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The Limits of Powerful States: International Law's Power to Influence the Behavior of Strong States

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The Limits of Powerful States: International Law's Power to Influence the Behavior of Strong States

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Report

Presented to the Faculty of the Graduate School
of the University of Texas at Austin
in Partial Fulfillment
of the Requirements
for the Degree of

Master of Global Policy Studies

The University of Texas at Austin
May 2017

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ABSTRACT

While power has been thought to shape international law, we are seeing that international law itself has become a source of power for developing states. This occurs as developing states use international law as a means to affect regional change. Developing states' reliance on international law, particularly as they form coherent foreign policy against a counter-colonial background, strengthens international law as a process by which developing states express their interests. Gradually, this strengthening snowballs to where it affects change in global international law processes and, at times, can act to constrain powerful states from acting in ways that directly reflect their personal interests. Indeed, the reliance on international law may reflect that the preservation of international law processes has become a shared, global interest. This imbues international law itself with an unexpected form of power.

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"The International Court of Justice represents one of the symbols of man's belief in a world of law and order, a world in which might ceases to be right, and truth and justice prevail."[1]

I. Introduction

At its root, this report is an inquiry into power. International law is an independent source of power that may operate to coerce a stronger state to act against its own interests. Recent events suggest that international law, a paragon of liberal virtues, may be in decline.[2] Several states have threatened to leave the International Criminal Court;[3] Russia arguably violated the principle of non-interference by tampering in U.S. elections;[4] and nationalism, embodying a trend against international law, is on the rise in many Western nations.[5] U.S. President Donald Trump has proposed cutting a significant portion of U.S. contributions to UN programs, which potentially threatens global stability[6]. Nevertheless, the role of liberal institutions, specifically those championing international law, will likely continue despite the current nationalist backlash.[7]

One fault in the current international order is that its reigning powers, namely the United States, appear to bend its rules for their benefit while requiring weaker states to fully comply with the rules.[8] Challenges to international law are not new. They have existed even as the modern international order began to establish itself.[9] But powerful states are finding it more difficult to force weaker states to comply with their interests. As William W. Burke-White found, "[t]he era in which the United States and Europe together

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[1] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 1 (1976) (quoting Chief S. O. Adebo).

[2] *See, e.g.*, *The Year of Living Dangerously*, ECONOMIST, Dec. 24, 2016–Jan. 6, 2017, at 11 (noting that some liberals believe events in 2016 indicate a decline of liberal order).

[3] Karen Allen, *Is This the End for the International Criminal Court?*, BBC NEWS (Oct. 24, 2016), http://www.bbc.com/news/world-africa-37750978.

[4] Scott Shane, *Highlights from the House Hearing on Russian Interference in the U.S. Election*, N.Y. TIMES (Mar. 20, 2017), https://www.nytimes.com/2017/03/20/us/politics/takeaways-russia-intelligence-committee-hearing.html?_r=0.

[5] *The Year of Living Dangerously*, ECONOMIST, Dec. 24, 2016–Jan. 6, 2017, at 11.

[6] *See US v. UN: President Trump Seems Bent on Weakening the Global Body*, ECONOMIST, Mar. 25–31, 2017, at 52–53 (describing U.S. President Trump's proposed budget cuts to UN programs).

[7] *See, e.g.*, *The Year of Living Dangerously*, ECONOMIST, Dec. 24, 2016–Jan. 6, 2017, at 11 ("Such [liberal] ideas have imprinted themselves on the West—and, despite Mr Trump's flirtation with protectionism, they will probably endure."); Richard Haass, *World 2.0: The Case for Sovereign Obligation*, FOREIGN AFF., Jan./Feb., 2017, at 2–9 (calling for increased international law and "sovereign obligations" to manage emerging global challenges).

[8] Michael J. Mazarr, *The Once and Future Order: What Comes After Hegemony?*, FOREIGN AFFAIRS, Jan./Feb., 2017, at 26 ("When the leader of an order consistently appears to others to interpret the rules as it sees fit, the legitimacy of the system is undermined and other countries come to believe that the order offends, rather than sustains, their dignity.").

[9] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 470 (2005).

could steer the international legal system has passed."[10] Burke-White asks whether international law can constrain power,[11] but the deeper question is whether international law has a power of its own.

While power has been thought to shape international law, international law itself has become a source of power for developing states. This occurs as developing states use international law as a means to affect regional change. Developing states' reliance on international law, particularly as they form coherent foreign policy against counter-colonial backgrounds, strengthens international law as a process by which developing states express their interests. Gradually, this strengthening snowballs to where it affects change in global international law processes and, at times, can act to constrain powerful states from acting in ways that directly reflect their personal interests. Indeed, states' reliance on international law to justify their actions demonstrates that international law itself has become a shared, global interest. Therefore, international law possesses an unexpected form of power.

This report seeks to explain international law as a source of power in its own right, using the ICJ and its decisions as case studies to show that international law itself may influence state behavior. Part II discusses several theories that relate to whether international law may have power to influence state behavior. Part III explains the methodology of the case study. Part IV presents the three cases in detail. Part V analyzes the cases to determine whether states complied with international law against their own interests. Part VI concludes the report.

II. Theory Discussion

This Part will review several theories behind international law. The first section will define power while the next two sections will review both realist and constructivist theories on international law. Only recently have international relations and international law theorists worked to develop harmonized theories. Historically, these two disciplines have not worked in tandem, specifically due to an initial rejection of the power of international law by the realist perspective of international relations theory.[12] Thus several approaches combining international law and international relations theories will be examined. The last section discusses developing states in the international system.

a. Power

Power is typically divided into two main subgroups: Hard power and soft power. Hard power includes military power and economic power, while soft power encompasses almost every other form of coercive tools. Soft power can include moral authority, cultural

[10] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 2 (2015).
[11] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 4 (2015).
[12] Jeffrey L. Dunoff & Mark A. Pollack, *International Law and International Relations: Introducing an Interdisciplinary Dialogue*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 3 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

dominance, and political power. All power, whether hard or soft, is relative, meaning that the power of one entity can only be determined in relation to the power of another entity.

