

THE INTERNATIONAL COURT OF JUSTICE

Distinguished members of the Court,

Be very welcome to the International Court of Justice of the 6th *UFRGS Model United Nations*! This year, the Judges of the Court are expected to address two different and challenging topics of Public International Law: the Advisory Opinion on Gibraltar, concerning sovereignty and self-determination of peoples, and the Dispute between Costa Rica and Nicaragua, concerning navigational and related rights.

Allow us, first, to introduce ourselves. Joyce has been studying Law at UFRGS for over five years, and has been participating in UFRGSMUN for over five years as well. The delay on her undergraduate studies is due to the fact that she is also a journalism student, currently working at a radio station. Although, for the moment she does not plan to become a lawyer, international issues are of her major interest, and that is why she has never missed a single edition of UFRGMUN – first as a delegate, then as a staff member of the former Commission on Human Rights, the International Law Commission, the General Assembly’s Social, Cultural and Humanitarian Committee and, finally, the International Court of Justice, both in 2007 and now in 2008. Besides, she also took part in the Philip C. Jessup International Law Moot Court Competition of 2008, which was a thrilling experience. Joyce hopes that judges of the UFRGSMUN 2008 International Court of Justice will also enjoy very thrilling moments while discussing the proposed topics.

Kauê is a fourth-year Law student at UFRGS, and is on his third participation on UFRGSMUN, always as a member of the International Court of Justice – in 2006, as a Judge and, in 2007 and 2008, as a staff member (2007 – Registrar and 2008 – Vice-President), what gives you a small idea of how much he enjoys taking part of the ICJ. Although he knows it is a tougher mission, he is sure that this year’s edition will beat the previous editions, and expects that each and everyone of this year’s Judges have the same joy during the discussions, while learning with each other much more than just International Law.

Bernardo is a fifth-year Law student at UFRGS, where he has always had a big interest in the fields of both Private and Public International Law. Although he has participated as a delegate in several models United Nations – including two editions of UFRGSMUN and one edition of WorldMUN, held by Harvard University – it is the first time that Bernardo joins the Academic Staff of UFRGSMUN, now as the Court’s Registrar. He is very delighted with the opportunity and hopes to be able to assist the Judges of 2008 in whatever they need.

For now, we would like you to join our e-group at icj_ufrgsmun2008-subscribe@yahoogroups.com, so that we can get to know ourselves a little bit before the beginning of our conference, which will be held from the 4th to the 8th of November at the Plaza São Rafael Hotel, in Porto Alegre.

Finally, we would like to give special thanks to our Secretary-General, Helena Jornada, and to our Under-Secretary-General for Academic Affairs, Gustavo Carneiro and Thiago Borne, for their valuable contribution to our work. Last, but not least, we would like to thank Mikaela Kärki, our Research Assistant, for her enthusiasm with our project and unconditional assistance while concluding these study guides.

Joyce Copstein Wainberg

President

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INTRODUCTION

A Brief Overview of the ICJ

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). The Court was established in 1945 by the UN Charter¹, as a windup of a long development of methods for the pacific settlement of international disputes.

The History of the Court

Although the roots of international adjudication may be found in arbitral practice of commercial and navigational disputes, in the 18th Century, the settlement of a permanently constituted international tribunal dates back to 1922, when the Permanent Court of International Justice (PCIJ) started its works in The Hague. The PCIJ, created under the auspices of the League of Nations, is usually referred to as the predecessor of the ICJ; it functioned only until 1940, due to the rise of World War II.

In 1946 the Permanent Court was then dissolved, because of the will to create a new World Court. Such an aim was concretized by the publication of the Charter of the United Nations, which provided for the creation of the International Court of Justice. The ICJ began its works in 1946 and, since then, has become the most important international judicial body worldwide.

The Organization of the Court

The Court is located at the Peace Palace in The Hague (Netherlands). It is composed of fifteen (15) judges (Statute of the ICJ, Article 3), who are elected for terms of office of nine years by the United Nations General Assembly and the Security Council (Statute of the ICJ, Article 4(1)). One third of the Court's Judges is elected every three years, for assuring a certain degree of continuity, and reelection is permitted (Statute of the ICJ, Article 1(3)).

Among the elected judges, there cannot be more than one national of the same State (Statute of the ICJ, Article 3(1)). For the purposes of a particular case, the Court may also include upon the Bench nationals of the parties to sit as judges *ad hoc*. It is important to

¹ The UN Charter, Article 7, paragraph 1, provides that “there are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.”

emphasize that Judges of the ICJ, although nationals of a given State, do not represent it in the Court: they are independent magistrates, elected regardless of their nationality and from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.²

ICJ's Competence and Procedures

The competence of the ICJ comprises two types of cases, which are (1) the settlement of legal disputes between States – contentious cases – and (2) the delivery of advisory opinions on legal questions referred to it by United Nations organs and specialized agencies – advisory proceedings (UN Charter, Articles 94 and 96).

As to the **contentious cases**, only States may be parties thereto. These may be States Members of the UN and other States which have become parties to the Statute of the Court, or which have recognized its jurisdiction under certain conditions (for instance, a declaration of compulsory jurisdiction, or a special agreement by the Parties, called *Compromis*), or even as a consequence of a provision enshrined in a Treaty.

The proceedings before the Court may be instituted either through the notification of a special agreement – a document that can be lodged with the Court by one State or by both – or by means of an application –, which is submitted by an applicant State against a respondent State. Contentious proceedings start with a written phase (pleadings by the parties), which is then followed by an oral phase, where the public hearings of witnesses, experts, agents, counsels and advocates take place. After that, the Court deliberates in camera and delivers its judgment, which is final, binding (only) on the parties and without appeal (UN Charter, Articles 94 and 95; Statute of the ICJ, Article 59).

As to the **advisory proceedings**, an advisory opinion may be requested by the UN General Assembly or by the Security Council on “any legal question”, or by other UN organs and specialized agencies duly authorized to do so, although only “with respect to legal questions arising within the scope of their activities” (UN Charter, Article 96). Questions

² Statute of the ICJ, Article 2. In addition, the Statute (Article 9) provides that “the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principle legal systems of the world should be assured.”

upon which the advisory opinion is asked shall be laid before the Court by means of a written request (Statute of the ICJ, Article 65 II).

In order to reach a conclusion on the request, the Court is empowered to hold written and oral proceedings, although these are not mandatory. At the end, the proceedings are concluded by the delivery of the advisory opinion in open court, which – unlikely a judgment – has no binding effect, except in rare cases.

TOPIC AREA A: THE QUESTION OF SOVEREIGNTY IN GIBRALTAR (ADVISORY OPINION)

By Joyce Copstein Wainberg with Bernardo Fontana and Mikaela Kärki

“The issue of territorial sovereignty (...) is often complex, and involves the application of various principles of the law to the material facts.” (BROWNLIE, 2003, p.123)

1. INTRODUCTION

The present request for an advisory opinion addresses the question of Gibraltar, an impasse regarding sovereignty between the United Kingdom of Great Britain and Northern Ireland (hereinafter UK), the Kingdom of Spain (hereinafter Spain) and the people of Gibraltar, a Non-Self-Governing Territory administered by the UK. The question has entered the United Nations General Assembly’s agenda in the 1960s, and is currently under discussion at the Special Political and Decolonization Committee (SPECPOL). Now, the United Nations General Assembly (hereinafter UNGA) comes to the International Court of Justice for an opinion on the legal aspects that affect the issue.

