



CHAPTER NINE

THE INTERNATIONAL COURT OF JUSTICE (ICJ)

The Purview of the Simulation: The International Court of Justice (ICJ) is the principal international judicial body of the United Nations. The two major roles of the ICJ include developing advisory opinions on matters of international law referred to it by specialized agencies and presiding over legal disputes submitted to the court by Member States. Only Member States may submit cases to the

court, and the court is only considered competent to preside over a case if both States have accepted the jurisdiction of the court over the dispute. The ICJ does not preside over legal disputes between individuals, the public, or private organizations.

Website: www.icj-cij.org

NICARAGUA V. COLOMBIA, TERRITORIAL AND MARITIME DISPUTE

On 6 December 2001, Nicaragua filed an application requesting that the ICJ resolve a maritime and territorial dispute between Nicaragua and Colombia. At issue is the right of title to a collection of islands and the maritime boundary between the two countries in the Caribbean Ocean. Nicaragua asked the ICJ to review the right to title of the Archipelago of San Andres and to establish a maritime boundary. Nicaragua has claimed the Barcenas-Esguerra Treaty of 1928 was invalid, thus making the Treaty an inappropriate means of exacting right to title. Colombia has patrolled the waters in and around the disputed territory, particularly stopping vessels licensed in Nicaragua and escorting them to a controlled port on San Andres Island. Nicaragua holds that this alleged illegal assertion of the right to title and control of the maritime area has impacted its citizens on the Caribbean coast and also their maritime economy.

Colombia, for its part, argues that the ICJ lacks jurisdiction to entertain the application because the issues have been previously resolved. With no jurisdiction, there is no dispute and the territorial and boundary issue would be settled. The basis for the argument rests on the agreement between both parties by ratifying the Barcenas-Esguerra Treaty in 1930. The Treaty resolved, among other things, a territorial dispute over the San Andres islands with both parties agreeing that the islands belonged to Colombia and also set the maritime limitation between Nicaragua and Colombia. Colombia's second objection to jurisdiction cites the 1988 Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), claiming that a similar issue has already been solved in the ICJ and therefore prohibits jurisdiction. Colombia argues that the reasons for granting jurisdiction as put forth by Nicaragua are a misapplication of the 1948 Pact of Bogotá.

The Barcenas-Esguerra Treaty stated that the Archipelago of San Andres would fall under Colombian title, and also that Nicaragua had no claim, or interest of claim to the Archipelago's Roncador, Quitasueno and Serrana. Included, but less relevant, was the recognition by Colombia of Nicaragua's sovereignty over the Mosquito Coast and over the Islas Mangles, two islands that are part of the San Andres Archipelago. Finally, it was established that the 82 West Meridian would serve as the maritime limit between both countries.

In 1969, Nicaragua began issuing licenses for exploration and commercial use of the waters west of the 82 West Meridian. By 1980, Nicaragua began disclaiming the validity of the 1928 Treaty altogether, on the grounds that it had been signed under military occupation by the United States, and thus did not represent a sovereign decision. Colombia, in response, would detain any boats with Nicaraguan licenses or flying the Nicaraguan flag and would escort them to San Andres or back over the 82 West Meridian. Claims by Nicaragua also include pursuit by Colombian vessels over and west of the Meridian line solely to intimidate Nicaraguan vessels. The number of incidents listed in the Nicaraguan application is five between 1993 and 2001.

In this simulation, the ICJ will preempt history from the time when the Court's simulation begins. History will be as it was written until the moment the Court convenes on 12 February 2007. From that moment on, however, ICJ participants exercise free will based on the range of all the choices within their national character and the confines of available law.

Questions to consider on this issue include:

- Does a treaty that was signed while a party was influenced or still under colonial rule have legal standing?
- Does more recent international law carry more weight than previously signed treaties when considering precedents and/or the outcome of a dispute?
- When considering a dispute that involves maritime economic/territorial boundaries, how much significance should be placed on agreements enacted prior to the establishment of the UN over internationally recognized rule of law?
- How do previous cases involving maritime disputes impact the outcome of the current case with respect to maritime boundaries?

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BOTSWANA V. NAMIBIA, KASIKILI/SEDUDU ISLAND (HISTORICAL, 1999)

This boundary dispute case concerns the northeastern border between Namibia and Botswana along the Chobe River. The river's status as the border is not contested. However, exactly where the border lines are drawn within the river is important, as a sizeable island lies approximately 20 km upstream from the Chobe River's confluence with the Zambezi River. Namibia knows this island as Kasikili, while Botswana calls it Sedudu. The island is a popular tourist attraction. Due to ambiguities in the treaty that created the border, the ownership of the island is unclear. Each country claims that the island is within its territory.