The nature of power's components changes under an international law interpretive lens. "While military power remains relevant in international law, the general prohibition on the use of force under the U.N. Charter and the inherent constraints on the application of military force to many questions of international law limit its effectiveness."[13] Such a statement presumes that international law has the power to coerce state behavior, but it also indicates that international law places greater emphasis on non-military power. Economic power, for instance, may correlate directly to legal influence via direct investment and trade relations.[14] Moreover, "[u]nlike military power, the use of economic power—ranging from vote-buying to foreign assistance, from trade preferences to economic sanctions—is generally consistent with the norms of the international legal system and far less costly to the imposing state."[15]

In addition to hard and soft power, power should be subdivided into coercive power and inducive power. Coercive power is an active power. Powerful states create coercive power by pursuing their interests. This pursuit causes weaker states to modify their interests so they do not conflict with the coercively powerful state's interests. The key actor in directing coercive power is the powerful state: By directly pursuing its interests, the powerful state forces weaker states to act. Inducive power, on the other hand, is a passive power. Inducive power emanates from powerful states and attracts weaker states. Through the exertion of inducive power, weaker states modify their institutions and behaviors after those of powerful states. Inducive power also encourages weaker states to support the interests of more powerful states. Inducive power closely accords with soft power: "The 'pull' of soft power, such as the desire to cooperate with like-minded states, the affinity for particular culture, or the shared sense of benevolent goals, operates legitimately within the international legal system and applies across a wide range of issues."[16]

For the purposes of this report, the relative power of states will be determined by reference to hard power. There are two main reasons for this. The first is that the purpose of this report is to demonstrate that more powerful states will sometimes act against their interests due to international law's exertion of its own inherent power. Thus there is more explanatory value in analyzing cases where the state with the most hard power acts against its interests. Second, while international law's power is not suitable for quantitative calculation, the determination of military and economic power may be calculated by reference to GDP (economic power) and the percentage of that GDP spent on the military (military power).

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[13] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 13 (2015).
[14] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 13 (2015).
[15] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 13 (2015).
[16] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 14 (2015).

b. Realism and International Law

Realism is a school of political theory that emerged following World War II and which seeks to define international relations based on reality rather than the idealism that characterized previous schools of thought.[17] Realism essentially argues that states compete in a zero-sum game with other states for power and security.[18] Hans J. Morgenthau, the preeminent realist theorist, argued that "[i]nternational politics, like all politics, is a struggle for power. Whatever the ultimate aims of international politics, power is always the immediate aim."[19] The basic components of realist theory are that states are the only actors on the international plane; states are homogenous entities acting self-interestedly; states act rationally; and the world exists in a state of anarchy. Kenneth N. Waltz, a neo-realist theorist, argued that "[a]mong states, the state of nature is a state of war.[20] This is meant not in the sense that war constantly occurs but in the sense that, with each state deciding for itself whether or not to use force, war may at any time break out."[21]

While realists have long seen military power to be the determining factor in international relations, this view has been challenged.[22] Modern realists have acknowledged that power must be conceptualized along military, economic, and diplomatic capabilities.[23] They have also acknowledged that collective action, girded by international law, is required to meet emerging global challenges.[24]

Goldsmith and Posner assert a rational-choice theory of international relations that corresponds to the realist perspective. They assert that "international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power."[25]

Rational action occurs because "preferences about outcomes embedded in the state interest are consistent, complete, and transitive," even if state sometimes do act irrationally

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[17] OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 27 (2006).
[18] OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 27 (2006).
[19] HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 13 (1948).
[20] Peter J. Katzenstein et al., International Organization *and The Study of World Politics*, *in* OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 3, 4–5 (2006).
[21] KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 102 (1979).
[22] *See, e.g.*, LEO TOLSTOY, WAR AND PEACE 1032 (Richard Pevear & Larissa Volkhonsky trans., 2007) ("The period in the campaign of 1812 from the battle of Borodino to the expulsion of the French . . . proved that the force that decides the destiny of nations lies not in conquerors, not even in armies and battles, but in something else.").
[23] *See, e.g.*, Joseph S. Nye, Jr., *Will the Liberal Order Survive?: The History of an Idea*, FOREIGN AFF., Jan./Feb., 2017 at 14–16 (acknowledging that power can no longer be determined purely by military might).
[24] *See, e.g.*, Joseph S. Nye, Jr., *Will the Liberal Order Survive?: The History of an Idea*, FOREIGN AFF., Jan./Feb., 2017 at 16 ("Trying to control the domestic politics of nationalistic foreign populations is a recipe for failure, and force has little to offer in addressing issues such as climate change, financial stability, or Internet governance. Maintaining networks, working with other countries and international institutions, and helping establish norms to deal with new transnational issues are crucial.").
[25] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3 (2005).

as a result of their leaders' mistakes or institutional failures.[26] Moreover, a state acts only through the actions of its leaders.[27] Goldsmith and Posner reject the assertion "that states comply with international law for noninstrumental reasons."[28] In other words, they reject the notion that states comply with international law "because compliance is the morally right or legitimate thing to do."[29] International law serves as a mask behind which states can obscure actions motivated by pure self-interest.[30] In fact, any nominal acknowledgement of international law actually reflects "cheap talk" that, at a minimum, is simply expected of states or, at a maximum, is designed to facilitate coordination actions.[31] Goldsmith and Posner reject the notion that states' interests "can be influenced by international law and institutions."[32]

