

HUMAN RIGHTS IN THE RECENT JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE



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ABSTRACT

The Article aims at human rights issues in the cases heard (judgments and advisory opinions delivered) by the International Court of Justice ("ICJ" or "the Court") within the past five years. The author analyses the newest jurisprudence of the ICJ thereby revealing the development of human rights and providing some general insight into the role of the ICJ and the importance of the Court's jurisprudence in the field. Despite the jurisdiction of the ICJ (neither specifically designed for or limited to human rights issues, nor allowing individual complaints), the Court's impact on the protection of human rights and the development of international human rights law is uncontested. Among the judgments and advisory opinions announced within the period 2016-2020 the author distinguishes the following cases related with human rights: the *Marshall Islands cases* (*Marshall Islands v. United Kingdom*, *Marshall Islands v. India*, *Marshall Islands v. Pakistan*), the *Jadhav case* (*India v. Pakistan*) and the *Chagos Archipelago case* (advisory proceedings).

Accordingly, the research focuses on the issues of nuclear weapons and human rights, the right to consular notification and access and the peoples' right to self-determination. The research reveals that the *Marshall Islands cases*, on the one hand, have precluded a more elaborate clarification on the issues of complete nuclear disarmament as they ended without the decision on the merits; on the other hand, these cases have reminded of the legal uncertainties in the face of remaining threat of nuclear weapons and contributed to the movement on nuclear disarmament, which witnessed the adoption of a treaty on complete prohibition of nuclear weapons in 2017. Nuclear weapons not only have catastrophic consequences on environment and humanity, but also violates human rights (particular

individual rights, e.g. the right to life) and is a breach of international human rights law. The *Jadhav case* contributed to the interpretation of the Vienna Convention on Consular Relations (Article 36): the right of consular notification and access shall not be limited even in cases of the charges of espionage. In the *Chagos Archipelago case* (advisory opinion), the ICJ has reminded of the importance of the right of peoples to self-determination and *inter alia* confirmed the customary nature of this right (principle).

Keywords

Human rights; nuclear weapons; the International Court of Justice; peoples' right to self-determination; consular notification and access; *Marshall Islands cases*, *Jadhav case*, *Chagos Archipelago case* (advisory opinion), etc.

1. INTRODUCTION

International community has started calculating the second century of international justice¹, which is inseparable from the protection of human rights. Bringing to justice those responsible for genocide, war crimes and crimes against humanity is a concern of the international community; universal implementation of human rights' obligations is essential for both international legal order and international peace and security. Among different international courts, arbitrations and other mechanisms for international dispute settlement, the ICJ has been considered as and remains the major international institution for the realisation of international justice. Although, differently from other, especially regional, institutionalised mechanisms, particularly designed for the protection of human rights, the ICJ has neither been intended solely for human rights disputes, nor has been limited to this type of cases, the Court's impact on the development of human

East Timor) is one of the newest UN Member States, admitted to the organisation in 2002 as 191st Member State, following the referendum where Timorese people voted to begin the process of independence from Indonesia⁷².

Judgments and advisory opinions delivered by the ICJ before the *Chagos Archipelago advisory opinion* referred to the above listed legal sources which established the right of self-determination, explained the evolution of the right at issue, emphasized States' obligations in respect of that right, recognized the right of peoples to self-determination as a right *erga omnes*. For example, in the case *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*⁷³ (*Advisory Opinion on Palestine*) the Court has reminded of the applicability of the right to non-self-governing territories and that it was a right *erga omnes*⁷⁴. In the above mentioned advisory opinion and the *Western Sahara advisory opinion*⁷⁵ emphasis was made to the UN General Assembly's resolutions. In the *Advisory Opinion on Palestine*, having stated that "the existence of a Palestinian people [was] no longer an issue", the Court referred to their right to self-determination as established in numerous GA resolutions.⁷⁶ The Court indicated that the construction of the wall by Israeli in the occupied Palestinian territory (along with measures taken previously) severely impeded the exercise of this right and this was Israeli's breach of the obligation to respect that right⁷⁷, which the Court ordered to respect⁷⁸ as the "obligation *erga omnes*"⁷⁹, and therefore "all States [were] under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory", "not to render aid or assistance in maintaining the situation created by such construction".⁸⁰ The *Western Sahara advisory opinion* also emphasized the importance of the respect for the will of people in the context of the administering power.