The territory of Gibraltar is a narrow peninsula located southward from Spain, and connected to it by an approximately 1.6 kilometers long isthmus. The Spanish port of Algeciras is situated 8 kilometers across the bay to the west; the African continent is at a 32 kilometers distance, across the Strait of Gibraltar to the south. Gibraltar’s area is subject of a divergence: according to Spain, it is of 4.8 square kilometers; according to the UK, of 5.8 square kilometers. A census dated from 2005 indicates a population of 28,779 persons living in the peninsula (Gibraltar: Working paper prepared by the Secretariat (A/AC.109/2007), 2007).

2. HISTORICAL BACKGROUND

The current dispute is not the first one in the history of the territory. Originally belonging to the Moors,³ the city of Gibraltar has changed hands between them and the

³ “The Moors were the first people to settle Gibraltar when Tariq ibn Zeyad, the lieutenant of Moorish General Musa ibn Nusayr, took Gibraltar in 711 A.D. Between 1309 and 1462 A.D., Gibraltar underwent eight separate

Spaniards several times until 1462, when it was conquered by Castile. In the early years of the 18th Century, during the War of Spanish Succession (1701-1713), the territory was invaded by a combined Anglo-Dutch force, and thus passed to the control of the United Kingdom (LINCOLN, 1995).

The conflict ended in 1713, when Spain formally ceded the property over the territory to the United Kingdom in a series of treaties concluded by five European States, known as the Peace of Utrecht.⁴ Article X of the Treaty of Peace and Friendship between Great Britain and Spain addressed the cession, ruling at the same time that

in case it shall hereafter seem meet to the Crown of Great Britain to grant, sell or by any means to alienate therefrom the propriety of the said town of Gibraltar, it is hereby agreed and concluded that the preference of having the sale shall always be given to the Crown of Spain before any others (Treaty of Utrecht, 1713, article X).

The status of the peninsula as a British dependency was not questioned until the issue of decolonization surfaced among the international community, at the time of the passing by the UNGA of Resolution 1514 (XV), in 1960 (LINCOLN, 1995)⁵. Based on Resolution 1514, also called the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, the UN Special Committee on Decolonization⁶ considered the question of Gibraltar in 1963, hearing the representatives of the three parties – the UK, Spain and the people of Gibraltar. Eventually, the Committee reached a consensus, structuring the negotiations on the issue in spite of a visible disagreement between the UK and Spain (FAWCETT, 1967). At that time, no reference was made to the principle of self-determination of peoples.

As none of the matters in dispute was being solved, the UNGA approved two resolutions addressing negotiations on the status of the territory, Resolution 2070 of 1965 and 2231 of 1966 (FAWCETT, 1967; LINCOLN, 1995). Both resolutions called for the British and Spanish governments to implement the *Declaration on the Granting of Independence to*

sieges, with different Muslim rulers controlling Gibraltar for all but the first twenty-four of those years” (LINCOLN, 1995, p. 2)

⁴ The peace treaty was signed by the representatives of France and of Spain on one side, and by the representatives of Great Britain, the Duke of Savoy, and the United Provinces on the other.

⁵ For more on Resolution 1514, see The principle of Self-Determination (infra).

⁶ Created by the UNGA in 1961, the Committee’s full name is “Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples”. It is also known as “Special Committee of 24”, for it originally had 24 members.

Colonial Countries and Peoples in their efforts to settle the question, and the latter also requested the two parties to take into account “the interests of the people of Gibraltar” (UNGA Resolution 2231 (XXI), 1966).

On 10 September 1967, the UK held a referendum among the Gibraltarian, who expressed their undeniable will to maintain their link with the Administering Power and rejected ties with the Spanish government (LINCOLN, 1995; PORTER, 2003)⁷. However, on Resolution 2353 (XXII) of 1968, the UNGA denied the validity of the public consultation, on the grounds that it violated Resolution 2231. In fact, Resolution 2231 made no recommendation for such a referendum (FAWCETT, 1972)⁸.

Meanwhile, the British government confirmed the consultation’s results by promulgating the Gibraltar Constitution of 1969, which “effectively gave the people of Gibraltar the power to veto any decision regarding the transfer of sovereignty from the British Crown to another state” (LICOLN, 1995, p.3). In response to both the referendum and the Constitution, Spain closed its border to Gibraltar later that year (PORTER, 2003).

Further negotiations, based on Resolution 2231, led Britain and Spain to conclude two agreements in the 1980’s regarding sovereignty over Gibraltar: the Lisbon Agreement and the Brussels Agreement. In 1988, with the election of Joseph Bossano as a Chief Minister in the territory⁹, a consistent advocacy on the Gibraltar's right to self-determination began, with the insistence of Mr. Bossano that Gibraltarian government officials should represent the people of Gibraltar in negotiations with Spain (LINCOLN, 1995).

3. STATEMENT OF THE ISSUE

⁷ The results came from an overwhelming majority: “out of 12,182 votes cast, 12,138 supported British rule, whereas a mere forty-four voted in support for annexation to Spain” (PORTER, 2003, p. 8).

⁸ The clause on UNGA Resolution 2353 that declared the holding of the referendum a contravention of Resolution 2231 was most likely based on the UN Special Committee on Decolonization’s previous statement of 1st September 1967 that a referendum would contradict the provisions of Resolution 2231 (PORTER, 2003).

⁹ The Government of Gibraltar is constituted by a Governor, who represents the United Kingdom, and a Council of Ministers. The Governor of Gibraltar is responsible “for external affairs, defence, internal security, including police, and certain appointments as are conferred on him by the Constitution” (A/AC.109/2007, §2). The Chief Minister is appointed by the Governor after an election to the Parliament. The Governor acts in his discretion and appoints, as Chief Minister, the member of the Parliament who he believes to be “most likely to command the greatest measure of confidence among the elected members of the Parliament” (A/AC.109/2007, §2). The other Ministers of Gibraltar are appointed by the Governor with the advice of the Chief Minister, also from among the members of the Parliament.

3.1. Legal theses involved: Self-determination of Peoples and Sovereignty of States

Amongst the principles of international law that surround the question presented to the Court, self-determination of peoples and sovereignty of states are key ones. Therefore, we shall undertake a deeper analysis on each of them. According to Cassese, the first eroded the latter, “one of the basic postulates of the old international community” (2005, p. 60). In the same sense, Klabbbers writes that “[i]t was probably never very realistic to expect judicial bodies to render final decisions allowing (or even ordering) existing states to be broken up in the name of self-determination” (1998, p. 4).

In opposition, Brownlie holds that the principle of self-determination actually *informs* and *complements* other general principles of international law such as sovereignty of states (2003).

3.1.1. The Principle of Self-Determination

With roots tracing back to the American and French revolutions (KLABBERS, 1998), self-determination first appeared on the international arena in the United States of America President Wilson’s unsuccessful efforts to include it in the League of Nations Covenant after the First World War (SHAW, 2003). In addition, the political leader, Lenin has strongly supported the self-determination of peoples (CASSESE, 2005). Self-determination, writes Cassese,

“was intended (...) to brush aside the old, State-oriented approach prevailing in international dealings. Under this old approach, the world community consisted of potentates, the sovereign States, each of them primarily concerned with the interests of its own political elite. (...) By contrast, self-determination meant that peoples and nations were to have a say in international dealings: sovereign Powers could no longer freely dispose of them, for example by ceding or annexing territories without paying any regard to the wishes of the populations concerned” (2005, p. 60).