It is critical to note that Goldsmith and Posner do not expand on why exactly states are expected to couch their actions in international law terms beyond purporting that international law rhetoric is convenient[33] or that it obfuscates a state's pursuit of its own interests.[34] Perhaps their idea is that other states look for any reason to challenge another state's self-promoting actions, and thus the absence of an international law justification (which is supposedly convenient) is pretext for challenge. They claim "[i]t is unenlightening to explain international law compliance in terms of a preference for complying with international law. Such an assumption says nothing interesting about when and why states act consistently with international law and provides no basis for understanding variation in, and violation of, international law."[35]

Put simply, Goldsmith and Posner sought to incorporate an understanding of economics into international law—some form of international law and economics theory. With their incorporation comes the criticism leveled at economic approaches to real situations. Their perspective is also admittedly realist—specifically a variation known as neorealism.[36]

Goldsmith and Posner assert that four situations explain state behaviors associated with international law: (1) Coincidence of interest; (2) coordination; (3) cooperation; and (4) coercion.[37] A coincidence of interest occurs when two states, driven by self-interest, act in a way that preserves the status quo.[38] Coordination results from an agreement by

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[26] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 7 (2005).
[27] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 4 (2005).
[28] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 14 (2005).
[29] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 15 (2005).
[30] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 180 (2005). ("[Talk of compliance with international law] is largely a ceremonial usage designed to enable the speaker to assert policies and goals without overtly admitting that he or she is acting for a purpose to which others might object.").
[31] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 172–84 (2005).
[32] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 9 (2005).
[33] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 182 (2005).
[34] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 168 (2005).
[35] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 10 (2005).
[36] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 171 (2005).
[37] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 11–13 (2005). The reduction to these four situations allows Goldsmith and Posner to incorporate game theory into their analysis.
[38] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 11–12 (2005).

two states designed to avoid conflict and reduce costs.[39] Cooperation is reciprocal restrain from actions that would "otherwise be in [two states'] immediate self-interest in order to reap larger medium- or long-term benefits."[40] Coercion occurs when a power state "forces weaker states to engage in acts that are contrary to their interests."[41] Professors Goldsmith and Posner assert that some combination of these four situations explain all state behaviors associated with international law.[42]

My criticism of Goldsmith and Posner's work is one that can be leveled at economic theory in general: While assumptions of interest-seeking and rational choice are helpful to create a general understanding of how some states may act, the assertion of the universality of these assumptions is dangerous. Put simply, not all states act to promote their own self-interest and not all states act rationally.

c. Constructivism and International Law

Constructivist theories seek to explain why states obey international law and how international law's compliance mechanisms can be improved.[43] Harold Hongju Koh wrote on the transnational legal process theory that synthesizes the making, interpretation, enforcement, and internalization of transnational laws in order to explain why states obey international law.[44] Transnational legal process has four features:

> First it is nontraditional: [I]t breaks down two traditional dichotomies that have historically dominated the study of international law: [B]etween domestic and international, public and private. Second, it is non-statist: [T]he actors in this process are not just, or even primarily, nation-states, but include nonstate actors as well. Third, transnational legal process is dynamic, not static. Transnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again. Fourth and finally, it is normative. From this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning that process all over

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[39] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 12 (2005).
[40] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 12 (2005).
[41] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 12 (2005).
[42] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 13 (2005).
[43] *See, e.g.*, CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 6 (Philippe Sands et al. eds., 2004) ("[O]ne might analyze the issue through the lens of compliance theory, considering why states obey international law in general, what motivates them to obey international courts, and how mechanisms inducing compliance could be enhanced. Another approach would be to focus on the potential for enforcement in the post-adjudicative phase, suggesting ways to improve the efficiency of various enforcement mechanisms.").
[44] Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996). I initially wrote the next few paragraphs in an earlier work. Christopher R. Marshall, *Swaziland, the AGOA, and Convention 87: A Case Study for the Trade Preference Program Enforcement Model*, 52 TEX. INT'L L.J. 163, 169–71 (2017). I have reproduced it here, giving minor edits to the language, because my analysis and criticism of the transnational legal process theory as a practical tool remains the same.

> again. Thus the concept embraces not just the descriptive workings of a process, but the normativity of that process. It focuses not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: [I]n short, how law influences why nations obey.[45]

Koh addresses both the realist and liberalist perspectives on international law in discussing the transnational legal process theory. He rejects the traditional realist approach outright.[46] But in engaging with the liberalist perspective, Koh criticizes it for ignoring the fluidity of identity in influencing international norms.[47] "Like national interests, national identities are not givens, but rather, socially constructed products of learning, knowledge, cultural practices, and ideology."[48] The critical feature of the transnational legal process theory is the interaction between all the movable parts of the transnational legal process theory and the internalization of norms that emerge from those interactions.[49] The interactions between states, between a state and its non-state actors, between a state and international law, for example, create new perceptions of identity that become internalized through repeated interaction.

The transnational legal process theory is very broad. The multiple actors and their interactions, not just with each other but also with international law and their perceived identities, are difficult to follow as time exponentially increases the interactions and thus the changes through interactions. Practically speaking, it would be difficult for a person applying this theory in real time to effectively determine when an enforcement mechanism would work.

Perception of identity, along with identity in general, is a subjective feature that is not easily identified by outside observers. A person applying the transnational theory would not only have to consider an actor's perception of its identity, but would also have to begin a game-theory analysis of the actor's perception of what the applying person's perception of the actor's perception of its identity is in order to effectively predict the creation of an identity-based norm. Together, the broad nature of the theory and the indeterminate nature of its factors can potentially lead to its over-application and yield self-confirming results.

