

Asser – ICJ Series

The International Court of Justice: A major player in the field of Human Rights'

On 26th October 2016, the TMC Asser Instituut hosted the third lecture in the Asser-ICJ Series. The speakers for the evening were Prof. Dr Bruno Simma, Judge at the Iran-United States Claims Tribunal (IUSCT) and former Judge of the International Court of Justice (ICJ/the Court); and Dr Dominika Švarc, Dean of the American University Law School in Bosnia-Herzegovina and former Legal Officer of the ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY). Dr Olivier Ribbelink, Senior Researcher of the T.M.C. Asser Instituut and initiator of the Asser – ICJ Lecture Series, welcomed and introduced the speakers of the event.

For the evening, Judge Simma and Dr Švarc adopted roles to present some of the human rights developments in the case law of the ICJ. Judge Simma adopted the role of a critic of the Courts contribution, while Dr Švarc spoke about its positive contributions to the human rights regime. Dr Švarc provided an overview of the Court's growth in the field of human rights, especially during her time there (2010 – 2014), specifically mentioning two key cases, *Georgia v. Russia* and *Croatia v. Serbia*. She also referred to the Court's initial reluctance in earlier years to bring human rights into the main focus of the cases and how it was often a peripheral issue or dealt with in individual judgments. However, she noted that it was important to bear in mind that the ICJ was not a specialised human rights court and it was founded prior to the rapid developments and proliferation of human rights treaties and monitoring bodies. Despite this the Court has played a role in streamlining the human rights regime, through clarifying human rights norms and integrating them into general international law.

Following this general introduction, Dr Švarc outlined the areas which the presentation focused upon and the dialogue style approach which was taken by herself and Judge Simma while addressing each point in turn. The first area which they dealt with was the role of the ICJ in recognising and clarifying the nature of human rights norms. Dr Švarc noted that as far back as 1949 in the *Corfu Channel* case, the Court had referred to humanitarian obligations of states in providing warnings of the presence of mines. She further mentioned the Court's return to the humanitarian concerns in the *Nicaragua* case to confirm elements of international humanitarian law as customary law. Finally, she discussed the Court's approach to *jus cogens* and *erga omnes* norms development. While she noted that the Court showed some reliance in dealing with *jus cogens* norms expressly, *erga omnes* norms were a concept developed by the Court in its earlier incarnation as the PCIJ (Permanent Court of International Justice) in the *Barcelona Traction* case. She noted the Court's contributions in both a substantive and systematic way to the human rights regime.

In response to the points raised by Dr Švarc, Judge Simma discussed the limitations to the Court's role. He pointed out that the trend of growth in human rights related cases may be more reflective of a general growth in what constitutes human rights violations, and that some cases that may have previously been limited to other areas of law also now involve human rights concerns. The Court could simply be responding to an elevated role of human rights as raised by the state parties in their submissions to the Court. He also noted that a pure human rights case is unlikely given the existence of specialised human rights courts. Judge Simma further discussed the fact that *jus cogens* norms have still not been fully accepted by all members of the bench, and that there are dissenting opinions concerning *erga omnes* norms, especially in the *Belgium v. Senegal* case. The Court still deals with human rights claims in a peripheral manner in some cases, but in referring to human rights, it tends to focus on treaty based arguments rather than customary law. Finally, he noted the political limitations of the Court, given that it is a Court with inter State jurisdiction, requiring states to accept its jurisdiction and bring forward cases only against other states, which in turn must accept its jurisdiction. Dr Švarc expanded on this in regards to the Court's need to respect the subject matter of the case brought before it and that there is a need for state willingness to come before the Court. She highlighted the cases of *Georgia v. Russia* and *Croatia v. Serbia* to demonstrate that the Court does not exist in a political vacuum.

Moving on to the scope of application of human rights treaties, Dr Švarc discussed the Court's acceptance of the extraterritoriality of human rights treaties and the Geneva conventions. The Court further accepted in the *Wall Advisory Opinion* and the *Democratic Republic of Congo v. Uganda* that human rights obligations continued to apply under circumstances of derogation such as armed conflicts. Additionally, the Court noted the complementary nature of human rights and international humanitarian law obligations in times of armed conflict, with international humanitarian law being *lex specialis*. In response to this, Judge Simma noted on the other hand the lack of clarity provided by the Court in regard to these principles and the application of such in complex situations of armed conflicts.

The final point discussed was the role of the ICJ in clarifying the relationship between international human rights law and general international law, specifically state responsibility and treaty interpretation. Dr Švarc referred to the *Croatia v. Serbia* case and the Court's discussion of the application of general rules of state responsibility and law of treaty interpretation where the specific treaty at hand does not provide an answer on such issues. She mentioned the fact that such aspects are generally absent in human rights treaties. She noted the Court's efforts to close gaps in treaty law. Furthermore, she discussed the right to invoke state responsibility in interstate claims and the development of the principle of attribution of states for the actions of non-state actors. She mentioned the Court's development since the *Chorzow Factory* case in the area of reparation for injuries, which is also evident in the human rights regime and has been referred to by the ICJ. However, the redress mechanism of the Court has often been criticised and this issue is due to be discussed in the pending re-referral of the *Democratic of Congo v. Uganda* case for further clarification on reparations. Finally, on treaty interpretation Dr Švarc noted a similarity in approach by the Court to treaty interpretation as in the case of human rights bodies. Judge Simma went on to discuss the Court's role in interpreting human rights language into the broader language of general international law. He also noted its contribution in referring to a positive obligation to prevent violations under the Genocide Convention. He discussed the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and how these served as laws made by states for states through clear codification mandate of the International Law Commission in drafting the principles. He pointed out the challenges faced by the Court as states do not like to challenge other states human rights violations, and the role of diplomatic protection in international law.

The presentation was followed by a short Q&A session. The question session ended on the positive note that the ICJ had served a key role in mainstreaming human rights decisions. Dr Olivier Ribbelink provided a closing note, thanking Judge Simma and Dr Švarc for their contributions and the participants for their attendance at the event.