The idea of self-determination, however, did not gain the status of a legal principle until the second half of the 20th Century; when it was considered as a purely political

concept¹⁰. Even its reference in the UN Charter, in 1945, as one of the purposes of the United Nations (CHARTER..., article 1(2)) could not suffice its recognition as hard law, for, as writes Shaw, “[n]ot every statement of a political aim in the Charter can be regarded as automatically creative of legal obligations” (2003, p. 226). The Charter’s recognition of self-determination created, though, an opportunity for further definition and interpretation of its legal effect and consequences, leading to its establishment as both a right and a principle under international law (BROWNLIE, 2003; SHAW, 2003). The very practice of the UN, within its General Assembly and the ICJ, constituted the key development of the principle (BROWNLIE, 2003; SHAW, 2003).

In 1960, with eighty-nine votes in favor, none against and nine abstentions, the UNGA adopted Resolution 1514 (XV), the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, providing that:

“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. (Article 2)

In 1971, ICJ’s advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* recognized Resolution 1514 as an important stage in the development of the self-determination principle and also held that

“the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them” (ICJ, 1971, p. 31).

This very passage was reaffirmed on the Court’s Western Sahara opinion of 1975, in which it also recognized Resolution 1514 as having enunciated the principle of self-determination as a right of peoples and as determining its application “for the purpose of bringing all colonial situations to a speedy end” (ICJ, 1975, p. 31). Referred to in several posterior resolutions addressing specific colonial territories, the Declaration “regards the

¹⁰ “Until recently the majority of Western jurists assumed or asserted that the principle had no legal content, being an ill-defined concept of policy and morality” (BROWNLIE, 2003, p.553). That was the understanding in the Åland Islands Case, one of the first disputes resolved by the Council of the League of Nations, in 1921. The Swedish population of the Island, allegedly a part of Finland, wished to join Sweden, but the League recognized Finnish sovereignty combined with the granting of minority guarantees (SHAW, 2003, p. 226).

principle of self-determination as a part of the obligations stemming from the Charter, and is not a ‘recommendation’, but is in the form of an authoritative interpretation of the Charter” (BROWNLIE, 2003, p. 554).

Further development of international law gave more and more strength to the principle. On its judgment of 1995, the ICJ affirmed the *erga omnes*¹¹ character of the right of peoples to self-determination by affirming that:

“In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (...); it is one of the essential principles of contemporary international law.” (East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, para. 29)

In addition, the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 enlisted self-determination as one of the peremptory norms that are clearly accepted and recognized under international law, recognizing, therefore, its *ius cogens* character.¹²

On this subject, Cançado Trindade writes that the

“recent developments on contemporaneous International Law reveal the internal and external dimensions of self-determination: the first one is the right of every people to be free of any kind of foreign *dominium*, and the second is the right of each people to choose its

¹¹ The Oxford Dictionary of Law defines *erga omnes* obligations as the ones “in whose fulfillment all states have a legal interest because their subject matter is of importance to the international community as a whole. It follows from this that the breach of such an obligation is of concern not only to the victimized state but also to all the other members of the international community. Thus, in the event of a breach of these obligations, every state must be considered justified in invoking (probably through judicial channels) the responsibility of the guilty state committing the internationally wrongful act. It has been suggested that an example of an *erga omnes* obligation is that of a people's right to self-determination” (MARTIN, 2003, p. 453).

¹² “The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination” (ILC, 2001, article 26 (5)).

destiny and affirm its own will, even against its own government” (2002, p. 737, free translation).¹³

Cassese points out that there are currently three areas in which self-determination is established under international law: “as an *anti-colonialist standard*, as a *ban on foreign military occupation*, and as a requirement that all *racial groups be given full access to government*” (2005, p.61). Regarding the first one, the author defines it as a customary rule¹⁴ that peoples under colonial domination are entitled to *external* self-determination, that is, they have the right to achieve independence or to freely associate or integrate with an independent State. The Oxford Law Dictionary’s definition is in consonance with this understanding:

“**self-determination** *n.* (in international law) The right of a people living within a non-self-governing territory to choose for themselves the political and legal status of that territory. They may choose independence and the formation of a separate state, integration into another state, or association with an independent state, with autonomy in internal affairs.” (MARTIN, 2003, p. 453).

Janis and Noyes, on the other hand, affirm that,

“(…) even though it [the principle of self determination] be regarded as the most important of the principles governing the formation of States, geographical, economic and other similar considerations may put obstacles in the way of its complete recognition. Under such circumstances, a solution in the nature of a compromise, based on an extensive grant of liberty to minorities, may appear necessary according to international legal conception and may even be dictated by the interests of peace” (2006, p. 487).

3.1.2. Sovereignty and Territorial Integrity

¹³ On the original, “Desenvolvimentos recentes no direito internacional contemporâneo revelam as dimensões tanto externa quanto interna do direito de autodeterminação dos povos: a primeira significa o direito de todo povo de estar livre de qualquer forma de dominação estrangeira, e a segunda refere-se ao direito de todo povo de escolher seu destino e afirmar sua própria vontade, se necessário contra seu próprio governo”.

¹⁴ “Custom is one of the four sources of international law. Its elaboration is a complex process involving the accumulation of state practice, i.e. (1) the decisions of those who advise the state to act in a certain manner, (2) the practices of international organizations, (3) the decisions of international and national courts on disputed questions of international law, and (4) the mediation of jurists who organize and evaluate the amorphous material of state activity” (MARTIN, 2003, p. 453).

Article 2(1) of the UN Charter states that “the Organization is based on the principle of the sovereign equality of all its Members”, recognizing sovereignty of States as a fundamental principle of international law. Oppenheim’s definition of sovereignty of 1948 regards it as a “supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all round, within and without the borders of the country” (1948, pp. 114-115). The concept of sovereignty is, nevertheless, problematic. How can a State, if sovereign, be bound by rules? International lawyers usually argue that a State can be bound precisely because it is sovereign (Klabbers, 1998): a sovereign State can consent to be bound by a rule and conclude treaties. This was stated by the predecessor of the Court in the Wimbledon case (Case of the S.S. Wimbledon, Judgment, P.C.I.J., 1923). According to Klabbers, there has, however, been a tendency to do away with the notion of sovereignty or, at least to re-conceptualize it so that it becomes less fundamental (1998).

Deeply connected with the principle of State sovereignty is the principle of territorial integrity, defined by Shaw as “a reflex of the need for stability and finality and boundary questions, one of the core principles of the international system” (2003, p. 443). According to the author, “[s]elf-determination cannot be used to further larger territorial claims in defiance of internationally accepted boundaries of sovereign states, but it may be of some use in resolving cases of disputed frontier lines on the basis of the wishes of the inhabitants. In addition, one may point to the need to take account of the interests of the local population where the determination of the boundary has resulted in a shift in the line, at least in the view of one of the parties” (2003, p. 444). Cassese also views territorial integrity as a limit to the right to self-determination (2005).

If Resolution 1514 (XV) affirms the right of self-determination of all peoples, it also affirms that “[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purpose and principles of the Charter of the United Nations” (Resolution 1514, article 6). Recognizing the principle of territorial integrity, this clause was reaffirmed in the preamble of the *Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations*, approved by the UNGA Resolution 2625.

3.2. Legal Precedents of the ICJ: Western Sahara, Advisory Opinion of 16 of October 1975

In the Advisory Opinion on Western Sahara, the UNGA request the Court to give its opinion on two questions related to the territory of Western Sahara (region of Río de Oro and Sakiet El Hamra).¹⁵ The questions formulated were the following:

- I. *“Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?*

If the answer to the first question is in the negative,

- II. *What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian Entity?”* (Western Sahara, Advisory Opinion, I.C.J., 1975, para. 1.)