As a post-hoc tool, the transnational legal process theory may yield a high number of false positives due to the number of actors, factors, and interactions at play. It thus straddles the line between a useful tool that could indicate when a state is likely to comply with a law or enforcement mechanism and an overly-descriptive theory that does not aid the real world person applying the theory. Koh's own description of the predictive power of the transnational legal process theory seems to make it fall into the latter category: "It

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[45] Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996).
[46] Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 199 (1996) ("As contemporary international relations theorists have long recognized, nations are not exclusively preoccupied with maximizing their power vis-a-vis one another in zero-sum games.").
[47] Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 202 (1996).
[48] Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 202 (1996).
[49] Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 203–04 (1996).

predicts that nations will come into compliance with international norms if transnational legal processes are aggressively triggered by other transnational actors in a way that forces interaction in forums capable of generating norms, followed by norm-internalization."[50]

Oona A. Hathaway proposes an integrated theory of international law that combines international legal scholarship with international relations theory.[51] Her theory asserts that state behavior, in the treaty context, is explained by the interactive nature of a state's decisions about whether or not to commit to international rules or whether or not to comply with them.[52] In her words, "compliance not only depends upon the decision to commit, but commitment also depends upon the decision to comply."[53] Her model purports to explain why states refuse to join treaties with which compliance would be easy and why states join treaties with which they do not intend to comply.[54] In the former case, the state has much to lose and little to gain, while in the latter case, the state has much to gain and little to lose.[55]

Hathaway highlights two broad theoretical approaches to the role of international law on state behavior: Interest-based theory and norms-based theory.[56] Interest-based theory focuses on states as "rational, unitary actors in pursuit of self-interest."[57] There are two key assumptions: (1) States engage in consequentialist means-end calculations; and (2) a state's interests can be inferred from its material characteristics and its objective conditions.[58] Interest-based theories thus correspond to the realist perspective of international law. Hathaway argues that while interest-based theorists argue that states use international law rhetoric as "cheap talk," these theorists "give no explanation as to why such cover is valuable—as to why, that is, the great powers feel the need to justify the

[50] Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 206 (1996).
[51] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 472 (2005).
[52] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 473 (2005).
[53] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 473 (2005).
[54] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 473–74 (2005).
[55] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 473–74 (2005).
[56] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 476–77 (2005).
[57] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 478 (2005).
[58] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 479 (2005).

pursuit of their interests."[59] She argues that interest-based theories fail to explain why states join treaties with which they do not expect to comply.[60]

Norms-based theorists argue that state behavior is motivated by the power of principled ideas in addition to the state's self-interest.[61] States internalize these principled ideas and act in a manner that accords with them because states believe the ideas to be correct or appropriate.[62] International law thus changes state action not by constraining behavior, but by altering the preferences of states.[63] Hathaway argues that the flaw of norms-based theories is that they do not explain why states join treaties, but focus instead on the issue of compliance.[64] The norms-based analysis of compliance also has little predictive value for state behavior—it mostly acts as a post-hoc tool.[65]

A key difference between the two theories is that "[i]nterest-based scholars tend to conclude that international law that is not backed by sanctions is not effective. Norm-based scholars, by contrast, conclude that international law need not be backed by sanctions to influence state behavior."[66]

Hathaway's integrated theory rejects the claim that state behavior will not be modified where international law is not enforced, but does not discount the value of enforcement.[67] A state's decision to commit or comply with international law depends upon legal enforcement, determined by the terms of the treaty and their enforcement as specific legal obligations, and collateral consequences, which arise from the anticipated reactions of individuals, states, and organizations in relation to the decision to commit to a treaty and then to abide or not abide by its terms.[68] These two incentives operate at both the domestic and transnational level.[69] In determining whether or not to incur an

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[59] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 479 (2005). As I noted above, however, the easiest explanation for realist-based theories is that the pursuit of self-interest is a zero-sum game, so states must obfuscate their pursuit of self-interest in order to minimize international interference. This acknowledgement, of course, adds nothing to the explanative value of the interest-based theories if the underlying premises are rejected.

[60] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 480–81 (2005).

[61] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 481 (2005).

[62] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 481 (2005).

[63] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 481 (2005).

[64] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 481–82 (2005).

[65] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 483 (2005).

[66] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 491 (2005).

[67] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 492 (2005).

[68] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 492 (2005).

[69] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 492 (2005).

international obligation, a state will weigh the costs and benefits of compliance, which inherently depend upon the degree of expected compliance with the commitment.[70] The process is thus iterative.

Hathaway's key assertion is that states possessing domestic institutions with the capacity to enforce international obligations against the state are less likely to formally incur international legal obligations, but are more likely to change their behavior to comply with international legal requirements.[71] Moreover, states that lack such domestic institutions are more likely to incur international legal requirements, but are less likely to alter their behavior.[72] Hathaway thus takes a bottom-up view of international law: Law that is enforced domestically will be successful at the international level.

