Chapter Ten
The International Court of Justice (ICJ)

Purview of the Committee

The International Court of Justice (ICJ) is the principal international judicial body of the United Nations. The two major roles of the ICJ are 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 the 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

Jurisdictional Immunities of the State (Germany v. Italy) - 2008

On 23 December 2008, the Federal Republic of Germany filed an application with the International Court of Justice asserting, among other claims, that "Italy has infringed and continues to infringe its obligations towards Germany under international law." In addition to allowing civil claims based on violations of international humanitarian law to be brought against Germany in Italian courts, the Federal Republic of Germany also asks the Court to declare that Italy has violated international law by failing to respect the jurisdictional immunity enjoyed by a sovereign state by taking measures of constraint against German state property in Italy.

During World War II, the Third Reich utilized more than six million foreign nationals as forced laborers in Germany. These forced laborers came from all over Europe, including Italy, and where forced to work on farms and in manufacturing, including the manufacture of armaments. Luigi Ferrini, an Italian citizen, was captured by German troops in 1944 and forced to work in Germany, where he remained until 1945. In 1998 Ferrini filed suit against Germany in the Italian courts, claiming physical and psychological damages relating to his capture and subsequent forced labor in Germany. On 11 March 2004, the Corte di Cassazione (the Italian Supreme Court) declared that Italian courts had jurisdiction over the case, on the theory that the acts in question violated fundamental human rights, nullifying sovereign immunity. Since the decision in *Ferrini v. Federal Republic of Germany* a number of suits arising from similar facts have been filed in Italy.

The Corte di Cassazione declared that Italian courts had jurisdiction in the *Ferrini* case because, while customary law grants a foreign state immunity from jurisdiction for acts which are the expression of its sovereign authority, such immunity does not cover acts that amount to international crimes. The Italian Court determined that violations of fundamental human rights encroach upon the universal values protected by preemptory norms. Preemptory norms are those that take precedent over any conflicting law, including state immunity.

After the *Ferrini* decision, a group of Greek nationals filed suit against Germany in the Italian courts seeking to enforce a judgment for damages affirmed by the Hellenic Supreme Court. The claimants sought damages arising out of the massacre of more than 200 residents in *Distomo*, Greece, by Wafen-SS troops in 1944. Though the Hellenic Supreme Court affirmed the damages awarded, Greek law makes enforcement of the judgment in Greece impossible. When the claimants in *Distomo* brought proceedings against Greece and Germany before the European Court of Human Rights, the European Court, referring to the principle of state immunity, held that the claimants' application was inadmissible. The *Distomo* claimants then successfully sought to enforce the damages awarded by Greek courts in Italy. This resulted in the placement of measures of constraint, or lien, against Villa Vigorni, a cultural exchange center owned by the German government and located in Italy.

As remedies to the above requested findings, Germany asks the Court to find that: 1) the Italian Republic must take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable; and 2) the Italian Republic must take any and all steps to ensure that in the future, Italian courts do not entertain legal actions against Germany founded on the occurrences as described in the *Ferrini* case.

For its part, the Italian Republic supports the holding of the Italian Supreme Court, declaring that no violation of international law was committed, since, under international law, a State responsible for violations of fundamental rules is not entitled to immunity in cases in which immunity would be tantamount to exonerating the State from bearing the legal consequences of its unlawful conduct. Additionally, Italy relies on the European Convention on Human Rights, which stipulates the independence of national judges. As a party to the Convention, Italian judges are not subject to instructions imparted to them by their Government, even on contentious international issues. In reply, the German Republic holds that under Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts, Italy as a whole must shoulder responsibility for the acts of any state organ that is capable of exercising "legislative, executive, judicial or any other functions."

The Federal Republic of Germany, to provide the Court jurisdiction to adjudicate on this matter, has invoked Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, which directs parties to submit to the judgment of the International Court of Justice all international legal disputes including those concerning the interpretation of a treaty and the existence of any fact, which, if established, would constitute a breach of an international obligation. The Italian Republic does not dispute the Court's jurisdiction. The German and Italian Governments have jointly issued a declaration in which Germany "fully acknowledges the untold suffering inflicted on Italian men and women" during World

War II. Furthermore, Italy "respects Germany's decision to apply to the International Court of Justice for a ruling on the principle of state immunity [and] is of the view that the ICJ's ruling on State immunity will help to clarify this complex issue."

As part of its contentions against Italy, Germany calls the attention of the Court to the decision of the Corte di Cassazione in the *Distomo* case. Germany asserts that this is an unacceptable violation of their sovereign immunity. The doctrine of foreign sovereign immunity provides that a foreign state generally is immune from the jurisdiction of the courts of another sovereign state. State immunity developed as an "undisputed principle of customary international law" and the law of nations based upon core aspects of sovereignty applicable in common law, civil law and other judicial systems. Article 38 of the Statute of the International Court of Justice dictates that the Court apply international custom when resolving disputes. Germany specifically points to "attempts by Greek nationals to enforce in Italy a judgment obtained in Greece on account of a massacre committed by German military units during their withdrawal in 1944."

