
« *Lawyers for Lawyers* »

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TRAINING MANUAL ON HUMAN RIGHTS AND HUMAN RIGHTS PROTECTION FOR LAWYERS

FILE N° 22: WHAT IS THE INTERNATIONAL COURT OF JUSTICE?

The International Court of Justice (henceforth ICJ) is the **principal and permanent judicial organ of the United Nations**. It was established in 1945 by the Charter of the United Nations, as successor to the Permanent Court of International Justice created by the League of Nations.

The Court sits at the Peace Palace in The Hague (Netherlands). It is composed of 15 permanent judges, elected for nine-year terms, and judges *ad hoc* appointed when one or more of the parties to the case does not have a judge of their nationality on the Bench, in the interests of preserving equality between the parties and ensuring that justice is carried out fairly.

It has general jurisdiction to settle legal disputes between States that agree to submit to its authority, in accordance with international law (as it derives from international treaties, international custom and general legal principles; Article 38 of the Statute of the ICJ. See File n° 2 on public international law, its sources and principles). It also has the power to make orders indicating provisional measures that ought to be taken (Article 41 of the Statute of the ICJ).

This jurisdiction in **contentious cases** concerns only States, which alone can bring cases before the Court, and not individuals (Article 34 of the Statute of the ICJ).

The Court's jurisdiction is based on either (Article 36 of the Statute of the ICJ):

- a *jurisdictional*, or *compromissory clause* rendering the ICJ's jurisdiction compulsory. This may be a treaty setting forth the means for settling disputes between the States Parties, or a specific clause stipulating the ICJ's competence in a treaty dealing with a different subject;
- a *special agreement* established between the States Parties at the time the dispute arises (in this case, the ICJ's jurisdiction is founded on the consent of the States concerned); or
- an *optional declaration accepting the Court's compulsory jurisdiction*, made by a State unilaterally in order to settle disputes to which it may be a party. This declaration may be subject to reciprocity in order to settle only those disputes arising with a State having made the same declaration.

The ICJ is also competent to determine whether it has jurisdiction in a particular case (Article 3.6).



Lawyers for Lawyers

The ICJ also issues **advisory opinions** (Article 65 of the Statute of the ICJ). By virtue of Article 96.1 of the Charter of the United Nations, the General Assembly and the Security Council may ask the ICJ to formulate an advisory opinion on any legal matter. Other United Nations agencies or specialised institutions authorised by the General Assembly may request an advisory opinion from the ICJ on legal matters arising within the scope of their activities.

Disputes brought before the ICJ concern the interpretation, application or implementation of treaties and in particular facts constituting violations of States' international commitments. Cases may concern various issues: territorial disputes, disputes concerning the principle of State sovereignty, diplomatic protection, etc. They are often linked to international laws concerning land, maritime and airspace boundaries.

Its judgments are binding and final (Art 94.1 of the Charter of the United Nations). States may have recourse to the Security Council in order to obtain the effective application of a judgment handed down by the ICJ (Article 94§2 of the Charter of the United Nations).

The ICJ does not have a specific remit to protect human rights. However, as human rights are guaranteed by international norms, the ICJ has on a number of occasions **been called upon to rule on violations of human rights**, as they also constitute illegal acts under international law.

Contentious cases concerning human rights and the legal significance of decisions handed down by the ICJ

The *LaGrand* case (*Germany v. United States of America*), Judgment of 27 June 2001, and the *Avena and Other Mexican Nationals* case (*Mexico v. United States*), Judgment of 31 March 2004, concerning application of the 1963 Vienna Convention on Consular Relations.

In the *LaGrand* case, in which two German nationals were sentenced to death and executed without having been informed of their right to consular protection at the time of their arrest and without having been able to benefit from this protection, the Court specifies that “a State party to a treaty, which creates individual rights, may take up the case of one of its nationals and institute international judicial proceedings on behalf that national, on the basis of a general jurisdictional clause in such a treaty.”