Burke-White identified three basic features of the new international law power structure: (1) Diffusion, meaning that many states are amassing power; (2) disaggregation, meaning that more types of power have emerged; and (3) asymmetric distribution, with the result that power is more relevant on an issue-specific basis.[73] Burke-White dubbed this new system "multi-hub," as distinct from unipolar, bipolar, and multipolar systems.[74] The multi-hub system permits any state to lead "international legal processes or articulating preferences that attract followers and alter substantive norms."[75] Consequently, the ability to coerce through traditional power, a necessary feature of a multipolar system, is less important than the ability to attract followers.[76] "The multi-hub system thereby empowers states that are not hubs in a particular instance with choices as to which of a number of hubs to follow on any given issue or even to build the issue-specific power necessary to assume leadership themselves."[77] The main effect is that power in the international system is decentralized, making it relevant only in "separate, flexible subsystems."[78] Burke-White suggests that the changing structure of international law is due to observable shifts in military, economic, and soft power.[79] He incorporates the economic principle of

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[70] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 492–93 (2005).
[71] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 512 (2005).
[72] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 512 (2005).
[73] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 5–6 (2015).
[74] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 6 (2015) (describing a multipolar system as a fixed group of powers or poles dominating weaker states by engaging each other in rivalry and balancing).
[75] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 6 (2015).
[76] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 6 (2015).
[77] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 6 (2015).
[78] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 6 (2015).
[79] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 14 (2015).

comparative advantage to suggest that a comparative advantage in the issue-specific form of power will carry the day even if the state with the comparative power advantage does not have an absolute power advantage.[80]

d. Developing States and International Law

Developing states have been involved, as they emerge, with the development of international law.[81] Their increased involvement corresponds with their expanding abilities to shape international law to their own interests. Indeed, "rising powers are not attempting to wholly destroy the edifice of international law nor even rejecting international law *per se*. Rather, they are seeking to adjust the system from within and to make contemporary international law more compatible with their own preferences."[82] Such findings contradict arguments that developing states, which are mostly non-Western, resist the imposition of international law because it is driven by Western liberal ideology.[83]

Dr. Walter L. Williams, Jr. reviewed the compliance of "lesser developed countries" with ICJ decisions. By 1976, none of them had failed to comply with a final judgment.[84] Dr. Williams noted, however, that Albania had not complied with the third judgment of the *Corfu Channel Case*; Iran had not complied with the interim protection measures of the *Anglo-Iranian Oil Co. Case*; and France had not complied with the interim protection measures in the *Nuclear Test Cases*.[85] Moreover, while many developing states had not declared the ICJ's jurisdiction compulsory, a significant number were party to bilateral or multilateral agreements that named the ICJ as the forum for dispute resolution.[86] This pattern "indicates that many [lesser developed countries] who have not accepted the compulsory jurisdiction of the Court are nevertheless willing to confer jurisdiction on the Court to handle disputes arising out of specific agreements."[87] Many lesser developed

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[80] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 14 (2015).

[81] *See* DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 2 (1976) ("What is indeed noteworthy about the conduct of the [lesser-developed states] is not that they have opted out of the international legal process, but rather, that they are intensively engaged in all features of that process to create, maintain, modify or terminate prescriptions of international law in ways best suited to achieve the world community goals that they favor.").

[82] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARVARD INT'L L.J. 1, 3 (2015) (italics in the original).

[83] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 5, 13 (1976).

[84] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 30 (1976).

[85] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 30–31 (1976).

[86] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 34, 38, 40–42 (1976).

[87] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 44 (1976).

countries were also parties to agreements allowing the President of the ICJ to appoint impartial officials to mediate or settle disputes under the agreements.[88]

Dr. Williams concluded that any hesitancy of lesser developed countries to accept the jurisdiction of the ICJ was not motivated by a rejection of the ICJ as a product of Western ideals, but only where international law was particularly damaging to a state's position in a dispute.[89] In fact, since 1945 many lesser developed countries sought to make the ICJ's jurisdiction a mandatory component of the UN Charter.[90] Lesser developed countries' challenges to international law are not a rejection of international law itself, but an attempt to shape international law to lesser developed countries' interests.[91] Additionally, much of lesser developed countries' ambivalence toward fully accepting the compulsory jurisdiction of the ICJ was a result of "benign neglect."[92] In other words, lesser developed countries had not found it necessary to accept the ICJ's compulsory jurisdiction.[93] Likely, this attitude existed because it was not yet clear how, in the 1970s, the ICJ could act as a forum for weak states to bind powerful states' from asserting their interests to the detriment of the weak state.[94]

Meanwhile, developed states—or to put it in the terms of this report, powerful states—have been hesitant to fully recognize the ICJ as the forum to resolve international disputes.[95] Dr. Williams found that lesser developed countries, like developed states, "would prefer to use the Court when an advantage could be gained and would prefer to avoid its use when something could be lost."[96] Hathaway's integrated theory of

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[88] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 44–45 (1976).

[89] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 47–48 (1976).

[90] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 49 (1976).

[91] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 50–51, 61 (1976). Some of the lesser developed countries' proposals to modify international adjudication were "(1) Decentralization of international adjudication; (2) A balanced composition in the Court representing all principal judicial systems; (3) Increased development and codification of international law; (4) As a corollary to (3), above, development and codification of international law that more adequately represents the interests of lesser developed as well as developed States; and (5) A panel of eminent jurists to pass on the qualifications of candidates for the Court before they are considered for election by the Security Council and the General Assembly." DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 61 (1976).

[92] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 57 (1976).

[93] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 55–58 (1976).

[94] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 58 (1976) ("Implicit in this view is the opinion that the Court is not playing a meaningful role in the international affairs of States, or, to put the proposition differently, that States have not given a meaningful role to the Court.").

[95] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 52 (1976).

