



## CHAPTER NINE

# THE INTERNATIONAL COURT OF JUSTICE

### PURVIEW OF THE INTERNATIONAL COURT OF JUSTICE

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 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.

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

This is a historical case. In accordance with AMUN rules and procedures, please note that the historical timeline for this case will stop on 8 July 2004. Any and all updates to this case after that date will not be relevant to the AMUN simulation nor considered in hearing the case.

In 2002, Israel approved a plan for the construction of a wall in Occupied Palestinian Territory. On 8 December 2003, the United Nations General Assembly adopted a resolution at its Tenth Emergency Special Session requesting 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 the overwhelming number of *amicus curiae* briefs filed in this matter, participation will be limited to Israel, Australia, Egypt and Palestine.

After World War I, the League of Nations issued a Mandate that recognized the existence of Palestine and created territorial boundaries for the land, then under British control. When the United Kingdom announced its intention to withdraw from Palestine, the General Assembly adopted the Plan of Partition, which called for two independent states, one Arab, the other Jewish, and for Jerusalem to be administered by a special international regime apart from the two States. The Arab population in Palestine rejected the resolution as unbalanced; in 1948 Israel proclaimed its independence and armed conflict ensued. In 1949, general armistice agreements were reached between Israel and its opponents in the war: Jordan, Egypt, Lebanon and Syria. These agreements established what became known as the “Green Line,” which marked the military demarcation lines that the various armies agreed to withdraw to as a result of the armistice. 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. While the Green Line was never

intended to be a permanent border, it continues to have political and administrative significance.

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 under Israeli control since the 1967 War) are occupied territories and Israel is the Occupying Power. Much of the proposed route for the Wall lies within this area. 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 of 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 United Nations Human Rights Council noted that the Wall annexes aquifers which provided 51 percent of the West Bank’s water resources.

The Court must first determine whether it has jurisdiction. The language of the General Assembly’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 United Nations Charter, the General Assembly may request an advisory opinion from the Court on “any legal question.” The jurisdiction of the General Assembly 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 the resolution that asked for the Court’s opinion, 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, the resolution would not be a legitimate request to the Court.

Although Article 65 of the Court’s Statute provides that the Court “may” give an advisory opinion, as the principal judicial organ of the United Nations 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 Court 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 United Nations Charter, 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 States 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 may 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 the following:

- Was the General Assembly acting within its authority when it requested this Advisory Opinion?
- Does the Court have jurisdiction? If so, is there a compelling reason why the Court should not exercise its jurisdiction to give an advisory opinion?
- 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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## APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (CROATIA V. SERBIA) (1999)

This is a historical case. In accordance with AMUN rules and procedures, please note that the historical timeline for this case will stop on 30 August 2012. Any and all updates to this case after that date will not be relevant to the AMUN simulation nor considered in hearing the case.

The fall of the communist system in the former Yugoslavia, accompanied by the elections of ultra-nationalist parties in the former Soviet republics, created a stage set for violence. The separation of Croatia and Slovenia in 1991 from Serb-controlled Yugoslavia initiated four years of bloodshed that killed thousands and displaced hundreds of thousands of Serbs, Croats and Muslims. Slobodan Milosevic, on trial before an international tribunal for crimes of genocide, led the forces of the Federal Republic of Yugoslavia to create a “Greater Serbia.” Croatia comes before the Court alleging that Serbia aided and abetted, as a Nation-State, the crime of genocide as defined under the Convention on the Prevention and Punishment of the Crimes of Genocide (Genocide Convention). Serbia filed a counter-complaint, making similar allegations against Croatia.

At the close of World War II, the Socialist Federal Republic of Yugoslavia was formed as a federation of six equal states: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. This federation did nothing to quell the long-standing political discord between ethnic Croats and Serbs, and the two groups struggled for political dominance in the new State’s government. From its creation, Yugoslavia was dominated and stabilized by communist rule under Josip Tito and its ties to the Soviet Union, but an undercurrent of unrest remained, fueled by the struggle for power between the Croats and Serbs. With Tito’s death in 1980 and the eroding power of the central government through the 1980s, Slobodan Milosevic became the President of the Serbian state and instituted nationalist policies that destabilized the federal government. He also encouraged nationalistic sentiments among ethnic Serbs throughout Yugoslavia. By late 1990, ethnic Serbs living in Croatia declared a separate “Republic of Serbian Krajina” and, in 1991, began a violent rebellion.

In January 1992, both the United Nations and the European Union recognized the independent Republic of Croatia; at the same time, rebel Serbs maintain controlled of large areas of Croatia. The rebels had achieved this control in large part due to the actions of the Yugoslav People’s Army (JNA) and Serbian paramilitaries. Croatia alleges that the actions taken by these forces to displace Croatian people from the territories that the ethnic group controlled under the Soviet Federal Republic of Yugoslavia constitute genocide. Specifically, in the period from May 1991 to November 1991, Croatia alleges that the JNA and ethnic Serbian paramilitaries perpetrated genocide in eastern Croatia by killing and maiming Croats and destroying their homes in a largely successful effort to forcibly displace the entire ethnic Croatian population from the region. Croatia further contends that these forces were ultimately controlled by the government of Serbia and Montenegro.