On 1 July 1890, the colonial powers Great Britain and Germany signed the Heligoland-Zanzibar treaty, which divided the colonies of the two countries. The treaty officially determined the border between the colonial holdings of the two countries, parts of which would later become Botswana and Namibia. According to the treaty, the exact border line through the Chobe River is along the "centre of the main channel" of the river. However, the treaty does not define exactly what this term means. Namibia claims that the Chobe River's main channel runs south of the island, while Botswana claims the main channel runs north of the island.

It is a widely accepted principle of international law that whenever possible, the meaning of a treaty must be determined solely according to the text of the treaty. When the meaning is ambiguous, however, recourse to alternative methods of definition may be used. Conflicting historical evidence indicates that the main channel could be defined as the channel that carries the most water, the deepest channel, or the most navigable channel. Determining the main channel by a simple measurement of flow rates is not helpful due to contested scientific evidence and the fact that the island is submerged for several months every year. To further complicate matters, the German text of the Heligoland-Zanzibar treaty refers to the "thalweg" of the main channel. Although similar, the meaning of the terms "thalweg" and "centre" are not identical. They may have also had different respective meanings in 1890 than they have now.

Although the dispute over the ownership of the island has been ongoing for more than a century, the need to determine the border with finality became especially apparent in 1984, when Botswanan troops fired on a South African boat patrol in the southern channel

of the Chobe River. At the time, South African forces were in control of Namibia, which was then known officially as South West Africa. Each side's maps showed the island as within their own territory. When Namibia gained its independence in 1990, it continued the boundary dispute, this time through newly available avenues open to Namibia as a member of the United Nations.

In 1992, Botswana and Namibia jointly appointed a team of technical experts to determine the proper location of the boundary. This team was unable to reach a conclusion and recommended referral to the ICJ. The case is before the Court pursuant to a Special Agreement signed by the two countries in 1996, which asked the Court to "determine, on the basis of the Anglo-German Treaty of 1 July 1890 and the rules and principles of international law, the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the island."

Both countries cite voluminous scientific reports as well as colonial-era maps to support their positions. Evidence of the familiarity of the colonial powers with the characteristics of the river is also important. Namibia additionally argues that regardless of the proper location of the border as determined by the treaty, Namibia has an ownership interest in the island pursuant to its long-standing seasonal occupation of the island. According to Namibia, the British colonists' failure to object to Namibian presence on the island indicates that the British believed the island belonged to the colonial territories that would later form Namibia. This claim is similar to the legal doctrine of adverse possession in common law jurisdictions, which grants a non-owner property rights after the land has been occupied or used in a way that conflicts with the true owner's rights for a certain period of time. The year is 1999, and the Court must now determine which country owns the island.

In this simulation, the ICJ will preempt history from the time when the Court's simulation begins. History will be as it was written until the moment the Court convenes on 15 February 1999. From that moment on, however, ICJ participants exercise free will based on the range of all the choices within their national character and the confines of available law.

Questions to consider on this issue include:

- What intentions did the colonial powers have in mind when they wrote the terminology concerning the "thalweg of the main channel" into the Heligoland-Zanzibar treaty?
- What are the relative roles of scientific measurements and historical maps in determining the outcome of this dispute?
- Is Namibia's seasonal occupation of the island enough to justify granting Namibia legal title over the island?
- Considering that waterways constitute a great many international borders, how should the Court go about making a decision that will provide useful guidance in future disputes of a similar nature?

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Statute of the International Court of Justice

Vienna Convention on the Law of Treaties

Additional Web Resources:

www.icj-cij.org - International Court of Justice

ADVISORY OPINION: LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

In 2002, Israel approved a plan for the construction of a wall in Occupied Palestinian Territory. On 8 December 2003, an emergency session of the General Assembly (GA) adopted resolution A/RES/ES-10/14 in which it requested the ICJ to "urgently render" an advisory opinion on the following question:

What are the legal consequences arising from the construction of the Wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and GA resolutions?

Due to overwhelming *amicus curiae* in this matter, participation will be limited to Israel, South Africa, Saudi Arabia, and Palestine.

After World War I, the League of Nations issued a Mandate that recognized the Palestinian existence and saw a formulation of territorial boundaries for the land then under British control. When the United Kingdom announced its intention to leave Palestine, the GA adopted the Plan of Partition, which called for two independent states, one Arab, the other Jewish, and for Jerusalem to be a special international regime. The Arab population in Palestine rejected the resolution as unbalanced, and in 1948 Israel proclaimed its independence and armed conflict ensued. In 1949 a general armistice agreement was reached between Israel and neighboring states, including a provision for what was to become the "Green Line." In the Six Day War of 1967 Israel greatly expanded its territory beyond the Green Line, and continues to occupy territory outside of the Green Line to date.