[96] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 62 (1976).

international law would argue that powerful states resist international intrusions partly because their domestic courts will resolve disputes in a compatible manner with any international resolution.[97] Rational-choice theorists would argue that it is not within powerful states' interests to allow an impartial international body resolve disputes affecting the powerful state's interests.[98] And Dr. Williams qualified his finding by stating that his finding reflected the circumstances that, even though the ICJ had greatly evolved since 1946, it was still evolving along with the international community.[99] "The exciting prospect for the Court is not what will be its role in 1980, or 1990, but in the Twenty-First Century, and it is today's leaders, and in a very real sense, concerned citizens of all States, who in large measure will brighten or dim the prospects for future, more constructive attitudes toward the International Court of Justice."[100]

III. Methodology

a. The International Court of Justice

To analyze the effects of international law on powerful states, the ICJ and its decisions prove excellent test subjects. States from virtually every background—Western, non-Western, capitalist, communist, developing, developed, etc.—have had "a reason to refuse to implement [an ICJ] ruling, or violently attack it."[101] Nevertheless, the ICJ has survived as a relevant forum for states of all strengths to air their grievances against one another. This durability has been won in spite of the volatile relationship that many states have with international law: Several commentators have remarked that "[t]he most striking feature of the pattern of use of the International Court of Justice since 1946 is its irregularity."[102]

Additionally, the ICJ has virtually no enforcement power, so a more powerful state's compliance with its judgments against that state's interests will show that international law itself may have influenced that state's behavior. "[S]ince the ICJ is the judicial authority of an international society made of equals, and since it lacks its own enforcement powers, the only way it has to ensure actual compliance with its decisions is persuading the parties of the worth of its decisions."[103] This statement, while certainly valid, does not encapsulate the totality of the ICJ's power, nor that of international law in

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[97] Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 512 (2005).
[98] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 9 (2005).
[99] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 63 (1976).
[100] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 623(1976).
[101] Philippe Sands, Ruth Mackenzie, & Cesare Romano, *General Editors' Preface, in* COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE vii (Philippe Sands et al. eds., 2004).
[102] Philippe Sands, Ruth Mackenzie, & Cesare Romano, *General Editors' Preface, in* COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE vii (Philippe Sands et al. eds., 2004).
[103] Philippe Sands, Ruth Mackenzie, & Cesare Romano, *General Editors' Preface, in* COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE viii (Philippe Sands et al. eds., 2004).

its own right. While states have chafed at the ICJ's decisions, by and large there is a trend of compliance with international law asserted in an ICJ decision.[104] While specific compliance with ICJ judgments is surely a measure of the success of international law in subverting the interests of powerful states,[105] it is certainly not the only metric.

But the concerns over the "worthiness" of ICJ decisions reveal the multiplicity of factors involved in analyzing influences on state behavior. Even assuming total compliance, "the perceived inadequacy of the ICJ as a settlement mechanism . . . might discourage states from submitting further cases."[106] The ICJ thus has a vested interest in ensuring states comply with its judgments. While this may indicate that the ICJ will choose the path of least resistance, the judgments in the selected cases did not, by any measure, follow those paths. The selected cases were specifically chosen because they reflect a judgment against the interests of the more powerful state.

Explicit or visible non-compliance with an ICJ judgment registers as a prima facie failure for compliance.[107] But, ultimately, the failure may be rebutted by a state's actions that do ultimately comply with the judgment, albeit in a subtler manner. The distinction will depend upon the circumstances of the individual cases, though the ultimate goal is to distinguish cases where non-compliance is "pure talk"[108] from those cases where non-compliance reflects international law's subordination to state interests.

The ICJ has jurisdiction over any matter which state parties refer to it, as well as in all matters specifically provided for in the UN Charter and where provided in treaties.[109] States may declare that the ICJ has compulsory jurisdiction over all legal disputes between state parties involving the interpretation of treaties; questions of international law; the existence of any fact that would constitute a breach of an international obligation; and the nature or extent of reparations to be made for the breach of an international obligation.[110] Such state declarations may be unconditional, on the condition of reciprocity, or limited to a certain period of time.[111] The ICJ settles all disputes as to whether the ICJ has jurisdiction.[112]

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[104] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 271–75 (Philippe Sands et al. eds., 2004).

[105] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 2 (Philippe Sands et al. eds., 2004).

[106] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 7 (Philippe Sands et al. eds., 2004).

[107] *See* CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 8 (Philippe Sands et al. eds., 2004) ("Non-compliance with the final decision puts the very purpose of adjudication before the Court into question and could potentially diminish the Court's authority and prestige.").

[108] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 180 (2005).

[109] Statute of the International Court of Justice art. 36(1).

[110] Statute of the International Court of Justice art. 36(2).

[111] Statute of the International Court of Justice art. 36(3).

[112] Statute of the International Court of Justice art. 36(6).

b. Case Selection

There are many cases that may demonstrate that international law, in and of itself, has the power to influence a state's behavior. The *LaGrand Case*, for instance, may serve as an example of the perceived efficacy of ICJ decisions to influence state behavior. The major accomplishment of the *LaGrand Case* was the ICJ's decision that its provisional measures would be binding under article 41 of the ICJ Statute.[113] Given the concerns surrounding the ICJ as an effective forum for dispute resolution, one would assume that the ICJ would not expand its binding authority unless it was sure that states would respect that authority. Indeed, the *LaGrand Case* may go even further than its landmark holding—by finding the authority to issue binding preliminary decisions implicit in the ICJ's function as a judicial institution, the ICJ concretely asserted itself as more than a political instrument for powerful states to assert their interests.[114] Coupled with broad praise from states,[115] the *LaGrand Case* may further secure compliance with ICJ decisions.

Additionally, the United States's actions regarding the jurisdiction of the ICJ reveal a respect for the power of international law. Prior to rejecting the ICJ's compulsory jurisdiction,[116] the United States declared several conditions to its jurisdictional acceptance. Among other reservations, the United States refused to grant the ICJ jurisdiction to entertain "disputes with regard to matters that are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."[117] This reservation was known as the Connally Amendment.[118] In the *Interhandel Case*, the United States argued that the ICJ lacked jurisdiction to resolve the matter because the matter was domestic.[119] The ICJ withheld ruling on the United States's jurisdictional claim, but stilled ruled in favor of the United States on March 21, 1959.[120]

On September 3, 1959, Bulgaria argued that the Connally Amendment barred the ICJ from resolving the issues presented in the *Case Concerning the Aerial Incident of 27*

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[113] LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, para. 109 (June 27).