*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*⁸¹ (*Kosovo advisory opinion*), which preceded the *Chagos Archipelago advisory opinion*, was also accompanied by dissenting opinions and discussed by academics. The Court limited itself to deciding on the legality of the declaration of independence, however, has not elaborated on the issue of secession (conditions thereof, remedial secession, etc.).

Nevertheless, it recognised that "the scope of the principle of territorial integrity [was] confined to the sphere of relations between States"⁸², thus the principle does not preclude peoples' exercise of their right to self-determination by declaring independence. The declaration of independence of Kosovo of 17 February 2008 did not violate international law, - the interim regime under the UN administration was not an obstacle for the expression of such genuine will of Kosovar people who (Kosovo Albanians) had faced long-lasting systematic repressions, prosecution and violence.⁸³ The Court, with reference to its former jurisprudence, summarised the development of the right of self-determination during the second half of the twentieth century: it occurred "in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation".⁸⁴ Moreover, the evolution of this right in that period was "one of the major developments of international law".⁸⁵ The applicability of the right to all, including non-self-governing territories, under the trusteeship of the League of Nations (the United Nations) had been recognised earlier in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.⁸⁶ As was recognised in one of the separate opinions to the *Kosovo advisory opinion*, "the principle of self-determination has survived decolonization" and "applies in new situations of systematic oppression, subjugation and tyranny"⁸⁷.

In addition to what was construed in the previous cases, the *Chagos Archipelago advisory opinion* covered an issue of whether the right of self-determination had crystallised as a customary rule binding States. International legal custom was defined in the *North Sea Continental Shelf cases*⁸⁸ and even earlier, in *The case of the S.S. "Lotus"*⁸⁹. In the *Chagos Archipelago advisory opinion* the Court considered the UN General Assembly's resolution 1514 as having "a declaratory character with regard to the right to self-determination as a customary norm"⁹⁰, that the wording used indicated "a normative character"⁹¹. However, "[t]he right to self-determination under customary international law does not impose a specific mechanism for its implementation in all instances"⁹². The ICJ concludes that "[b]oth State practice and *opinio juris* at the relevant time confirm the customary

law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination".⁹³ The Court not only declared the right of peoples of non-self-governing territories to exercise their right to self-determination in respect of their territory as a whole, the integrity of which must be respected by the administering Power, but as in *Western Sahara advisory opinion*, stressed the importance of the genuine will of the people: "any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination".⁹⁴

3.3.3. Consular notification and access

In *Jadhav case* the Court was called upon to construe States' obligations under the Vienna Convention on Consular Relations of 1963⁹⁵ ("Consular Convention"), some two decades following the preceding judgment in the case *LaGrand (Germany v. United States of America)*⁹⁶, which dealt with similar issues. The alleged violation of individual rights (Article 36 of the Consular Convention) was to be determined as an object of inter-State dispute.⁹⁷ As the Court stated, "Article 36, paragraph 1, creates individual rights, which, by virtue of Article 1 of the Optional Protocol, may be invoked in this Court by the national State of the detained person".⁹⁸ The article at issue "creates individual rights for the detained person in addition to the rights accorded the sending State, and consequently the reference to "rights" in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual".⁹⁹

A jurisdiction is a corollary of the principle of sovereign equality of States under international law, as well as a prohibition to intervene in the affairs of other States. The principles to justify jurisdiction over aliens (territorial principle, nationality principle, passive nationality principle, the protective and security principle, the universality principle), in the words of I. Brownlie, "often interweave in practice" and "each individual principle is only evidence of the reasonableness of the exercise of jurisdiction".¹⁰⁰ States may sometimes arrive at a concurrent jurisdiction and disagree on the (priority or exclusive) rights to institute proceedings in such cases.¹⁰¹ Thus the issue,

being rather complex, is even more sensitive in cases of criminal jurisdiction, related with the arrest, detention, trial and sentencing of a foreign national, especially, in cases of corporal punishment. The lawfulness of the exercise of jurisdiction depends on not only the existence of a respective ground (principle) but also the compliance with all procedural requirements. When charges are made in respect of an alien, the receiving State's obligation to inform a consular officer of the sending State and to allow their communication (consular notification and access) is one of them.