In late 1992, a cease-fire agreement was reached. The Serbian-controlled areas remained occupied until 1995, when the Republic of Croatia liberated some of the territory through Operation Flash. After attempts

to negotiate a peaceful settlement of the conflict failed, Croatia organized Operation Storm and retook most of the remaining rebel-controlled areas. In 1996 the Republic of Croatia and the Federal Republic of Yugoslavia reached an Agreement for Normalization of Relations. Subsequently, Croatia regained control of the remainder of its territory. In 2003 Yugoslavia was reconstituted as Serbia and Montenegro, which in 2006 separated into individual countries. In its counterclaim, Serbia alleges that the Croatian forces engaged in ethnic cleansing and genocide during Operation Storm, in particular the indiscriminate killing of ethnic Serbs who were attempting to flee the advance of the Croatian forces.

The United Nations was not silent during this period of violence. Following the 1992 cease-fire agreement, the United Nations created a peacekeeping mission to help stabilize the region. The General Assembly also produced two resolutions condemning the violence. The first, adopted in 1992, recognized the genocide by the Federal Republic of Yugoslavia. The second, in 1995, condemned human rights violations committed by all sides to the conflict. In 2007 a judgment was rendered in the parallel ICJ case, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), where the Court found that Serbia and Montenegro (at the time a single entity—Montenegro’s 2006 succession left Serbia as the successor state) had violated the Genocide Convention in 1995, when they failed to prevent the massacre in Srebrenica.

In 2008 Croatia brought this case before the International Court of Justice to contest the Serbian response to its duties to pay restitution for the destruction of Croatian property during the regional conflicts in the 1990s. The Republic of Croatia contends that Serbia is responsible for the actions of the Serb-Croats, because Serbia aided and supported rebels who were fighting for the Serbian State’s ends. Croatia also claims that Serbian-controlled forces committed genocide during Croatia’s war of independence. Finally, Croatia asserts that Serbia should be bound by the Agreement for Normalization of Relations to pay for the damage done by those rebels. In response, Serbia contends that, in the aftermath of Operation Storm and other conflicts, Croatian forces committed genocide by killing fleeing ethnic Serbians. Serbia denies its accountability for the acts of uncontrolled rebels and views the killing of ethnic Serbs during the conflict as an act of genocide against their country.

In considering this case, the Court must first consider whether it has jurisdiction. The jurisdictional question has two components. The first is whether Article IX of the Genocide Convention, which is Croatia’s basis for jurisdiction, allows the Court to hear the case. The second is whether the Court is able to hear Croatia’s claims concerning events that occurred prior to 27 April 1992, which is the date the Federal Republic of Yugoslavia established its constitution, formally separated itself from Croatia, and succeeded to the Socialist Federal Republic of Yugoslavia’s obligations under the Genocide Convention. Until that date, Croatia was, at least nominally, part of the Socialist Federal Republic of Yugoslavia, along with Montenegro and Serbia.

Should the Court determine that jurisdiction exists, it must then apply the definition of genocide as set forth in the Genocide Convention. This definition has two components, known by the legal terms *actus reus* and *dolus specialis*. The *actus reus* of genocide concerns the actions that must be present in order for genocide to have occurred against a national, ethnic, religious or racial group. These are set forth in Article 2 of the Convention and include killing members of the group and



causing serious bodily or mental harm to members of the group. The *dolus specialis* or “special mental element” set forth in the Convention requires that, for genocide to occur, the actions must be committed with “intent to destroy” that particular group. A threshold question is whether the Serbian forces within the Federal Republic of Yugoslavia had de facto control of the ethnic Serbian rebelling against Croatia, and if such control was present, whether it created Serbian liability for the rebels’ actions.

Questions to consider on this issue include the following:

- By what mechanism and to what extent did Serbia succeed to the Soviet Republic of Yugoslavia’s treaty obligations?
- Were the ethnic Serbian rebels fighting for the political goals of Yugoslavia, or did they have their own agenda for a separate state?
- What effect does the recognition of the Republic of Croatia have on the legal aspects of the case?
- What is the legal definition of internal conflict?

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## CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA V. NICARAGUA) (2010)

This is a historical case. In accordance with AMUN rules and procedures, please note that the historical timeline for this case will stop on 30 August 2011. Any and all updates to this case after that date will not be relevant to the AMUN simulation nor considered in hearing the case.

The San Juan River, which flows through Costa Rica and Nicaragua, has been in dispute for over a century. The San Juan River forms an outlet of Lake Nicaragua on the Nicaragua-Costa Rica border and issues from the southwest end of the Lake at San Carlos and passes El Castillo before reaching the Caribbean Sea at San Juan del Norte (Greytown). Approximately 35 km before reaching its delta, the river bifurcates into the San Juan to the north and the Rio Colorado to the south. The Rio Colorado flows almost entirely through Costa Rican territory. The branch that retains the San Juan name and flows to the north is politically and economically vital to Nicaragua as one of the only river outlets to the Caribbean Sea that flows through its territory.