In 1993 Israel and Palestine signed the first, face-to-face agreement between the parties in the Oslo Accords, which provided, among other things, for the Palestinian mandates and borders. These borders

were based on the facts as they existed in 1993, including then-existing Israeli settlements. Citing ongoing terrorist attacks and regional tensions, in 2002 Israel announced its plan to construct a wall. While roughly conforming to the Green Line, the Wall's route deviates to encompass Israeli settlements outside of its boundaries and the borders established in the Oslo Accords.

Under customary international law, the territories outside the Green Line, i.e., those acquired in the 1967 War, are occupied territories and Israel is the Occupying Power. Much of the proposed route for the Wall lies within this area; construction continues, with some areas completed. Opponents of the Wall claim that Israel is expanding its territory and disregarding the rights of the Palestinian people. Arab Member States and the Palestinian Authority have urged international action, claiming that the Wall is not needed for security, violates essential rights, and is being used to annex territory. The Secretary-General's Report in November 2003 described the Wall as separating communities from health services, schools, primary water sources, and electricity networks. The Special Rapporteur on the Right to Food of the UNHCR noted that the Wall annexes aquifers which provided 51% of the West Bank's water resources.

The Court must first determine whether it has jurisdiction. The language of the GA's request encompasses an inquiry into whether the construction breaches international law, and if so, what are the legal consequences. The scope of the question is limited to the portions of the Wall "in the Occupied Palestinian Territory, including in and around East Jerusalem." The existence of "Palestinian people" and their legitimate rights are to be recognized and not at issue; they are accepted both by international law and all parties before the Court.

Under Article 96 of the UN Charter the GA may request an advisory opinion from the ICJ on "any legal question." The jurisdiction of the GA to make recommendations is limited by Article 12, which gives the Security Council exclusive authority over any issue before it. Moreover, the question before the Court must be of a "legal" nature appropriate for the Court's consideration, as opposed to political or hypothetical questions. Finally, the Tenth Emergency Special Session, which drafted ES 10/14, can only convene and act if the Security Council, because of lack of unanimity, has failed to exercise its primary responsibility and the situation is one accompanied by a threat to peace. If these conditions were not met, ES 10/14 would not be a legitimate request to the Court.

Although Article 65 of the ICJ Statute provides that the Court "may" give an advisory opinion, as the principal judicial organ of the UN the Court should not decline to issue an advisory opinion without a compelling reason. However, Israel has not consented to this specific exercise of jurisdiction and describes the dispute as a bilateral matter. While a fundamental principle of the ICJ is that a State is not obliged to submit its disputes to judicial settlement without its consent, this is not a request for judicial settlement, but rather a request by the General Assembly for an advisory opinion under Article 65. The Court should consider these factors in its jurisdictional analysis.

Beyond the question of jurisdiction, a number of rules and principles of international law are implicated by this question, including the UN Charter and Resolution 2625 (XXV), international humanitarian law, and human rights law. One of the issues implicated is the need to reconcile the right to political independence and sovereignty versus the prohibition on territorial acquisition by means of force. The fact

that the Palestinian people do not have an internationally recognized state also raises questions about the applicability of international conventions such as the Hague Convention and the Fourth Geneva Convention. Although Israel is not a party to the Hague Convention, an argument could be made that it has become part of customary international law.

Israel has ratified treaties on human rights, but argues that humanitarian law applies in conflict situations and that human rights treaties were intended to protect citizens from their own Governments in times of peace. By extension, it holds that those human rights treaties do not apply to this situation. It is a generally accepted tenet of customary international law that the protections of human rights obligations do not cease during times of conflict except where they are derogated by the treaty itself. Furthermore, the Court should consider to what extent Israel is bound by the Oslo Accords, which were ratified and adopted by both parties.

Should the Court find a breach of any of the above international laws, it must next determine the legal consequences that flow from the breach. While advisory opinions are not legally binding they do carry great legal weight and moral authority. Generally, the consequence for a state responsible for the breaching act is an obligation to put an end to that act. Any legislation causing or empowering the illegal action must therefore be repealed or voided. Reparation is guided by what the situation would have been had there been no illegal act. Consequences can extend beyond the breaching state. Certain international rights are erga omnes, or owed to all, and as such these rights are the concern of all States. Some humanitarian rights and the right to self-determination fall under this category. Additionally, legal consequences may attach to other states, including obligations to recognize the illegality of action or to not aid and abet the breaching action. In addressing the issue before the Court, all justices and advocates should keep in mind that the function of an advisory opinion is to “identify the existing principles and rules, interpret them and apply them...thus offering a reply to the question based on law.”

Questions to consider on this issue include:

- Does the ICJ have jurisdiction? If so, is there a compelling reason why the Court should not exercise its jurisdiction to give an advisory opinion?
- Was the GA acting within its authority when it passed A/RES/ES-10/14?
- Which rules and principles of international law apply? Of the applicable rules and principles, which, if any, are in violation?
- What are the legal consequences to the parties involved? Are any of the violations to rights of erga omnes character?

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