Greece submitted an application to intervene in the case. Coming before the Court, Greece seeks to inform the Court of Greece's legal rights and interests so that they may remain unaffected in the course of the Court's holdings regarding jurisdictional immunity and international responsibility of a State in the matter of the main proceeding between Germany and Italy. In short, if unable to comment on the procedure relating to this case, Greece's ability to negotiate a legal solution for all disputes arising from particular acts and the general practice of Germany during World War II could be impaired or prejudiced.

In response to Greece's application, the Court determined it might find it necessary to consider the decision of the Greek court in the *Distomo* case. In light of the principle of State immunity, the Court must determine if Italy committed a further breach of Germany's jurisdictional immunity when the Italian courts enforced the Greek judgment in the *Distomo* case.

In successfully adjudicating this case, the Court must consider two fundamental claims. First, is the sovereign immunity of a state violated when another state fails to respect jurisdictional immunity by allowing civil claims based on violations of international humanitarian law? Second, to what extend should the details of the *Distomo* case weigh on the Court in the context of the main proceedings between Germany and Italy?

Questions to consider include the following

- Is the sovereign immunity of a state violated when another state fails to respect jurisdictional immunity by allowing civil claims based on violations of international humanitarian law?
- Do the actions taken by the German Reich, as described in the *Ferrini* case, constitute violations of fundamental human rights? If so, do they provide the standing as a preemptory norm to justify the Italian Supreme Court's disregard for the sovereign immunity of the Federal Republic of Germany?
- What weight should the Court give to the independent ruling of the Italian Supreme Court on the issues specifically related to this proceeding? Furthermore, to what extend should national courts be allowed to contradict or circumvent international norms or international law?
- Is the sovereign immunity of a state violated if such an action includes a third-party national?
- To what extent should the Court allow the circumstances of the *Distomo* Case influence its considerations on the main proceeding, if at all?

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Whaling in the Antarctic (Australia v. Japan) - 2010

On 01 June 2010, Australia instituted proceedings before the International Court of Justice against the Government of Japan over a dispute concerning Japan's JARPA II program on "scientific whaling." Australia contends that the Court has jurisdiction in this matter based upon the provisions of Article 36, paragraph 2, of the Court's statute, which refer to the declarations recognizing the Court's jurisdiction as compulsory.

Australia's allegation is based upon a dispute over the interpretation of the International Convention on the Regulation of Whaling (ICRW). The stated purpose of the ICRW is to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry." Under the ICRW, state parties to the Convention form the International Commission on Whaling (ICW), which meets once a year to discuss and adjust the Convention. Since 1986, under the ICRW, there has been a moratorium on whaling for commercial purposes. In addition to the moratorium, an Indian and Southern Ocean Sanctuary was created, which also bans commercial whaling.

Article VIII(1) of the ICRW allows any Contracting Government to grant to its nationals a "special permit" for "scientific whaling." Whaling conducted under the protection of a permit is exempt from the ICRW, but all such permits must be reported to the ICRW "at once." After the 1986 moratorium, Japan issued itself a permit under which it has caught a small number of whales each year for scientific study. This program, known as JARPA I, ran from 1987 until it expired in 2005. When JARPA I expired, Japan announced that it was instituting a second phase of JARPA under Article VIII, called JARPA II. This second phase increased the sample size of whales taken under the program by 10%. JARPA II also expanded the study to include humpback and fin whales.

In its application, Australia alleged that "Japan's continued pursuit of a large scale program of whaling under the Second Phase of its Japanese Whale Research Program under the Special Permit in the Antarctic ('JARPA II') [is] in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ('ICRW'), as well as its other international obligations for the preservation of marine mammals and marine environment." Australia contends that Japan has breached the following obligations under the ICRW:

1. The obligation under paragraph 10 (e) of the Schedule to the ICRW to observe in good faith the zero catch limit in relation to the killing of whales for commercial purposes; and
2. The obligation under paragraph 7 (b) of the Schedule to the ICRW to act in good faith to refrain from undertaking

   commercial whaling of humpback and fin whales in the Southern Ocean Sanctuary.

In addition to its alleged breaches of the ICRW, Australia also contends that Japan has breached, and continues to breach, its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) by removing from the sea specimens threatened with extinction absent exceptional circumstances. Similarly, Australia claims that Japan has breached its obligation under the Convention on Biological Diversity to ensure than any actions taken within Japan's jurisdiction are not harmful to the environment of other States. Australia also asserts that ongoing negotiations in the ICW have been "unable to resolve the key legal issue that is the subject of the dispute, namely the large scale 'special permit' whaling under JARPA II."

Australia requests that the Court declare that Japan is in breach of its international obligations in implementing the JARPA II program in the Southern Ocean. It also requests that the Court order Japan to

1. Cease implementation of JARPA II;
2. Revoke any authorizations, permits or licenses allowing the activities which are subject of this application to be undertaken; and
3. Provide assurances and guarantees that it will not take any further action under the JARPA II or any other similar program until such program has been brought into conformity with its obligations under international law.