Article 36, paragraph 1 (b) of the Consular Convention establishes the obligations of the receiving State towards the detained person and the sending State. Accordingly, consular officers shall be free to communicate with the nationals of the sending State, to have access to them, to visit and speak with them and to arrange for their legal representation, respective rights of consular notification and access belong to nationals. In *Avena and Other Mexican Nationals (Mexico v. United States of America)*¹⁰² (*Avena case*) the Court listed three elements of the right in Article 36, paragraph 1 (b): the right of the individual concerned to be informed without delay of his rights under Article 36; the right of the consular post to be notified without delay of the individual's detention, if he so requests; and the obligation of the receiving State to forward without delay any communication addressed to the consular post by the detained person. The judgment contains reference to the *La Grand case*, where the ICJ construed that Article 36, paragraph 1, established "an interrelated régime designed to facilitate the implementation of the system of consular protection"¹⁰³. Although the above listed obligations seem to be quite clear (in the words of the Court "[t]he clarity of these provisions, viewed in their context, admits of no doubt"¹⁰⁴), the cases before the Court reveal that these requirements are not always satisfied. Usually, States do not in general argue the existence of the obligations of consular notification and access; however, disagree on the conditions of their application: the persons in respect of which they apply, the consequences of the refusal of the right by a national, the meaning of "without delay", etc. All these aspects should be clarified in the context of a particular case.

Among the issues construed in the Court's jurisprudence on consular notification

and access was the issue of a national's request (or refusal) as regards the provision of consular information. The ICJ stated that "the clear duty to provide consular information under Article 36, paragraph 1 (b), [did] not invite assumptions as to what the arrested person might prefer, as a ground for not informing him <...> [it] rather [gave] the arrested person, once informed, the right to say he nonetheless [did] not wish his consular post to be notified¹⁰⁵." However, under Article 36, paragraph 1 (c), the sending State's right to provide consular assistance to the detained person may not be exercised (consular officers shall refrain from taking an action on behalf of a national) "if he expressly opposes such action".¹⁰⁶ The exercise of the rights or the sending State also depends upon notification by the authorities of the receiving State.

One of the issues that required clarification in majority of cases under the current analysis was the meaning of "without delay", as established in Article 36 of the Consular Convention. For example, in *Avena case* having established the violation of the duty to be informed "without delay" in 47 cases, the Court denied that "without delay" was to be understood as "immediately upon arrest and before interrogation"¹⁰⁷. Nevertheless, this does not release a State from a duty of notification in such cases: "there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national"¹⁰⁸. "Without delay", as established in Article 36, paragraph 1 (b), means informing by the receiving State (at the request of the detained person) the consular post of the sending State of the individual's detention; forwarding by the sending State any communication by the detained person addressed to the consular post and also informing the person concerned of his rights under this subparagraph¹⁰⁹.

In *Jadhav case* the examination of the alleged violations of Article 36 of the Consular Convention not only contributed to the clarification of the issues already revealed in the Court's previous jurisprudence, as presented above, but also complemented the case law in several new aspects. Arrest and detention by Pakistan of Mr. Kulbhushan Sudhir Jadhav

accused of involvement in espionage and terrorism activities and sentenced to death by military court in Pakistan was the ground for the claim of India, which *inter alia* asked to declare that Pakistan had violated Mr. Jadhav's "elementary human rights" (Article 14 of the International Covenant on Civil and Political Rights).

