The Development of Human Rights Law by the Judges of the International Court of Justice

Shiv R S Bedi
# CONTENTS

1. Introduction 1

Part I Perspective: Legislative Role of the Judge and Human Rights Law

2. Legislative Role of the Judge: A Vital Force in the Life of the Law: 12
   I. The Core Truth: All Roads Lead to Rome 15
   II. The Core Truth in Retrospect: An International Perspective 17
   III. Legislative Role of the ECJ and the ECHR 19
   IV. Legislative Role of the International Court of Justice 29
   V. The Development of Law and Judicial Ideologies 32
   VI. Appraisal 34

3. Relationship between Human Rights and International Law:
   Principle of Human Dignity versus Principle of State Sovereignty: 37
   I. Basis of International Law: The Principle of Sovereignty 39
   II. Basis of Human Rights Law: The Principle of Human Dignity 49
   III. Appraisal: Principle of Human Dignity in Retrospect and Prospect 72

Part II The Development of Human Rights Law by the International Court of Justice: Contentious Cases

Introduction to the Contentious Procedure of the Court 87

   I. The Principle of Elementary Considerations of Humanity 105
   II. Judge Alvarez: Manifest Misuse of a Right Not Protected by Law 107

   I. Prelude 109
   II. Norm of Non-Discrimination and 1962 Judgment: Court Has Jurisdiction to Adjudicate Upon the Merits 112
III. Judges Jessup and Bustamante: Voting in Favour of 1962
Judgment with Human Rights Additions 115

IV. Second Phase Judgment: Compositional Politics a Setback to
Human Rights 117

V. Disproportionate Quorum: A Setback to Human Rights 120

VI. Second Phase Judgment: Legal Formalism Circumvents
Human Rights 122

VII. Judge Tanaka and the Development of Human Rights Law 126

VIII. Judge Jessup: Principle of Equal Rights is Universal and Apartheid
is a Justiciable Issue 142

IX. Judge Padula Nervo: The Principle of Non-Discrimination and
Obligation to Promote Respect for Human Rights are
Internationally Recognized in Most Solemn Form 144

X. Judge Wellington Koo: A Nation is a Developed Nation only if all
its Citizens are Treated on the Basis of Equality before the Law 146

XI. Judge Koretsky: Racial Discrimination an Issue of Vital Importance 147

XII. Judge Mbanefo's Dynamic Interpretation: Mandate and Apartheid
Interpretation of Law Condemns Apartheid 148

XIII. Judge Forster's Bold Teleological-Sociological-Natural
Interpretation of Law Condemns Apartheid 149

XIV. Postlude: Violation of Human Rights Law Led to Formation of
Human Rights Law 150

(New Application: 1962) case (Belgium v Spain) (1962-70) 157

I. Human Rights Run Erga Omnes 157

II. Enforcement of Human Rights 160

7. United States Diplomatic and Consular Staff in Tehran case
(USA v Iran) (1979-1981) 163

I. Human Dignity and Diplomatic Immunity 163

II. 1948 Universal Declaration of Human Rights is Binding in Character 165

8. Military and Paramilitary Activities in and against Nicaragua
case (Nicaragua v USA) (1984-1991) 167

I. The Use of Force not an Appropriate Method to Ensure Respect
for Human Rights 167

II. The Principle of Self Determination: adherence to a particular
doctrine Does Not Violate Customary International Law 170


I. Some Preliminary Reflections 171
II. The Factual Background of the Yerodia case 232
III. Why Separate the issues of Universal Jurisdiction and Immunity 235
IV. Doctrine of Immunity and Concept of Human Dignity 237
   a) Judge Al-Khasawneh: the Concept of Combating of Grave Crimes Prevails Over the Rules of Immunity 241
V. The Principle of Universal Jurisdiction and the Concept of Human Dignity 243
   a) Judge Guillaume: The Clarity of the Principle of Universal Jurisdiction 246
   b) Judge Ranjeva: Territoriality as the Basis of Entitlement to Jurisdiction Remains at the Core of Contemporary Positive International Law 248
   c) Judge Koroma: Concepts of Jurisdiction and Immunity are not the Same 249
   d) Judges Higgins, Kooijmans and Buergenthal: Universal Jurisdiction in absentia for the most Heinous Crimes is Permitted under Certain Safeguards 251
   e) Judge Rezek: Judicial Restraint Going Hand in Hand with Political Restraint 252
   f) Judge ad hoc Bula-Bula: Universal Jurisdiction in Absentia Runs Counter to the Dignity of People 254
   g) Judge ad hoc Van Den Wyngaert: Universal Jurisdiction in absentia is Permissible 255
VI. Belgian Reaction After the Judgment 255
VII. Conclusion 256