Japan has not yet responded or made formal statements as to how it will approach the case. Among the many possible positions Japan may take, it may 1) dispute the jurisdiction of the ICJ to hear disputes arising under the ICRW; 2) challenge the jurisdiction of the ICJ on the basis that there is no "existing dispute" between the two nations; 3) argue that Australia has no legal standing to bring the case; or 4) maintain that it has not violated any of its obligations under the respective treaties.

Questions to consider include the following:

- Does the Court have jurisdiction in this case?
- What are the obligations of a Contracting Government that issues a special permit to itself under Article VIII(1) of the ICRW? What is the nature of Australia's interests, if any, in Japan's issuance of a permit?
- Are Australia's arguments under the Convention on International Trade in Endangered Species of Wild Fauna and Flora and under the Convention on Biological Diversity defensible?
- Is there enough evidence that JARPA II has a bona fide scientific purpose?

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Maritime Boundaries (Nicaragua v. Honduras, Historical) - 1999

Nicaragua seeks a determination by the Court establishing the maritime boundary shared between Nicaragua and Honduras. The conflict began in November 1999 when the Honduran Congress ratified the 1986 Caribbean Sea Maritime Limits Treaty, a bilateral treaty between Columbia and Honduras which grants Colombia sovereignty over a section of the Caribbean. The Nicaraguan government believes that the treaty, also known as the Ramirez-Lopez treaty, unjustly encroaches on 130,000 square kilometers of its maritime border. Honduran ambassadors in Managua said that the treaty was being ratified, after years of negotiations, because Honduras believed that Nicaragua and Jamaica were planning a claim on the disputed territory, which includes the islands of San Andres, Providence, and Serranilla Key.

Tensions rose in December 1999 with rumors of military troop movements near the Honduran/Nicaraguan border, which both parties denied. In response, Honduras and Nicaragua signed an agreement in March 2000 limiting the patrol of the contested Caribbean waters and military presence along their border until the dispute could be heard by the International Court of Justice. Nevertheless, even after signing of the treaty, there were naval incidents in the disputed area. In February 2000, Nicaraguan military officials accused two Honduran naval vessels of entering Nicaraguan waters and opening fire at a Nicaraguan patrol boat. The Honduran response was that a Nicaraguan patrol boat was about to detain a Honduran fishing vessel in Honduran waters. In December of the same year, the Honduran Navy seized the Nicaraguan vessel Mister Kerry, which it alleges was in Honduran national waters.

The underlying disagreement surrounds the land boundary created by the Arbitral Award from His Majesty the King of Spain on 23 December 1906. Both nations brought the issue of this land boundary before the ICJ in 1960 where the Award was found "valid and binding." Since then, the situation has achieved international attention as a serious threat to the region's stability and economic unity. The Inter-American Peace Committee of the Organization of American States (OAS) provided additional international assistance by aiding in determining the final details associated with the 1906 Award. The shortcoming of this agreement was that it left the issue of maritime delimitation considerably vague.

The Nicaraguan government made application on 8 December 1999 to have the ICJ finally resolve the issue of the Nicaraguan/Honduran maritime border. They applied under Article 36, Paragraph 1 and Article 40 of the Statutes, and Article 38 of the Rules of the Court. Jurisdiction exists, according to Nicaragua, under Article 31 of the American Treaty of Pacific Settlement of 1948, also known as the Bogotá Pact, because both Nicaragua and Honduras are signatories. Nicaragua also points to the general recognition in international law of the rights of coastal states, as set forth in Article 142 of the 1982 Law of The Sea Convention, as a source of jurisdiction. Nicaragua maintains the 1906 Award defined only the land boundary between Nicaragua and Honduras, and accordingly there is no established Caribbean maritime boundary. Nicaragua urges the Court to use the bisector of the coastal fronts of the two countries at a fixed point about three miles away from the mouth of the Coco River as the maritime boundary in the disputed sea area within the region of the Nicaragua Rise. Nicaragua maintains that the lowest point, or thalweg of the main mouth of the river, should be the starting point of the delimitation.

Honduras claims that the delimitation line runs straight easterly from the mouth of the Coco River, the point defined by the Arbitral Award on the parallel fourteen degrees, fifty-nine minutes and eight seconds. Approximately 30 miles away from the mouth of the Coco River are multiple reefs, rocks, and cays that have become an integral part of Honduras response to Nicaragua's application. Honduras requests the court to declare the Bobel Cay, South Cay, Savanna Cay, and Port Royal Cay, along with all other islands, rocks, and reefs that are claimed by Nicaragua and lie north of the 15th parallel, to be considered under the Republic of Honduras's sovereignty. Honduras asks the court to delimit the land in keeping with the 1906 Award.

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 5 March 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 include the following:

- Does Nicaragua have a viable claim on the area of concern?
- Does the land boundary created by the Arbitral Award extend into the maritime border?
- What jurisdiction is created in the Bogotá Pact? How does the Law of the Sea Convention affect the international legal perspective on the situation?
- Does the 1906 Award apply to the Bobel Cay, South Cay, Savanna Cay, and Port Royal Cay, or is it only relevant to the land boundary?

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