Western Sahara, at that time Spanish Sahara, was a territory under administration of Spain in the north-west African region, to which both Morocco and Mauritania claimed to have had legal ties prior to Spanish domain, thus demanding for reintegration of the region to either country’s sovereignty. Important to notice that, as it regards Question II, an answer in positive to the existence of any tie of sovereignty over the territory on the part of Morocco or of Mauritania could influence the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.

In this sense, UNGA resolution 3292 reaffirmed the right of the population of that territory to self-determination¹⁶, and considered that the persistence of a colonial situation in Western Sahara jeopardized stability and harmony in the north-west African region. In addition, Spain was urged to postpone the referendum on self-determination it contemplated holding in the region, pending the opinion of the Court. Regardless of the objections put by Spain¹⁷, the ICJ found no compelling reason for refusing to give a reply to the two questions submitted to it (Western Sahara, Advisory Opinion, I.C.J., 1975, para. 74). The decolonization process envisaged by the UNGA, asserted the Court, was one which would respect the right of the population of Western Sahara to determine their future political status

¹⁵ The General Assembly decided to request the advisory opinion by resolution 3292 (XXIX), adopted on 13 December 1974.

¹⁶ In accordance with UNGA Resolution 1514 (XV).

¹⁷ Spain argued: (a) that the advisory opinion was being used to circumvent the principle that jurisdiction to settle a dispute requires the consent of the parties; (b) that the questions, as formulated, raised issues concerning the attribution of territorial sovereignty over Western Sahara; (c) that the Court did not possess the necessary information concerning the relevant facts to enable it to pronounce judicially on the questions submitted to it.

by their own freely expressed will. This right, which was not affected by the request for an advisory opinion and which constituted therefore a basic assumption of the questions put to the Court, leaved the UNGA a measure of discretion with respect to the forms and procedures by which that right was to be realized. The Advisory opinion would thus furnish the UNGA with elements of a legal character relevant to that further discussion of the problem to which resolution 3292 (XXIX) alluded (Western Sahara, Advisory Opinion, I.C.J., 1975, para. 70-73).

With regard to Question I, the Court was of opinion that Western Sahara was not a territory belonging to no-one (*terra nullius*) at the time of colonization by Spain (Western Sahara, Advisory Opinion, I.C.J., 1975, para. 79-83). Given that the answer to the first question was in negative, the Court turned to Question II. As to it, the Court stated that the word “legal ties” might be understood as referring to such “legal ties” as might affect the policy to be followed in the decolonization of Western Sahara. “Legal ties”, in this context, could not be limited to ties established directly with the territory, since legal ties are normally established in relation to people (Western Sahara, Advisory Opinion, I.C.J., 1975, para. 85).

Both Morocco and Mauritania claimed before the Court to have legal ties with Western Sahara at the time of colonization by Spain.¹⁸ Meanwhile, Spain considered that there were a number of obstacles in the way of accepting the views of both countries. The Court, in its answer to Question II, concluded that there were legal ties between the Sultan of Morocco, as well as between the Mauritanian entity, and the territory of Western Sahara, although these were not “ties of territorial sovereignty”. Thus, the Court has not found legal ties of such a nature as might affect the application of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory in the decolonization of Western Sahara (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, para. 162).

Judge Nagendra Singh, in his declaration which followed the advisory opinion, stated that the consultation of the people of the territory awaiting decolonization was an inescapable

¹⁸ Morocco claim has been put to the Court as a claim to ties of sovereignty on the ground of an alleged immemorial possession of the territory, based not on an isolated act of occupation but on the public display of sovereignty, uninterrupted and uncontested, for centuries, Western Sahara, Advisory Opinion, I.C.J., 1975, para. 90. According to the Court, a claim to sovereignty based upon continued display of authority involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority (para. 92). As to Mauritania, it was clear and undisputed that there was not legal ties of Sate sovereignty with which the Court was concerned, since there was not then any Mauritanian State in existence, but rather an “cultural, geographical and social entity” (para. 130-132).

imperative, whether the method followed on decolonization was integration or association (with either Morocco or Mauritania) or independence. The ascertainment of freely expressed will of the people, he continued, was the very *sine qua non* of all decolonization (Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 81).

4. PARTIES' POSITIONS

4.1. The United Kingdom's position

Aiming to build a non-colonial relationship with the people of Gibraltar while retaining its property over the peninsula, UK's government put a new Constitution for Gibraltar into force on 2 January 2007¹⁹. The Constitution that had been agreed between the British and the Gibraltarians in March 2006 and later approved by 60.24 percent on a referendum held on 30 November 2006.²⁰

In this new Constitution, the British recognize the right of self-determination of the Gibraltarian people (BECKETT, 2006), to be “promoted and respected in conformity with the provisions of the Charter of the United Nations and any other applicable international treaties” (Gibraltar: Working paper prepared by the Secretariat (A/AC.109/2007), 2007, §50).

At the same time, the Administering Power understands that Article X of the Treaty of Utrecht is an exception to the Gibraltarian right to self-determination. Accordingly, Article X “gives Spain the right of refusal should Britain ever renounce sovereignty. Thus, it is the position of Her Majesty's Government that there is no constraint to that right, except that independence would only be an option for Gibraltar with Spain's consent” (BECKETT, 2006, §5).

Also in a reference to the current dispute, UK states that

“Her Majesty's Government will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes” (BECKETT, 2006, §2).

Foremost, the UK affirms that it “does not believe that the principle of territorial integrity is applicable to the decolonization of Gibraltar”, in addition to that “British

¹⁹ The Constitution was created by an Order-in-Council on 14 December 2006 and came into force on 2 January 2007.

²⁰ 37.75 per cent voted against, and the remainder were blank votes (A/AC.109/2007, §50).

sovereignty of Gibraltar remains undiminished” (Gibraltar: Working paper prepared by the Secretariat (A/AC.109/2007), 2007, §50).

It is also the British view that “none of its remaining overseas Territories, including Gibraltar, should remain on the United Nations list of Non-Self-Governing Territories, despite the different circumstances affecting Gibraltar” (Gibraltar: Working paper prepared by the Secretariat (A/AC.109/2007), 2007, §51). The “different circumstances” referred to are the ones created by virtue of Article X’s provisions.

4.2. Spain’s position

The Spanish view is that the principle of self-determination does not apply to the decolonization of Gibraltar. The State considers the 30 November 2006 referendum “a local initiative” which did not affect “in any way the pending decolonization process of Gibraltar” (Gibraltar: Working paper prepared by the Secretariat (A/AC.109/2007), 2007, §9) and that the 2006 Constitution recognizes “only a right of self-determination restricted to its purely internal dimension, with no consequences in the external context”. (Gibraltar: Working paper prepared by the Secretariat (A/AC.109/2007), 2007, §59)

The decolonization of Gibraltar, states the Spanish government, has to be

“the result of bilateral negotiations between Spain and the United Kingdom in which the interests and aspirations of the Gibraltarians would be taken into account, and could not be a consequence of the exercise of a presumed right of selfdetermination by the Gibraltarians” (Gibraltar: Working paper prepared by the Secretariat (A/AC.109/2007), 2007, §60).

Spain also points out that the dispute on sovereignty and the decolonization process on Gibraltar are inseparable issues, and that the question of sovereignty is to be addressed in bilateral negotiations between itself and the UK (Gibraltar: Working paper prepared by the Secretariat (A/AC.109/2007), 2007).