[114] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 11 (Philippe Sands et al. eds., 2004) ("The role of the Court as a judicial institution advocates against the assumption that such powers are meant to be purely recommendatory; exhortatory mechanisms belong in the diplomatic realm.").

[115] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 9–10 (Philippe Sands et al. eds., 2004).

[116] *U.S. Ends Full Compliance with World Court Rulings: Hits Use by Nicaragua as Political*, L.A. TIMES (Oct. 7, 1985), http://articles.latimes.com/1985-10-07/news/mn-16498_1_world-court.

[117] Declaration of the United States of America Recognizing as Compulsory the Jurisdiction of the Court, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice, Aug. 14, 1946, 1 U.N.T.S. 11, 11–12.

[118] *See* Leo Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L L. 357, 357 (1962) (describing the U.S. reservation to the ICJ Statute as the Connally Amendment).

[119] Preliminary Objection of the United States of America, Interhandel Case (Switz. v. U.S.), 1959 I.C.J. Pleadings 77 (Oct. 11, 1957).

[120] Interhandel Case (Switz. V. U.S.), Preliminary Objections, 1959 I.C.J. 6, 29–30 (Mar. 21).

July 1955, because the issue was a domestic, Bulgarian issue.[121] Bulgaria argued, in other words, that the Connally Amendment was a double-edged sword: If the United States could use it to bar review of cases where the United States was the respondent, the United States must respect another state's invocation of the Connally Amendment where the United States was the applicant.

While the United States initially challenged Bulgaria's assertion, it later discontinued the proceedings against Bulgaria.[122] Judge Hersch Lauterpacht's vociferous disapproval of the Connally Amendment was likely a motivating factor.[123] In effect, the United States conceded to Bulgaria the power to remove an issue from the ICJ's jurisdiction by declaring it to be a domestic matter.[124]

The Connally Amendment debacle reflects one instance of international law prevailing over the interests of a powerful state. Admittedly, the key international law principle was not the validity of the Connally Amendment, which judges in both the *Interhandel Case* and the *Case Concerning the Aerial Incident of 27 July 1955* contested, but the functionality of the Connally Amendment as a matter of the ICJ Statute's reciprocity requirements.[125] Rational-choice theorists may argue that the United States's long-term interests were best served by conceding that the Connally Amendment was reciprocal. Such an argument is flawed. Rational-choice theorists base their theory on states pursuing their self-interest. If a state's goal were to maximize its self-interest, then it would always act in accordance with its interests regardless of future negative consequences.[126] Based on rational-choice theory's own assumptions, the United States should never have conceded the reciprocity of the Connally Amendment. The rational-choice theory fails to explain the United States's actions.

The following cases were selected because they each involved an obviously powerful state pitted against a less powerful state. Moreover, two of the cases (*The Territorial Dispute* and *Armed Activities*) involved exclusively non-Western powers. This factor is significant because Western powers may have a vested interest in preserving the international law system, which largely reflects Western norms and values. Non-Western states, however, have no such incentive. Those two cases thus remove a possible intervening variable that may be present in other ICJ cases. While *Nicaragua* involved a

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[121] *See* Leo Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L L. 357, 361 (1962) (noting Bulgaria submitted four communications challenging the ICJ's jurisdiction because the collision was a domestic issue).

[122] S*ee* Leo Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L L. 357, 361 (1962) (noting that the United States filed a communication with the ICJ requesting the discontinuance of the proceedings on May 13, 1960).

[123] *See* Dissenting Opinion of Sir Hersch Lauterpacht, Interhandel Case (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. 95, 119 (Mar. 21) ("The United States cannot avail itself of its—legally ineffective—Declaration of Acceptance in order to bring an action before the Court against another State; but for the very reason that the Declaration is legally ineffective no State can invoke it against the United States.").

[124] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 18 (1976).

[125] DR. WALTER L. WILLIAMS, JR., THE ATTITUDES OF THE LESSER DEVELOPED COUNTRIES TOWARD THE INTERNATIONAL COURT OF JUSTICE 20 (1976).

[126] *See generally* SHAUN P. HARGREAVES HEAP & YANIS VAROUFAKIS, GAME THEORY: A CRITICAL TEXT 80–126 (2004).

Western power, the United States, it was a case of initial noncompliance by that Western power. Thus if respect for international law as a Western institution were an intervening variable, it did not obviously influence the United States's behavior immediately following the ICJ's judgment. Finally, the following three cases were selected because of they are landmark ICJ cases.

IV. Case Studies

a. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*

i. Procedure

On April 9, 1984, Nicaragua filed an application with the Registry of the ICJ to institute proceedings against the United States over a "dispute concerning the responsibility for military and paramilitary activities in and against Nicaragua."[127] Nicaragua alleged that the United States:

> (1) had recruited, trained, armed, equipped, financed, supplied, and otherwise encouraged, supported, aided, and directed military and paramilitary activities in and against Nicaragua in violation of article 2(4) of the UN Charter, articles 18 and 20 of the Charter of the Organization of American States, article 8 of the Convention on Rights and Duties of States, and article I, Third, of the Convention Concerning the Duties and Rights of States in the Event of Civil Strife;
> (2) had violated Nicaragua's sovereignty in breach of general and customary international law;
> (3) had used force and the threat of force against Nicaragua in breach of general and customary international law;
> (4) had intervened in Nicaragua's internal affairs in breach of general and customary international law;
> (5) had infringed on the freedom of the high seas and interrupted peaceful maritime commerce in breach of general and customary international law; and
> (6) had killed wounded, and kidnapped Nicaraguan citizens in breach of general and customary international law.[128]

Accordingly, Nicaragua asserted that the United States must cease and desist from:

[127] Application of the Republic of Nicaragua, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), (Apr. 9, 1984), http://www.icj-cij.org/docket/files/70/9615.pdf.
[128] Application of the Republic of Nicaragua, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), art. 26(a)–(f) (Apr. 9, 1984), http://www.icj-cij.org/docket/files/70/9615.pdf.