Costa Rica and Nicaragua came to a bilateral agreement regarding the San Juan River in the Treaty of Limits in 1858. While the Treaty of Limits grants sovereignty over the portions of the San Juan that border Nicaragua to Costa Rica, Costa Rica claims that it also grants them certain “important rights,” among these the perpetual right of free navigation for commercial purposes. Further international agreements between the two States regarding this matter include the ruling of the Central American Court of Justice in 1916 and Article IV of the Agreement Supplementary to Article IV of the Pact of Amity, 1956.

In an earlier case, captioned *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the Court issued a ruling in 2009. The decision stated that sovereignty over the San Juan River, and the waters therein, lay with Nicaragua, but that Costa Rica retained the right to navigate the river.

The present case concerns two specific incursions by the Nicaraguan military in connection with the construction of a canal from the San Juan River to Laguna Los Portillos. Both States claim sovereignty over Calero Island, a piece of wetland in the San Juan River delta; the construction took place in the area around the island. The first alleged incursion occurred on or about 18 October 2010. On 21 October 2010, after learning of the presence of Nicaraguan troops on what Costa Rica claims to be its territory, the Government of Costa Rica, through its Foreign Ministry, submitted a formal protest to the Government of Nicaragua. Costa Rica requested that Nicaragua immediately cease any action or activity that would affect Costa Rican territory or sovereignty. In response, on 26 October 2010, Nicaragua rejected Costa Rica’s protest letter and accused Costa Rica of conducting an incursion onto Nicaraguan territory.



On 1 November 2010, Costa Rica's Foreign Minister responded to Nicaragua's allegations and reminded Nicaragua of its international obligations. After learning on the same day that Nicaragua's armed forces had invaded, for the second time, and established a base on what Costa Rica claims to be its territory, the Costa Rican Foreign Minister sent a second diplomatic note, protesting in the strongest terms those hostile acts by Nicaragua. Nicaragua having made no further response, Costa Rica filed an urgent request to the Organization of American States (OAS) and, on 3 November 2010, in accordance with Articles 21 and 62 of the Charter, a Special Session of the Permanent Council of the OAS was convened.

Between 5 and 8 November 2010, the Secretary General of the OAS, José Miguel Insulza, visited both Nicaragua and Costa Rica in order to seek a diplomatic resolution to the dispute. He also flew above the Costa Rican territory occupied by the Nicaraguan military. Secretary General Insulza recommended that Nicaragua withdraw its armed forces from the occupied territory to permit the issue to be discussed bilaterally. Nicaragua allegedly rejected all calls for withdrawal and all means of negotiation attempted through the OAS. The Permanent Council of the OAS recommended that both sides remove any armed forces from the area and begin a process of conflict mediation.

On 18 November 2010, the Republic of Costa Rica filed an application to institute proceedings at the International Court of Justice against the Republic of Nicaragua. The case concerns the incursion into, occupation of and use by Nicaragua's army of Costa Rican territory, as well as breaches of Nicaragua's obligations toward Costa Rica. In particular, Costa Rica objects to Nicaragua's activities dredging the San Juan River and constructing the canal. Costa Rica cited the Charter of the United Nations, Charter of the Organization of American States (OAS), the Treaty of Limits and additional arbitral awards as the proof of Nicaragua's obligations.

Costa Rica cites the 1948 American Treaty on Pacific Settlement, also known as the Pact of Bogotá, in support of the Court's jurisdiction in this matter. Article 31 of the Pact recognizes the jurisdiction of the Court in matters between American States involving, among other disputes, matters of interpreting treaties and questions of international law. Both Costa Rica and Nicaragua have signed and ratified the pact. Costa Rica also calls for the Court to rule on its request for provisional measures of protection on the basis that the Nicaraguan presence is causing irreparable damage to the surrounding rainforests and wetlands, including Calero Island.

In response, Nicaragua claims that its sovereignty over the San Juan River, confirmed in connection with the separate International Court of Justice case that was decided in 2009, also grants Nicaragua the right to improve the navigability of the river through its dredging work and through the construction of the canal. Additionally, Nicaragua claims that no invasion of Calero Island occurred because Nicaragua has sovereignty over the island and cannot invade its own territory. Finally, Nicaragua contends that its activities are not causing harm to Costa Rica and that Nicaragua has complied with its obligations under international environmental law, namely the completion of an environmental impact study prior to beginning its work on the canal and associated dredging.

In considering this matter, the Court must first decide if the Pact of Bogotá is an appropriate method of providing jurisdiction in this case.

The Court must then consider Costa Rica's request for provisional measures.

Questions to consider on this issue include the following:

- Does the Pact of Bogotá provide the Court jurisdiction over this matter?
- Was there a violation of Article 21 or 62 of the Charter of the Organization of American States (OAS)?
- Should Nicaragua be held to the recommendations adopted by the Permanent Council of the OAS?

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