In doing so, the Court provides an interpretation of Article 36 (1) of the Convention on Consular Relations, finding that said article establishes an interrelated regime designed to “facilitate the implementation of the system of consular protection”, founded on the basic principle of the right of communication and access (Article 36 (1)(a)). It also points out that consular notification must follow the procedures set forth in Article 36 (1)(b) and that consular officers may take a series of measures in order to render assistance to their nationals in the custody of the receiving State (Article 36, (1)(c)). The ICJ infers from the foregoing that “when the sending State is unaware of the detention of one of its nationals due to the failure of the receiving State to provide the requisite consular notification, [...] the sending State has been prevented for all practical purposes from exercising its rights under Article 36 (1)”, which “creates individual rights for the detained person in addition to the rights accorded the sending State”.

In the *Avena* case, Mexico acted both in its own name and in respect of its right to protect 52 Mexican nationals sentenced to death, who had not been informed by the United States of their right of notification and access to the consular authorities guaranteed them by virtue of Article 36 (1) of the Vienna Convention on Consular Relations. The Court recalls the interpretation of this article adopted in the *LaGrand* judgment and identifies three interrelated elements (interrelated due to the facts of the case): the right of the individual concerned to be informed of their rights without delay, the right of the consulate to receive notification of the detention of the individual concerned without delay if the latter so requests and the receiving State's obligation to transmit all correspondence addressed to the consulate by the detained person without delay.

In addition, the Court provides a new element of interpretation by explaining what is meant by being informed “without delay”. According to the Court, while this expression should not necessarily be interpreted as meaning “immediately” after the arrest, or before any questioning, the arresting authorities have the obligation to provide

the information “once 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”.

The *Georgia v. Russian Federation* case, concerning application of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

Although the Court found that it did not have jurisdiction to deal with this case in its Decision of 1 April 2011, in its Order concerning the request for an indication of provisional measures issued on 15 October 2008, the Court underlined that “there is a correlation between respect for individual rights, [and] the obligations of States parties under the International Convention on the Elimination of All Forms of Racial Discrimination” and indicates measures to be taken by both parties in order to protect the rights conferred by said Convention.

The *Ahmadou Sadio Diallo* case (*Republic of Guinea v. Democratic Republic of the Congo*), Judgment of 30 November 2010, concerning application of the 1966 International Covenant on Civil and Political Rights, the 1981 African Charter on Human and Peoples’ Rights and the 1963 Vienna Convention on Consular Relations.

In this case, Mr Ahmadou Sadio Diallo, a Guinean citizen residing in the DRC where he managed two companies, was arrested, imprisoned on several occasions and finally expelled from Congolese territory after bringing legal action against the business partners of said companies in an attempt to recover various debts.

In this Judgment, the Court interprets the provisions contained in the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights. Based on a combination of Article 13 of the Covenant and Article 12 (4) of the African Charter, it concludes that several conditions must be met in order for the expulsion of a foreign national residing lawfully in the territory of a State party to said instruments to be compatible with the international obligations of that State: not only must it be decided in accordance with the law, in other words the domestic law applicable in that respect, but the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter. In addition, an expulsion must not be arbitrary in nature, “since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the Covenant and the [African] Charter”.

The Court refers to the case-law of the Human Rights Committee in order to confirm this interpretation and underlines the abundant interpretive case law, indicating that “although the Court is in no way obliged [...] to base its own interpretation of the Covenant on that of the Committee”, it believes that it should “ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of the Covenant.” The Courts considers that this is necessary in order to achieve clarity and consistency of international law, as well as legal security, “to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.”

Likewise, the Court refers to the case law of the African Commission on Human and Peoples’ Rights, pointing out that when called upon to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created to monitor its sound application.

The Court also refers to the case law of the Human Rights Committee in order to determine the scope of application of the provisions contained in Article 9 (1) and (2) of the Covenant, as well as those contained in Article 6 of the African Charter (concerning the prohibition of arbitrary detention and the right of every individual arrested to information [concerning the charges against them]), indicating that they “apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued [...] and are not, therefore confined to criminal proceedings”. The Court specifies that they “also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory”, and that “in this latter case, it is of little importance whether the measure in question is characterized by domestic law as an ‘expulsion’ or a ‘*refoulement*’”.

On the other hand, when called upon to rule on the prohibition on subjecting a detainee to mistreatment, the Court stresses that the prohibition of inhuman and degrading treatment is among the “rules of general international law which are binding on States in all circumstances, even apart from any treaty considerations.”