For the first time the Court was called upon to elaborate on the scope of Article 36, namely, its application to persons accused of espionage. Having observed that there were neither any references to cases of espionage in the Consular Convention, nor exceptions to the applicability of the Article, having noted that interpreting otherwise would have run counter to its purpose (to facilitate the exercise of consular functions relating to nationals of the sending State) and having applied the methods for treaty interpretation (including *travaux préparatoires*)¹¹⁰, the Court concluded that the Article at issue did not exclude persons suspected of espionage¹¹¹. In the words of the ICJ, "any derogation from Article 36 of the Vienna Convention for political or security grounds may render the right related to consular access meaningless as it would give the receiving State the possibility of denying such access".¹¹² This conclusion was not repealed by the existence of the Agreement on Consular Access concluded by India and Pakistan in 2008, point (VI) of which stipulated that "[i]n case of arrest, detention or sentence made on political or security grounds, each side may examine the case on its merits" and, according to Pakistan, was to be applied instead of the Consular Convention. The Court, however, did not uphold that view: "<...> point (vi) of the Agreement cannot be read as denying consular access in the case of an arrest, detention or sentence made on political or security grounds. Given the importance of the rights concerned in guaranteeing the "humane treatment of nationals of either country arrested, detained or imprisoned in the other country", if the Parties had intended to restrict in some way the rights guaranteed by Article 36, one would expect such an intention to be unequivocally reflected in the provisions of the Agreement. That is not the case".¹¹³ Article 73, paragraph 2, of the Consular Convention refers to subsequent agreements intended to "confirm, supplement, extend or amplify" the Convention. As the aim of the Consular Convention is "to uniform standards for consular relations", the Court was of the

NOTES

1. The first and second Hague Peace Conferences were held, accordingly, in 1899 and 1907, and the Permanent Court of International Justice began to function in 1922.
2. As, for example, the right of peoples to self-determination (see further Subsection 3.3.2 of the current article). Generally, the prohibition of genocide, apartheid, racial discrimination, torture and slavery is also considered as *jus cogens* (the list is not exhaustive).
3. *The Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities*. Joint statement on human rights and climate change of 14 May 2020.
4. *Inter-American Court of Human Rights*. Advisory opinion (the Environment and Human Rights), OC-23/17 of 15 November 2017.
5. *Council of Europe*. The evolution of human rights <<https://www.coe.int/en/web/compass/the-evolution-of-human-rights>>
6. "Today, as a fusion of material, biological and digital technologies raises existential questions about what it means to be human, the time is ripe for a fourth generation of human rights to emerge." SOH, Ch.; CONNOLLY, D.; NAM, S. Time for a Fourth Generation of Human Rights? *United Nations Research Institute for Social Development*, 1 March 2018.
7. DOMARADZKI, S.; KHVOSTOVA, M.; PUPOVAC, D. Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse. *Human Rights Review*, Issue 20, 2019, p. 423-443.
8. *Committee on the Elimination of Racial Discrimination*. Inter-state communications: *State of Qatar v. Kingdom of Saudi Arabia, State of Qatar v. United Arab Emirates, State of Palestine v. State of Israel* <<https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx>>
9. *European Court of Human Rights*. Advisory Opinions. Protocol 16 to the Convention on Human Rights and Fundamental Freedoms entered into force on 1 August 2018. Two advisory opinions have been announced to date.
10. *International Criminal Court*. Assembly activates Court's jurisdiction over crime of aggression <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1350>>
11. BURROUGHS, J. Looking Back: The 1996 Advisory Opinion of the International Court of Justice. July / August 2016. *Arms Control Association*. <https://www.armscontrol.org/ACT/2016_07/Features/Looking-Back-The-1996-Advisory-Opinion-of-the-International-Court-of-Justice>
12. United Nations, *Treaty Series*, vol. 78, p. 277. Article IX: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."
13. Most often the declarations exclude disputes which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement, also disputes related to the deployment of armed forces and military operations (in accordance with the decision of respective international organisation), may also be disputes on maritime delimitation, etc. See *International Court of Justice*. Declarations recognizing the jurisdiction of the Court as compulsory <<https://www.icj-cij.org/en/declarations>>
14. CANÇADO TRINDADE, A. A. Reflections on a Century of International Justice: Developments, Current State and Perspectives. Vilnius: Vilnius University. *Teisé*, Issue 97, 2015. p. 212.
15. *Supra note 2*.
16. GHANDHI, S. Human Rights and the International Court of Justice. The Ahmadou Sadio Diallo Case. *Human Rights Law Review*. Issue 11(3), 2011, p. 528.
17. SUNGA, S. L. The International Court of Justice's Growing Contribution to Human Rights and Humanitarian Law. The Hague Institute for Global Justice, 18 April 2016 <<https://www.thehagueinstituteforglobaljustice.org/>>