4.3 The Gibraltarian’s position

Unlike Spain, the people of Gibraltar believe that self-determination is the only applicable principle to their decolonization process under international law. They also affirm (also) that “it was an unsustainable misconception to seek to apply the principle of territorial integrity to any process of decolonization” (Gibraltar: Working paper prepared by the

Secretariat (A/AC.109/2007), 2007, §55), disagreeing with the Spanish view that territorial integrity should have priority over self-determination on this case. Gibraltar sustains that decolonization and sovereignty are different questions.

When the 2006 Constitution came into effect, the Chief-Minister Peter Caruana started considering Gibraltar “effectively decolonized” (Gibraltar: Working paper prepared by the Secretariat (A/AC.109/2007), 2007, §52). Yet, there still is an internal discordance among the territorial government and the opposition regarding which should be the next steps: now leader of the opposition, Joseph Bossano does not agree with the British position that the UN should not participate in the decolonization process. Considering himself “faced with no other option” (Gibraltar: Working paper prepared by the Secretariat (A/AC.109/2007), 2007, §58), Bossano recognizes the new Constitution as a result of a bilateral agreement between Gibraltar and the UK, however does not believe that the colonial relationship between the territory and the Power has really ended. In that sense, Bossano is in favour of amending the new Constitution, if that is necessary for decolonization, with the participation of the British, the people of Gibraltar and the UN.

5. QUESTIONS TO PONDER

On the 1st of March of 2008, the United Nations General Assembly requested the International Court of Justice to issue an Advisory Opinion on the Question of Gibraltar, in order to furnish SPECPOL with the legal rules and principles that may apply to this particular situation. The questions formulated are the following:

- I. Is article X of the Treaty of Utrecht still applicable on the decolonization of Gibraltar?
- II. Is the principle of territorial integrity applicable to the decolonization process of Gibraltar?
- III. Is the principle of self-determination applicable to the process of decolonization of Gibraltar?

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TOPIC AREA B: DISPUTE CONCERNING NAVIGATIONAL AND RELATED RIGHTS ON THE SAN JUAN RIVER (COSTA RICA V. NICARAGUA)

By Kauê Ávila Petry with Bernardo Fontana and Mikaela Kärki

1. INTRODUCTION

The San Juan River is located between the Republic of Costa Rica (hereinafter “Costa Rica”) and the Republic of Nicaragua (hereinafter “Nicaragua”), and has been a historical reason of conflict between the two countries. Their dispute dates back to 1821, when the area of Nicoya and Guanacaste, previously belonging to Nicaragua, was annexed by Costa Rica (BARRIOS, 2004, p. 5).

Signed on 15 April 1858, the Cañas-Jerez Treaty of Limits between Costa Rica and Nicaragua (hereinafter “the Treaty of Limits”) officially sets the river as a permanent demarcation between the territories²¹. However, the Treaty of Limits was not enough to settle down the disputes regarding the possibilities of use of the river by the parties, reason why they agreed, in a treaty signed on 24 December 1886, to confer the powers of issuing an Arbitral Award to the former President of the United States of America, Mr. Grover Cleveland, regarding the interpretation of the Treaty of Limits. The Arbitral Award, also known as “Cleveland Award”, was issued on 22 March 1888.

Meanwhile, the Cleveland Award was also unable to cease the dispute as expected. On the beginning of the 20th Century, both parties once more disagreed about the content and the interpretation of the Treaty of Limits, when United States and Nicaragua signed the Bryan-Chamorro Treaty, which intent to give United States exclusive rights for the construction and operation of a canal that was supposed to pass by the San Juan River²².

²¹ **Article II** - *The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla - at the mouth of the San Juan de Nicaragua river, and shall run along the right bank of the said river up to point three English miles distant from Castillo Viejo, said distance to be measured between the exterior works of said castle and the above-named point. From here, and taking the said works as centre, a curve shall be drawn along said works keeping at the distance of three English miles from them, in its whole length, until reaching another point, which shall be at the distance of two miles from the bank of the river on the other side of the castle. From here the line shall continue in the direction of the Sapoá river, which empties into the Lake of Nicaragua, and it shall follow its course, keeping always at the distance of two miles from the right bank of the San Juan river all along its windings, up to reaching its origin in the lake; and from there along the right shore of the said lake until reaching the Sapoá river, where the line parallel to the bank and shore will terminate. From the point in which the said Line shall coincide with the Sapoá river - a point which, according to the above description, must be two miles distant from the lake - an astronomic straight line shall be drawn to the central point of the Salinas Bay in the Southern Sea, where the line marking the boundary between the two contracting Republics shall end. (TREATY OF LIMITS, 1858)*

²² **Article I** - *The Government of Nicaragua grants in perpetuity to the Government of the United States, forever free from all taxation or other public charge, the exclusive proprietary rights necessary and convenient for the*

Regarding this dispute, the Central American Court of Justice (hereinafter “CACJ”) issued, on 1916, a decision declaring that the Bryan-Chamorro Treaty violated Costa Rican rights over the river.

In the last decades, the relations among the parties concerning the use of the river once again became tense, culminating with the filing of an Application before the Court by Costa Rica, in which it demands remedies against alleged violations of its rights on the river by the Nicaraguan government.

Both Costa Rica²³ and Nicaragua²⁴ are members of the United Nations and have declared the acceptance of the compulsory jurisdiction of the Court on 20 February 1973 and 24 September 1929, respectively, which may be a basis for the Court’s jurisdiction in the case. Furthermore, the jurisdiction of the Court over the case is also granted by the article XXXI of the American Treaty on Pacific Settlement of 1948 (Pact of Bogota)²⁵, which Costa Rica and Nicaragua signed and ratified²⁶, reaffirming their commitment through the Pact of Amity signed on 21 February 1949.²⁷

2. STATEMENT OF THE ISSUE

construction, operation, and maintenance of an interoceanic canal by way of the San Juan River and the great Lake of Nicaragua or by way of any route over Nicaraguan territory, the details of the terms upon which such canal shall be constructed, operated, and maintained to be agreed to by the two Governments whenever the Government of the United States shall notify the Government of Nicaragua of its desire or intention to construct such canal. (BRYAN-CHAMORRO TREATY, 1914)

²³ See the declaration at: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&code=CR>

²⁴ See the declaration at: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&code=NI>

²⁵ *Article XXXI. In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:*

a) The interpretation of a treaty;

b) Any question of international law;

c) The existence of any fact which, if established, would constitute the breach of an international obligation;

d) The nature or extent of the reparation to be made for the breach of an international obligation. (PACT OF BOGOTA, 1948)

²⁶ Costa Rica ratified the Treaty on 04/27/49, and Nicaragua on 06/21/50. See at: <http://www.oas.org/juridico/english/sigs/a-42.html>

²⁷ *Article III – The Governments of Costa Rica and Nicaragua recognize the existing obligation of each of them, under the Inter-American Treaty of Reciprocal Assistance of Rio de Janeiro and under Article 20 of the Charter of the Organization of American States, to submit disputes that may arise between them to the methods for the peaceful settlement of international conflicts.*

In order to carry out this high purpose, both Governments agree to apply the American Treaty on Pacific Settlement, known as the Pact of Bogotá recognizing that Treaty as having full validity as to disputes between them even before it is formally ratified and enters in consequence into effect between all the American Republics. (PACT OF AMITY, 1949)

On the 29 September 2005, Costa Rica filed an Application before the International Court of Justice against the Republic of Nicaragua, concerning its navigational rights in the San Juan River. According to the Application, Nicaragua had been imposing, since the later years of the 1990 decade, several restrictions on the navigation of Costa Rican boats and their passengers on the river (DISPUTE CONCERNING NAVIGATIONAL AND RELATED RIGHTS OF COSTA RICA ON THE SAN JUAN RIVER, 2005, §8). Costa Rica claims that to be a clear violation of the Treaty of Limits, as well as the Cleveland Award, among other legal instruments.²⁸

According to Costa Rica's application, since the 1990's Nicaragua does not recognize that Costa Rican boats and vessels engaged with the commercial transportation of passengers or provision of services are acting for the purposes of commerce within the meaning of the Treaty of Limits (DISPUTE CONCERNING NAVIGATIONAL..., 2005, §9, a). Therefore, Nicaragua denies that these vessels must be treated according to the Treaty of Limits. Because of that, Nicaragua requires all Costa Rican boats that enter the San Juan River to stop on the Nicaraguan River bank, imposing the payment of charges ranging from US\$4 to US\$20, regarding immigration charges, the grant of a tourism card, and the use of the port facilities, irrespective of the purpose of the travel or the real use of the facilities (DISPUTE CONCERNING NAVIGATIONAL..., 2005, §9, b).