   I. Some Preliminary Observations 259
   II. Three Cases with One Common Fact: Vienna Convention on Consular Relations Creates Human Rights 261
   III. Case Concerning the Vienna Convention on Consular Relations (Paraguay v United States of America): Individual Rights Remained Undecided 262
   IV. LaGrand Case (Germany v United States of America): Vienna Convention Does Create Individual Rights 263
   V. The Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America): Individual Rights Further Clarified 270
      V-A. United States Must Provide ‘Review and Reconsideration of Convictions and Sentences’ 270
      V-B. Interdependence of the Rights of the State and Individual Rights 271
Contents

V-C. Right of an Arrested Person to Information and Time Factor 271
V-D. Judge Tomka: 'State authorities must show due diligence in the exercise of their powers' 272
V-E. Judge Tomka: Individual First Element Not the State 273
VI. General Conclusion 273

Part III The Development of Human Rights Law by the International Court of Justice: Advisory Cases

Introduction to the Advisory Procedure of the Court 277

The Principle of Sacred Trust of Civilization

Genocide is Supremely Unlawful and its Principles are Binding on All Parties Irrespective of being Party to a Convention 287


I. Introduction 291
II. Self-Determination in Retrospect and Prospect 292
III. Apartheid as a Policy Constitutes a Denial of Fundamental Human Rights 294
IV. People as Such Can Become Holder of Rights 295


I. Special Rapporteur of UN Human Rights Commission Entitled to Privileges and Immunities of a UN Expert on Mission 301
II. Judge Evensen: Integrity of a Person's Family and Family Life is Basic Human Right 302
III. Judge Evensen: Rights of Family and Family Life are Integral Parts of Privileges and Immunities 303

Contents

I. Human Right to Health v Use of Force: separation of powers is the Answer 305

II. Judge Weeramantry: to find law on nuclear weapons is not to legislate on the subject 308

III. Judge Koroma: right to health is a pillar of peace 308

20. Legality of the Threat or Use of Nuclear Threat case (request by UN General Assembly): —May Use; May not Use; But Do not Use. Hence, Legislate: MAY NOT USE— (1994–1996)

I. Judge Oda: Judges do not Legislate 315

II. Right to Life and Human Rights Component of the Law of War 316

III. Judge Bedjaoui: Nuclear Weapons v Right to Life 318

IV. Judge Weeramantry: Nuclear Weapons Totally Belie Human Dignity 320

V. Judge Koroma: Both Human Rights and International Humanitarian Law Have as their raison d'être the Protection of the Individual as well as the Worth and Dignity of the Human Person 321

VI. Genocide and Nuclear Weapons 322

VII. Judge Higgins: intent approximates to legal doctrine of foreseeability 323

VIII. Judge Weeramantry: Nuclear Weapons are Instruments of Genocide and their use is Plainly Genocide 324

IX. Judge Koroma: Quantum of the People Killed by Nuclear Weapons Could be Tantamount to Genocide 327

X. Human Component of the Law of War 327

XI. Conclusion 329


22. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2003–04): Belligerent Occupation and Human Rights 337

I. Some Preliminary Observations: 337

II. Facts of the Case in a Nutshell 338

III. Historical Analysis of the Occupied Territory 339

IV. Human Rights Law Does Apply in the Occupied Territories 340

V. International Humanitarian Law Does Apply in the Occupied Territory: The Rules of International Humanitarian Law are Binding on All Nations and the Law is Erga Omnes 345

VI. Terrorism v Self-defence: Grave Infringement of Human Rights Cannot be Justified by Military Exigencies and National Security 347
**Contents**

VII. The Court’s Advice to the General Assembly: Human Rights are Violated by Israel and They Must be Enforced by All States 349

VIII. Conclusion 350

23. Summary and General Conclusion 353

Bibliography of Books and Articles 371

Bibliography of Works by Judges of the Court 379

Bibliographical Annexes 385

1 Judgments of the International Court of Justice 385
2 Advisory Opinions of the International Court of Justice 389
3 Orders on Provisional Measures of the International Court of Justice 390
4 Judges of the International Court of Justice 392
5 Judges ad hoc of the International Court of Justice 451

*Index* 467