42. For example, resolutions A/RES/71/258 (2016), A/RES/70/33 (2015), A/RES/69/41 (2014), A/RES/68/46 (2013), A/RES/67/56 (2012) contained expression of the concern about “catastrophic humanitarian consequences of any use of nuclear weapons”.
43. *Human Rights Committee* (General Comment CCPR/C/GC/36) <<https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>>
44. As the ICJ stated in *Marshall Islands v. United Kingdom* (Para 44): “The Court notes that the Marshall Islands, by virtue of the suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs, has special reasons for concern about nuclear disarmament”.
45. *Supra note 29*, para 29.
46. *Supra note 40*, pp. 671-672.
47. *Ibid*, p. 680.
48. See, for example, CANÇADO TRINDADE, A. A. *The Universal Obligation of Nuclear Disarmament*. Brazil, 2017.
49. Dissenting opinion of Judge *ad hoc* M. Bedjaoui, para 74.
50. Dissenting opinion of Judge A. A. Cançado Trindade, para 156.
51. See UN Treaty Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26>
52. AMBOS, K.; LIPPOLD, M. The ICJ and nuclear disarmament: towards a universal obligation? *Blog of the European Journal of International Law*. 8 July 2020 <<https://www.ejiltalk.org/the-icj-and-nuclear-disarmament-towards-a-universal-obligation/>>
53. *UN Office for Disarmament Affairs*. Treaty on the prohibition of nuclear weapons <<https://www.un.org/disarmament/wmd/nuclear/tpnw/>>
54. 1945, 1 United Nations, *Treaty Series*, XVI, Para 2, Article 1: “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”.
55. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), adopted on 24 October 1970: “[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes <...> a denial of fundamental human rights”.
56. Recognised by the ICJ, for example, in *Legal Consequences for States of the Constituted Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Reports 1971, p. 16, Para 126; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, p. 136, Para 155. Separate opinion of ICJ Judge P. L. Robinson (*Chagos Archipelago advisory opinion*) (Part II, etc.).
57. *Supra note 22*, Para 88.
58. HANNUM, H. The Right of Self-Determination in the Twenty-First Century. *Washington and Lee Law Review*. Volume 55, Issue 3, 1998. p. 780.
59. As the Court observed in *Chagos Archipelago advisory opinion*, Para 158, “[t]he right to self-determination under customary international law does not impose a specific mechanism for its implementation in all instances.”
60. *Supra note 22*, para 144.
61. *Supra note 58*. p. 779. H. Hannum also shared the view: “Unfortunately, it is unlikely that any existing human rights mechanism or even a new mechanism will be of much assistance in defining the right in the foreseeable future, because few states are willing to allow an international forum to judge a situation that might, if a claim to self-determination and secession is upheld, result in the destruction of the state itself.”
62. In which (para 183) the Court ruled that the process of decolonization of Mauritius was not lawfully completed after the country acceded to independence in 1968, following the separation of the Chagos Archipelago; that the United Kingdom was under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible; and that all Member States were under an obligation to cooperate with the United Nations in order to complete the decolonization of Mauritius.
63. *Supra note 22*, para 141.
64. *Ibid*, para 142.
65. Article 1, Paragraph 2, Article 55.
66. UN General Assembly’s Resolution 1514 (XV) of 14 December 1960.