Furthermore, as states the Applicant, on 15 July 1998 the former president of Nicaragua, Arnaldo Aleman, prohibited Costa Rican police from navigating the waterway while armed with their regular firearms.²⁹ Costa Rica claims that this is another violation of the Treaty of Limits and of the Arbitral Award, once they do permit the navigation of official vessels on the San Juan River for supply purposes, exchange of personnel of the border posts on its side of the river, with their official equipment (including arms and ammunitions), independently of Nicaraguan consent (DISPUTE CONCERNING NAVIGATIONAL..., 2005, §9, c).

Trying to solve the situation diplomatically, Costa Rica and Nicaragua signed, on 26 September 2002, the Tovar-Caldera Agreement. On the instrument, the parties conceded

²⁸ The judgment of the Central American Court of Justice in the case *Costa Rica v. Nicaragua*, of 13 September 1916, and also the Pact of Amity and its Agreement Supplementary of 9 January 1956.

²⁹ From NOTICEN, [Rio San Juan: From Nicaragua and Costa Rica to the Hague](http://goliath.ecnext.com/coms2/gi_0199-4874668/RIO-SAN-JUAN-FROM-NICARAGUA.html). See at: http://goliath.ecnext.com/coms2/gi_0199-4874668/RIO-SAN-JUAN-FROM-NICARAGUA.html

themselves a period of three years to solve the matter through political ways (TOVAR-CALDERA AGREEMENT, 2002, §3); Costa Rica compromised not to present any action against Nicaragua before the Court. However, this period elapsed, and the parties were unable to reach a consensus.

Right after the ending of the 3-year period, Nicaragua’s National Assembly passed a resolution in which it considered the imposition of economic sanctions against Costa Rica, in the event that it presented the case to the Court (DISPUTE CONCERNING NAVIGATIONAL..., 2005, §9, d). After the case went to deliberation by the Court, Nicaragua’s National Assembly approved a 35% import tax on Costa Rican goods and services, and a decree was signed by Nicaraguan President Enrique Bolaños increasing the military presence of the country in the river’s area to prevent the navigation of “foreign forces” on the river.³⁰

2.1. Former Precedents

2.1.1. Cleveland Award

On 22 March 1888, the former President of the United States of America, Mr. Grover Cleveland, empowered by a treaty signed by both parties on 24 December 1986, has issued an arbitral award, on which he had to arbitrate whether the Treaty of Limits was valid or not, and also he had to interpret the Treaty, clarifying points of doubtful interpretation and stating what rights Costa Rica was entitled by it.

The Arbitral Award can be divided in two parts: On the first one, composed by the first and second statements, Mr. Grover Cleveland has declared the Treaty of Limits was valid, and stated that, although Costa Rica could not navigate the San Juan River with war vessels, its vessels related with Revenue Service and vessels with purposes of commerce or necessary to its protection were free to navigate.

On the second part, composed by the third statement, the Award has interpreted eleven points of doubtful interpretation of the Treaty of Limits presented by Nicaragua. Most of the questions presented were directly related with the establishment of boundary lines between the parties and the division of expenses related to the river. However, it is important to say the third statement of the Award, more than once, affirmed Nicaragua could not execute works of

³⁰ See note #9.

improvement of the San Juan River that implicated on a prejudice to the navigation of Costa Rican boats. (CLEVELAND AWARD, 1888, *third*, §§ 6 and 8)

Finally, answering the 11th and last question presented by Nicaragua, the Award stated:

The Treaty of Limits of the 15th day of April, one thousand eight hundred and fifty-eight does not give to the Republic of Costa Rica the right to be a party to grants which Nicaragua may make for inter-oceanic canals; though in cases where the construction of the canal will involve an injury to the natural rights of Costa Rica, her opinion or advice, as mentioned in Article VIII of the Treaty, should be more than “advisory” or “consultative”. It would seem in such cases that her consent is necessary, and that she may thereupon demand compensation for the concessions she is asked to make; but she is not entitled as a right to share in the profits that the Republic of Nicaragua may reserve for herself as a compensation for such favors and privileges as she, in her turn, may concede. (TREATY OF LIMITS, 1888, *third*, §11)

2.1.2. *Costa Rica v. Nicaragua* (Central American Court of Justice, 1916)

On 1916, the CACJ issued a decision on the case between Costa Rica and Nicaragua regarding the authorization given by Nicaragua for the construction of a canal on the San Juan River by the United States of America. Nicaragua had not asked for the agreement or even the opinion of Costa Rica. In the judgment, important points were brought by the CACJ.

The CACJ affirmed that, although Nicaragua was exclusively entitled to ownership and sovereignty over the entire territory of the San Juan River, this right was not absolute, but subject to the restrictions imposed by the Treaty of Limits. It recognized, among these restrictions, the co-ownership of the common areas of the river, and the existence of solidarity in the moral and material interests of the parties regarding the river. The CACJ affirmed it was evidenced by their common obligation to guard and defend the river from foreign aggression (*COSTA RICA V. NICARAGUA*, CENTRAL AMERICAN COURT OF JUSTICE, JUDGMENT, 1916, p. 34).

Most importantly, the decision recognized that the ownership of the river by Nicaragua was not absolute or unlimited, but restricted by the rights of free navigation that the Treaty of Limits conceded to Costa Rica. In the view of the CACJ, these entitlements corresponded to a real, perpetual and unalterable right of use, which gave a practical

ownership to Costa Rica without prejudice to the Nicaraguan sovereignty (*COSTA RICA V. NICARAGUA*, CENTRAL AMERICAN COURT OF JUSTICE, JUDGMENT, 1916, p. 34).

2.2. Costa Rica’s Allegations

2.2.1 The rights recognized by the Treaty of Limits to Costa Rica on the San Juan River

Costa Rica claims that Article VI of the Treaty of Limits granted exclusive sovereignty over the San Juan River to Nicaragua, but guaranteed to Costa Rica several perpetual rights to the use of its waters, rights that were confirmed and interpreted with binding effect by the Cleveland Award as well as the CACJ decision of 1916.

According to Article VI, Costa Rica shall have the perpetual right of free navigation for the purposes of commerce, and its vessels are allowed to land indiscriminately on any part of the river where the navigation is common to both countries, without the imposition of any kind of charge or duty.³¹

Also, in the analysis of the Treaty made by the Cleveland Award, the validation of the Treaty and the rights of Costa Rica concerning the river were reassured by the former US President, which stated on Article II that Costa Rica “has not the right of navigation of the River San Juan with vessels of war; but she may navigate said river with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the ‘purposes of commerce’ accorded to her in said article (Article VI), or as may be necessary to the protection of said enjoyment” (CLEVELAND AWARD, 1888).

