under the 1984 Convention and thus avoid State responsibility proper setting in.

I will conclude my tour d’horizon of 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. This became painfully clear in its Judgment in the Arrest Warrant (Yerodia) Case between the Democratic Republic of the Congo and Belgium, in which the Court took the highly problematic view that former foreign ministers enjoy absolute immunity from the criminal jurisdiction of national courts also for past official acts constituting grave crimes against humanity, even incitement to genocide.55 If the international human rights community might have nurtured the hope

54 Response of Belgium to the question put by Judge Cançado Trindade at the end of the public sitting of 8 April 2009, Doc. BS 2009/15 (15 April 2009), at 4 (on file with the author).
that the Court would somehow improve the less than human rights-friendly position it had taken in the Yerodia Case by using the opportunity to do so presented by the case of Republic of Congo v. France brought in 2002, it was to be disappointed because this Application was withdrawn in late 2010. It had its origin in judicial proceedings initiated in France against the President, the Minister of the Interior and the Inspector-General of the armed forces of Congo (Brazzaville) based on accusations of the commission of crimes against humanity and acts of torture under the responsibility of these persons during an internal conflict in their country. The Republic of the Congo regarded the action of the French judiciary as violating the immunity from foreign criminal proceedings owed to these high-ranking officials and took the case to The Hague, without bothering much about the niceties of jurisdiction. Remarkably, however, France accepted the jurisdiction of the Court as a forum prorogatum under Art. 38 (5) of the ICJ Statute. Thus the stage was set for what might have become a reconsideration of Arrest Warrant, above all a new opportunity for the Court to clarify the purport of the principle of universal jurisdiction in criminal matters, a task it had preferred not to take on ten years earlier. It was not to be.

This leaves us with the case of Germany v. Italy brought in late 2008, in which Germany asks the Court to determine that Italy is responsible for breach of its international obligation to respect Germany’s jurisdictional immunity for sovereign acts, originating from a judgment by Italy’s Corte di Cassazione denying such immunity, the factual origins of which lie in war crimes and crimes against humanity perpetrated by the Third Reich’s armed forces and authorities during World War II against victims of both Italian and Greek nationality. In its Countermemorial of 22 December 2009, Italy raised counterclaims by which it attempted to raise the human rights “weight” of the case and put the blame in this regard on the Applicant, but this strategy failed when the Court unanimously rejected this procedural move in July 2010. In January 2011, Greece filed an application for permission to

intercede in the case. In view of the sensitivity of this *lis pendens*, I will refrain from commenting on the case, except by saying that this time the Court will not escape the extremely difficult task of reconciling the imperatives of the “new” international law (of human rights), elevated by its quality as *jus cogens*, and the exhortation not to destabilize time-honoured rules protecting the sovereignty of States in their mutual interest.

II. Prospects for the Future

In the light of the recent patterns of State and judicial practice thus described, is there something we can safely predict about the future “chances” of human rights in the ICJ? We can be certain of one thing: 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. This has become apparent in the marked increase of relevant cases in the last few years.

In contentious proceedings, human rights-related arguments will also continue to be made beside—or even against—more traditional, inter-State, ways of pleading. If there ever was a certain hesitancy on the part of the Court to tackle the human rights aspect of a case where this could be avoided, this tendency will grow weaker, if it has not disappeared already. It is to be expected that from time to time straightforward human rights cases, that is, claims of violations of such rights, will reach the Court, as they have done already. I would also assume that the Court will be prepared to deal fully with human rights arguments in particularly supportive ways when such arguments are in line with, or corroborate, or strengthen more traditional ways of international law reasoning; I consider *Congo v. Uganda* and the Wall Opinion as precedents in point. Further, applications for Provisional Measures will also increasingly be supported by considerations of human rights. As a consequence, the question how the Court will deal with the jurisprudence of specialized human rights courts and treaty bodies will arise with greater frequency—I have already mentioned that in this regard the *Diallo* Judgment is a good example to follow.