Finally, the Court recalls its interpretation of the 1963 Vienna Convention on Consular Relations (*Avena* case, see above), pointing out that “it is for the authorities of the State which proceeded with the arrest to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting State, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect”. It adds that the fact that the consular authorities of the national State of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights ‘without delay’”.

Contentious cases concerning international crimes.

The *Bosnia and Herzegovina v. Serbia and Montenegro* case, Judgment of 26 February 2007, and the *Croatia v. Serbia* case concerning application of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. See File n°14 on genocide.

Advisory opinions concerning human rights rendered by the ICJ

Accordance with international law of the unilateral declaration of independence in respect of Kosovo, advisory opinion of 22 July 2010, following the request submitted by the General Assembly of the United Nations.

This opinion concerns peoples’ right of self-determination and touches on the question of unilateral declarations of independence.

With regard to “the unilateral declaration of independence by the provisional institutions of self-government of Kosovo” adopted on 17 February 2008, the Court provides an opinion on the legality of said unilateral instrument with regard to international law, without going into the legal consequences of such a declaration.

The Court firstly addresses the legality of declarations of independence in general international law. It recalls that during the second half of the twentieth century, the international law of self-determination developed 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, that new States came into existence as a result of the exercise of this right and that there have, however, been instances of declarations of independence outside this context. It notes that the Security Council has declared some of these declarations to be illegal, not because of their unilateral character but due to the fact that they were, or could have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). It infers from the foregoing that no general prohibition exists against unilateral declarations of independence and that the unilateral declaration of independence in respect of Kosovo has not, therefore, violated general international law.

It also analyses whether or not the unilateral declaration of independence in respect of Kosovo is in accordance with international law applicable to the situation in Kosovo as at the date thereof and constituted by Security Council resolution 1244 (1999), adopted in the framework of Chapter VII of the Charter of the United Nations with the aim of establishing an international and interim territorial administration in order to respond to the civil, political and security crisis, and by the UNMIK regulations, in particular the constitutional framework set out in regulation 2001/9, which has binding force due to the binding character of resolution 1244.

The Court specifies that as the declaration of independence did not emanate from the provisional institutions of self-government of Kosovo (in this case the Assembly of Kosovo) but from representatives of the people of Kosovo, it falls outside the framework of the interim administration and therefore outside of the constitutional framework. We can emphasize that said representatives were elected democratically.

The Court finds that neither resolution 1244 nor the measures taken by virtue thereof contain any provision concerning the final status of Kosovo, on the one hand, nor any specific prohibition against a declaration of independence applicable to the authors of the declaration of independence in respect of Kosovo, on the other.

It infers from the content of each of these instruments that they have different aims and objectives: whereas resolution 1244 was designed to create an interim administration until a long-term political solution could be found and in order to facilitate stabilisation and reconstruction (without taking any final decision concerning the final status of Kosovo), the declaration of independence in respect of Kosovo is an attempt to determine finally

the status of Kosovo. The Court concludes that the adoption of the declaration of independence in respect of Kosovo has violated neither Security Council resolution 1244 (1999) nor the established constitutional framework.

The Court is therefore of the opinion that the declaration of independence of Kosovo is in accordance with international law.

This opinion therefore strengthens the independent status of Kosovo, which has been recognised by 69 States since its adoption.

This case shows that the ICJ can play an important role in the settlement of disputes through its advisory function, even though its decisions have no binding force.

In this case, the objective of the request submitted by the General Assembly was to end the deadlock in the situation which existed between Kosovo and Serbia and to establish the basis of a new dialogue between the Parties. It sought the opinion of the Court in the full knowledge that it could not subsequently issue a recommendation as, pursuant to Article 12 of the Charter of the United Nations, it cannot issue a recommendation on a dispute or situation being handled by the Security Council.

Furthermore, on 10 September 2010 the General Assembly adopted a resolution, with the support of Serbia and the EU Member States, in which is acknowledged the validity of the ICJ's decision.

Although this did not lead to recognition by Serbia of the independent status of Kosovo, it enabled the Parties to commit to entering into a 'technical' dialogue concerning those questions presenting mutual interest.

Sources:

Statute of the International Court of Justice and website of the International Court of Justice: <http://www.icj-cij.org/>

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