According to these legal instruments, Costa Rica claims that it has granted over the San Juan River: (a) the perpetual right of free navigation for commercial purposes of Costa Rican boats and passengers; (b) the right of these boats to touch at any part of the banks of the river without paying any dues except established by agreement; (c) the right to navigate the river in official boats for supply purposes, exchange of personnel of the border posts along the

³¹ **Article VI** *The Republic of Nicaragua shall have exclusively the dominion and sovereign jurisdiction over the waters of the San Juan river from its origin in the Lake to its mouth in the Atlantic; but the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being for the purposes of commerce either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiquí, or any other way proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica. The vessels of both countries shall have the power to land indiscriminately on either side of the river at the portion thereof where the navigation is common; and no charges of any kind, or duties, shall be collected unless when levied by mutual consent of both Governments.* (TREATY OF LIMITS, 1858)

right bank of the river, and for purposes of protection; and (d) the right not to have navigation on the river obstructed or impaired at the points where the country is entitled to navigate (DISPUTE CONCERNING NAVIGATIONAL..., 2005, §6).

2.2.2 The violation of Costa Rican rights by Nicaraguan actions

Considering the existent rights affirmed on the above items, Costa Rica states that Nicaragua has been violating the rights established by the Treaty of Limits, imposing the following restrictions on the country's use of the river: (a) imposition of charges on Costa Rican boats and passengers; (b) obligation of successive stops on Nicaraguan military posts to report the names of the passengers; (c) prohibition to Costa Rican official boats to navigate the river for supply purposes; (d) imposition of timetables for navigation; and (e) limitation to free moorage along the banks of the river (DISPUTE CONCERNING NAVIGATIONAL..., 2005, §8).

2.2.2.1 The boats engaged in the commercial carriage of passengers and the violation of right of "free commercial navigation"

Costa Rica claims that, by not recognizing boats engaged in the commercial carriage of passengers or provision of services are entitled to free navigation on the river, Nicaragua is acting against the Cleveland Award's and CACJ decision's interpretation of the Treaty of Limits. According to Costa Rica, Nicaragua's allegation that they would not be acting with "purpose of commerce" is unsustainable, because tourism is surely an activity analog with the "purpose of commerce" predicted by the Treaty of Limits and the Cleveland Award.

Directly related to this, Costa Rica states that the Nicaraguan imposition that all Costa Rican boats stop on the Nicaraguan bank of the river to report passengers and pay charges regarding the use of the port facilities, tourism cards and immigration charges, violates a procedural obligation established by the Treaty of Limits. Costa Rica claims these impositions could never be made, because were never authorized or even discussed by the countries.

Also, Costa Rica claims that the application of these charges irrespectively of the need or use of the facilities, the purposes of the voyage, or even of the existence of such infrastructure is abusive (*COSTA RICA V. NICARAGUA*, CENTRAL AMERICAN COURT OF JUSTICE, JUDGMENT, 1916, p. 34).

2.2.2.2 The prohibition of Costa Rican official boats to navigate the river for supply purposes

Costa Rica contends that the prohibition of its official vessels to navigate the San Juan River for supply purposes and exchange of personnel of its border posts, without express consent of Nicaragua, is also a clear violation of the Treaty of Limits and the Cleveland Award. In addition, it violates the interpretation given by the CACJ to the Treaty, which reaffirmed the existence of a duty of solidarity to the interests of the parties regarding the river (*COSTA RICA V. NICARAGUA*, CENTRAL AMERICAN COURT OF JUSTICE, JUDGMENT, 1916, p. 34).

In addition, according to Costa Rica, Nicaragua's behavior violates not only the Treaty of Limits. It also violates the articles I and II of the Agreement Supplementary to Article IV of the Pact of Amity, signed by the parties on 9 January 1956. This agreement states they shall collaborate to facilitate and expedite traffic on the San Juan River according to the Treaty of Limits and the Cleveland Award. In addition, it affirms both parties have the obligation to prevent the entry of weapons or armed groups into each other's territory.³²

2.2.3 The threat of economic sanctions made by Nicaragua in the case of the presentation of the case before the Court

Costa Rica also states that, on 28 September 2005, the National Assembly of Nicaragua passed a resolution, which represented a clear threat to the interests of the country. In resolution n° 17-2005, the National Assembly of Nicaragua requests that the Presidency approve a draft law that imposes economic sanctions against Costa Rica in the event of the presentation of the case before the Court, a clear unlawful action, which only aggravates and extends the dispute between the parties.

³² *Article I – The two Parties, acting in the spirit which should move the members of the Central American family of nations, shall collaborate to the best of their ability in order to carry out those undertakings and activities which require a common effort by both States and are of mutual benefit and, in particular, in order to facilitate and expedite traffic on the Pan American Highway and on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888, and also in order to facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other.*

Article II – The two Parties shall, in so far as possible and with the utmost diligence, arrange for the supervision of their common border as a means of preventing the illegal entry of either weapons or armed groups from the territory of one of the Parties into the territory of the other. The authorities of the two Governments, and, in particular, the border authorities, shall exchange, as fully as possible, any information which may come to their situation and which might help to avoid such incidents. (AGREEMENT SUPPLEMENTARY TO THE ARTICLE IV OF THE PACT OF AMITY, 1956)

2.3. Nicaragua's Allegations

2.3.1. Preliminary Question: Jurisdiction of the ICJ

Nicaragua starts its countermemorial affirming that, according to the Presidential Decision 335/2001, the country no longer accepts the jurisdiction of the ICJ regarding interpretation of any treaty or arbitral award signed before 31 December 1901. Therefore, it sustains that the application of Costa Rica cannot be accepted.

2.3.2. The Treaty of Limits and Nicaragua's sovereignty over the San Juan River

If the ICJ finds the application of Costa Rica acceptable despite the Preliminary Question raised on the jurisdiction of the Court, Nicaragua claims sovereignty over the San Juan River based on Article VI of the Treaty of Limits. By establishing its exclusive sovereignty over the river, Nicaragua sustains, Article VI grants to the country the power to make decisions on the correct and adequate utilization of the San Juan River, guaranteeing full control over its administration and care.

According to Nicaragua, the rights conceded to Costa Rica by the Treaty of Limits and the Cleveland Award do not overrule, in any way, the Nicaraguan sovereignty. Construing these rights in such a fashion would amount to a great distortion of the principle of territorial sovereignty, one of the basic pillars of international law.

In addition, Nicaragua states that Costa Rica demands in its application rights that neither the Treaty of Limits nor the Cleveland Award grant to the country, using an inappropriate interpretation of these international instruments (MEMORIA DEL MINISTERIO DE RELACIONES INTERNACIONALES DE NICARAGUA, 2006, pp. 26-28). This interpretation would not present the correct understanding of international law regarding the subject, by not recognizing Nicaraguan ownership of and exclusive sovereignty over the River. The River, affirms Nicaragua, is a part of its national territory, and hence subject to its sole sovereign decisions, which justifies any action made in defense of the watercourse.

2.3.3. The legality of Nicaraguan actions regarding the defense of its sovereignty over the River

2.3.3.1. The carriage of passengers with tourism purposes by Costa Rican boats and its non-provision by the legal instruments regarding the San Juan River

Nicaragua states that neither the Treaty of Limits nor the Cleveland Award gives Costa Rican vessels the right of performing navigation with tourism purposes, i.e., the “commercial carriage of passengers”. By doing so, those vessels would be navigating in a clear violation of the legal instruments regarding the use of the river and the sovereignty of Nicaragua.