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In advisory proceedings, the role played by human rights will of course also depend on the nature of the questions put to the Court. If they appear pertinent, my expectation is that the Court will not hesitate to treat them exhaustively, because here traditional inter-state “reflexes”, jurisdictional straitjackets and procedural hurdles are much less pronounced and the Court is not confined to the submissions of the States participating in the proceedings as in contentious cases. It is not surprising, therefore, that in the past some of the Court’s most marked contributions to international human rights have been made through advisory opinions.

Thus far a modest prognosis of things to come. It is essentially quantitative; we are on safe ground in predicting that in the future the Court will have even more occasions to develop its human rights jurisprudence than it has had so far. The Court has been increasingly supportive of human rights claims and it has demonstrated that it can handle human rights in a way considered respectable also by the “droits de l’homme”61. In this regard, it has caught up with the existing human rights courts. This leads me to a normative-qualitative assessment: is there something the ICJ could do in the field that the specialized courts cannot do, or that the Hague Court might be able to do better? This is the question I will pursue in the third and last part of my contribution.

C. A Proper Role for the Court

Let me start with a word of caution. Human rights are, and will remain, a field in which the Court ought to tread with the utmost care. This admonition is appropriate for at least two reasons. The first is to be seen in the great advances of international human rights law brought about by the regional human rights courts, and to a certain degree also by the non-judicial institutions of the UN human rights–particularly treaty–system. These actors have developed doctrines and rules custom-made for human rights, for instance, with regard to the interpretation of human rights treaties and other questions of treaty law,61 which may go too far to more conservative circles of the legal mainstream. This acquis must not be levelled by the participation in the discourse of a generalist

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61 Cf. the comprehensive study by F. Vanneste, General International law Before Human Rights Courts (2010).
court like the ICJ. I would submit that the way in which the ICJ engaged in an exercise of dynamic, or evolutionary, treaty interpretation in its recent Judgment on *Navigational and Related Rights* on the San Juan River between Costa Rica and Nicaragua\(^{62}\) bodes well in this regard and may indicate the willingness of the Court to test the application of progressive traits originally developed in specialized human rights jurisprudence to other branches of international law.

The second reason the ICJ ought to be careful about its role in the human rights field lies in the socio-political basis of the Court in the international community of States which it is to serve. In a certain sense, the ICJ is the permanent international court which still resembles most closely a system of dispute settlement by voluntary arbitration from the viewpoint of the freedom of States to have recourse to it: its contentious jurisdiction is still strictly consensual, and, compared with the working of more recently created judicial bodies especially at the regional level, the functioning of the Hague Court shows a distinctly more pronounced respect for the sovereignty of its users throughout. Thus, could we rule out that at least a part of its clientele might be somewhat less than enthusiastic if the ICJ assumed—more pronounced—features of a human rights court? Could the consequence be a loss of popularity with some of its best customers? Speaking frankly, most States, that is, not only the usual suspects in the eyes of Western observers, all too often behave like foxes guarding the well-being of chickens in human rights matters and are thus rather reticent towards the idea of truly effective international third-party adjudication of their problems in this field. After 25 years of experience in the international human rights machinery, I am still not convinced that “*Wasch mir den Pelz, aber mach mich nicht nass*”\(^{63}\) is entirely off the mark as a description of the hypocrisy that comes with it. International human rights are a permanent nuisance, and very often a threat, to the holders of political power. If the Court, to the compulsory jurisdiction of which States might have consented with the expectation that what they could possibly get involved in would be inter-State litigation of the traditional type, began broadly to accept, to give just one example,

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\(^{63}\) “Wash my fur, but don’t make me wet!” I hope that this translation can convey what I want to say.
applications or interventions by States “other than injured States” in the sense of the ILC’s Draft Articles on international responsibility, 64 this may come as a rather unpleasant surprise to many of its clients, not all of which count among the most human rights-respecting countries. After all, the development of international human rights will not infrequently upset sovereignty-based rules of international law with which most States will have been, and still are, quite comfortable.

What, then, is a proper role for the Court?