Therefore, the only legal interpretation possible regarding this action is the one that Nicaragua already has been doing on the last years, in accordance with the Treaty of Limits and the Cleveland Award: that the tourism vessels and the carriage of passengers are not included on the navigation for the “purposes of commerce”, as affirmed by the Treaty of Limits and the Cleveland Award.

Because of that, Nicaragua is in exercise of its full and complete sovereignty over the San Juan River when taxing this kind of activity and demanding full report by the vessels, and Costa Rica has no other option, according the actual legal system regarding the river, but to accept the limitations Nicaragua put on its navigation, to better protect the river.

2.2.3.2 The prohibition of Costa Rican official boats to navigate the River

Nicaragua also states that the prohibition imposed on Costa Rican official boats regarding the navigation on the River is totally legal according to international law and to the Treaty of Limits, once the purposes behind the navigation of such boats unquestionably concern the transportation of military personnel and arms within the limits of Nicaragua territory. According to Nicaragua, the permission of this kind of navigation without any need of approval or consent directly confronts international law, because it does not give effectiveness to the territorial sovereignty of a country.

Nicaragua does not deny that there is a duty of solidarity of both parties regarding the river. However, this duty could not be misinterpreted. Costa Rica has not the power to decide unilaterally the appropriated measures for the best protection of the river, because of this duty. Acting unilaterally, Costa Rica would be surely violating the Nicaraguan sovereignty over the River, which would empower Nicaragua to act on the defense of its sovereignty.

3. International Law Issues related

3.1. Treaty Interpretation

Like contracts, treaties are not always easy to interpret. In international law, three basic approaches to treaty interpretation can be found. According to the first approach, one should concentrate on the actual text of the treaty and analyse the words used. The second approach is more subjective; it tries to find a solution to ambiguous provisions by looking into the intentions of the parties when adopting the agreement. The last one emphasises the object and purpose of the treaty; the meaning of any individual treaty provision should always be measured against the object and purpose of the treaty (SHAW, 2003). When interpreting a treaty, one should, however, take into account all of the above-mentioned aspects of the treaty. A true interpretation of a treaty requires the consideration of the words employed, the intentions of the parties and the aims of the document (SHAW, 2003).

The Vienna Convention on the Law of Treaties of 1969 - which both parties have recognized - regulates treaty interpretation in articles 31-33. The articles contain aspects of all the above-mentioned principles. According to the *general rule of interpretation* stated in article 31, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Articles 31(2) and 31(3) list what the context for the purpose of the interpretation of a treaty shall comprise, and what shall be taken into account when interpreting the treaty. Article 31(4) provides that if the parties so intended, a special meaning shall be given to a term. If the interpretation according to article 31 leaves the meaning of the treaty ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable, recourse to supplementary means of interpretation may be given. As supplementary means article 32 mentions the *travaux preparatoires* and the circumstances of the conclusion of the treaty. Article 33 provides guidelines for interpreting a treaty authenticated in two or more languages.

About the Convention, Antonio Cassese affirms that

Although some important questions, such as inter-temporal interpretation, were left out, the rules on construction upheld the most advanced views. Basically the Convention gave pride of place to literal, systematic, and teleological interpretation (...). Thus, great weight was attributed to the purpose pursued by contracting parties, as laid down in the text of the treaty. Also, the authors of the Vienna Convention set great store by the principle of ‘effectiveness’ (*ut res magis valeat quam pereat*), whereby a treaty must be given an interpretation that enables its provisions to be ‘effective and useful’, that is, to

have the appropriate effect. This principle is plainly intended to expand the normative scope of treaties, to the detriment of the old principle whereby in case of doubt limitations of sovereignty were to be strictly interpreted. (2005, P. 179)

3.2. International Responsibility of States

“Every internationally wrongful act of a State entails the international responsibility of that State”. (DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, ILC, 2001, ART. 1)

As SHAW teaches,

State responsibility is a fundamental principle of international law, arising out of the nature of the international legal system and the doctrines of state sovereignty and equality of states. It provides that whenever one state commits an internationally unlawful act against another state, international responsibility is established between the two. A breach of an international obligation gives rise to a requirement for reparation. (2003, P. 694)

The solutions and principles regarding the subject have not been fixed by conventions or treaties, but they have been developed over the 20th Century with several decisions of international arbitral tribunals, which helped create some customary rules.

Nowadays, there is still a lack of binding legal instruments regarding the subject. However, the resolution 56/83 of the United Nations General Assembly, approved on 2001, has adopted the “Draft Articles on Responsibility of States for Internationally wrongful Acts”, instrument created by the International Law Committee, which can serve as an instrument of *soft law* on the matter.

As pointed out before, the basic precondition to the existence of State responsibility is that it commits a wrongful act. However, there are some necessary elements to the occurrence of such an act, which are divided on subjective and objective elements. CASSESE, presenting the traditional position of the doctrine, affirms that:

The subjective elements are: (i) the imputability to a State of conduct (action or omission) of an individual contrary to an international obligation; (ii) in some limited instances, the fault

(*culpa*) of the State official performing the wrongful act. The objective elements are: (i) the inconsistency of particular conduct with an international obligation; (ii) a material or moral damage to another international subject; (iii) the absence of any of the various circumstances precluding wrongfulness³³ (2005, PP. 245-246)

If a State commits a wrongful act, injuring another State because of that violation, the injured State is entitled to demand of the responsible State the reparation of the injury. The “Draft Articles on Responsibility of States for Internationally wrongful Acts” presents three possible ways of such reparation occurs: (i) restitution (*restitution in integrum*); (ii) satisfaction; and (iii) compensation (DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, ILC, 2001, ARTS. 35-37). The way used will depend on the circumstances of each case.³⁴

4. Submissions

The Republic of Costa Rica asks this Court to adjudge and declare that the Republic of Nicaragua:

- a) has violated the terms of the Treaty of Limits of 18 April 1858 and its interpretation given by the Cleveland Award of 22 March 1888;
- b) shall cease immediately its unlawful actions, permitting the free navigation of Costa Rican commercial and official vessels without any limitation or restriction that are not on the terms of the mentioned Treaty;

³³ About the circumstances precluding wrongfulness, CASSESE states that “state practice and case law, as codified in the ILC Draft, provide for six principal such circumstances: 9i) consent of the State injured; (ii) self-defence; (iii) countermeasures in respect of an international wrong; (iv) force majeure; (v) distress; (vi) state of necessity; (2005, P. 253)

³⁴ **Article 35 – Restitution** - A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) Is not materially impossible; (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36 - Compensation - 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37- Satisfaction - 1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State. (DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, ILC, 2001)

- c) is responsible for economic damages caused to Costa Rica regarding the prohibition of the use of the river and related actions, and therefore shall make full reparation of the losses suffered.

The Republic of Nicaragua asks this Court to recognize, preliminarily, its absence of jurisdiction. If this submission is rejected, asks this Court to adjudge and declare that the Republic of Nicaragua:

- a) has at all times acted within its sovereignty over the San Juan River, and in accordance with the Treaty of Limits of 18 April 1858 and its interpretation given by the Cleveland Award of 22 March 1888;
- b) by acting in defense of its sovereignty over the San Juan River, has not violated any international instrument or international law;
- c) has no responsibility for any damage or loss caused to Costa Rica.

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