In my view, the most valuable contribution the ICJ can make to the international protection of human rights—a role for which it is particularly well equipped and has almost no competition—consists of what could be called the juridical “mainstreaming” of human rights, in the sense of integrating this branch of the law into the fabric of both general international law and its various other branches. 65 By way of exemplifying what the Court can do, and is already doing, to fulfill that task, it can render human rights arguments more readily acceptable to international law generalists by interpreting and applying substantive provisions of human rights treaties in a state-of-the-art way, compared, for instance, to the reading given to such provisions by certain General Comments issued by UN human rights treaty bodies, all too often marked by a dearth of proper legal analysis compensated for by an overdose of wishful thinking. Further, the Court 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”) observer. Let me mention the following issues with regard to which the Court has already engaged in what I have just called “mainstreaming”:

(1) As I have indicated above, in its recent case law the Court has clarified the nature of obligations flowing from human rights treaties,

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64 Cf. Simma (note 36), at 367–373.
65 Cf. Vinuales (note 4) regarding an analogous role of the Court in the field of international environmental law.
in the sense that these obligations create correlative rights not only for individuals but also for the other States parties to the treaties, which these parties may enforce or vindicate in judicial proceedings.  

(2) The Court has made decisive contributions to the development of the law on reservations to human rights treaties and several other questions of the law of treaties applying particularly to such instruments.  

(3) In concert with the jurisprudence of regional human rights courts and UN human rights treaty bodies, the ICJ has clarified the territorial scope of human rights treaty obligations.

(4) The Court has contributed to the development of the doctrine of positive obligations in the area of human rights by giving contours to obligations of prevention.

(5) In several decisions, it has dealt with the question of attribution to a State of human rights violations by non-State actors.

(6) The Court has clarified the relationship between human rights law and international humanitarian law.

(7) In its very recent case law, it has dealt with the relationship between treaty-based implementation procedures provided for in human rights conventions and its own jurisdiction.

(8) Following a—rather unpromising—start with regard to the setting of priorities between human rights considerations/obligations and

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66 Cf. my preceding remarks on the LaGrand (note 24), Avena (note 24), Application of the International Convention on the Elimination of All Forms of Racial Discrimination (note 31), Questions relating to the Obligation to Prosecute or Extradite (note 52) and Ahmadou Sadio Diallo (note 24) cases.

67 Cf. my remarks on the Court’s Advisory Opinions on Reservations to the Genocide Convention (note 11) and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (note 22) as well as on its Judgments in the Armed Activities on the territory of the Congo Case (note 30) and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (note 44) cases.


70 Cf. id. and Armed Activities on the Territory of the Congo (note 37).


72 Cf. the Order on Provisional Measures of 15 October 2008 in Georgia v. Russia (note 68) and the forthcoming Judgment on Preliminary Objections in the same case.

73 Arrest Warrant (note 57).
other rules of international law, particularly State immunity, the Court is currently facing a new chance to develop its case law on this matter.  

(9) It has already adapted rules on State responsibility for internationally wrongful acts to the special situation of human rights violations.  

(10) Finally, and more generally, the Court has accepted and developed what I would call international legal vehicles which were then put to use to give human rights obligations even greater legal authority; in the first instance the category of _jus cogens_, and doctrinally connected to such higher law that of obligations _erga omnes_.

Thus, if we wanted to find a short-term description for our topic of the International Court of Justice and human rights, we could call it an instance of international legal discourse in which old international law (represented for our purpose by the Court) encounters the new. What we can observe already is that the Court has become a major player in a process in which human rights and general international law mutually impact upon one another: human rights “modernize” international law, while international law “mainstreams”, or “domesticates” human rights.

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74 In the _Germany v. Italy_ Case, with Greece requesting to intervene (note 60).  
75 Above all, concerning responsibility for the breach of negative obligations and such responsibility in case of violation of positive obligations, particularly obligations of prevention, in the _Genocide_ Judgment of 2007 (note 44); concerning reparation for the non-prevention of genocide in the same case, and most recently concerning reparation for human rights violations for the benefit of the individual victims in _Ahmadou Sadio Diallo_ (note 24).  
76 As regards the Court’s specific contribution to the development of these two categories, while the promotion of obligations _erga omnes_ can be clearly attributed to its jurisprudence, the Court has for an embarrassingly long time been hesitant to pay more than lip-service to _jus cogens_; cf. the Separate Opinion of Judge _ad hoc_ John Dugard in the _Congo v. Rwanda_ Case (note 30), at 86.