(1) all direct or indirect, overt or covert use of force against Nicaragua and all threats of force against Nicaragua;
(2) all violations of Nicaragua's sovereignty, territorial integrity, and political independence, including all direct or indirect intervention in Nicaragua's internal affairs;
(3) all support of any kind to any group or individual engaged or planning to engage in military or paramilitary actions in or against Nicaragua;
(4) all efforts to restrict, block, or endanger access to or from Nicaraguan ports; and
(5) all killings, woundings, and kidnappings of Nicaraguan citizens.[129]

At the same time, Nicaragua filed a request for provisional measures.[130] Specifically, Nicaragua requested the ICJ require that the United States cease and desist from directly or indirectly providing any support to any group or individual engaging in military or paramilitary activities in and against Nicaragua and that the United States cease and desist any military or paramilitary activities conducted by its own officials.[131]

On May 10, 1984, the ICJ imposed the following provisional measures: (1) The United States should cease and desist from any action "restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines;" (2) both states should respect the principle of non-interference; (3) both states should take no further action that "might aggravate or extend the dispute;" and (4) both states should take no action that might prejudice the rights of the other "in respect of the carrying out of whatever decision the Court may render in the case."[132] In the same order, the ICJ decided to first address whether it had jurisdiction to entertain the dispute and the admissibility of Nicaragua's application.[133]

Nicaragua argued that the ICJ had jurisdiction under article 36 of the Statute of the ICJ, as well as under article XXIV(2) of the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua.[134]

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[129] Application of the Republic of Nicaragua, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), art. 26(g)–(h) (Apr. 9, 1984), http://www.icj-cij.org/docket/files/70/9615.pdf.

[130] Request for the Indication of Provisional Measures of Protection Submitted by the Government of Nicaragua, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), (Apr. 9, 1984), http://www.icj-cij.org/docket/files/70/9629.pdf.

[131] Request for the Indication of Provisional Measures of Protection Submitted by the Government of Nicaragua, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), para. 10 (Apr. 9, 1984), http://www.icj-cij.org/docket/files/70/9629.pdf.

[132] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Request for the Indication of Provisional Measures, 1984 I.C.J. 169, para. 40(B)(1)–(4) (May 10).

[133] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Request for the Indication of Provisional Measures, 1984 I.C.J. 169, para. 40(D) (May 10).

[134] Memorial of Nicaragua (Questions of Jurisdiction and Admissibility), Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. Pleadings 361, para. 267(A) & (D) (June 30, 1984). *See also* Treaty of Friendship, Commerce and Navigation Between the United States of America and the Republic of Nicaragua. Signed at Managua, on 21 January 1956, Nicar.-U.S., Jan. 21, 1956, 367 U.N.T.S. 3, art. XXIV(2) ("Any dispute between the Parties as to the interpretation or application of the present Treaty,

The United States, in a 447-page Counter-Memorial, argued that Nicaragua's claims were not within the ICJ's jurisdiction and that Nicaragua's application was inadmissible.[135] Notably, the United States argued that (1) the UN Charter accorded jurisdiction to the Security Council or other UN organs;[136] and (2) the ICJ could not consider whether the use of force violated the UN Charter in an "ongoing armed conflict" without overstepping its bounds.[137]

On November 26, 1984, the ICJ found in favor of Nicaragua's two arguments and ruled that it had jurisdiction to entertain the case.[138] It also found that Nicaragua's application was admissible.[139]

On January 18, 1985, Davis R. Robinson, the U.S. Agent in the proceeding, transmitted a letter to the ICJ in which he announced that the United States would no longer participate in the proceedings:

> [T]he United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law. The United States remains firmly of the view . . . that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan application . . . is inadmissible. Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims.[140]

On January 22, 1985, the ICJ set the time limits for the filing of Nicaragua's Memorial and the United States's Counter-Memorial on the merits of the dispute.[141] Nicaragua filed its Memorial within the time limit, but the United States did not make any

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not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.").

[135] Counter-Memorial of the United States of America (Questions of Jurisdiction and Admissibility), I.C.J. Pleadings, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Vol. II, para. 552 (Aug. 17, 1984).

[136] Counter-Memorial of the United States of America (Questions of Jurisdiction and Admissibility), I.C.J. Pleadings, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Vol. II, paras. 450–59 (Aug. 17, 1984).

[137] Counter-Memorial of the United States of America (Questions of Jurisdiction and Admissibility), I.C.J. Pleadings, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Vol. II, paras. 520–31 (Aug. 17, 1984).

[138] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. 392, para. 113(1)(a)–(c) (Nov. 26).

[139] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. 392, para. 113(2) (Nov. 26).

[140] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Correspondence, No. 114, http://www.icj-cij.org/docket/files/70/9635.pdf.

[141] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Order of 22 January 1985, 1985 I.C.J. 3, 4 (Jan. 22).

filing.[142] Prior to filing its Memorial, Nicaragua called on the ICJ to resolve the dispute in its favor despite the failure of the United States to appear or defend itself, pursuant to article 53 of the Statute of the ICJ.[143]

In its Memorial, Nicaragua requested the ICJ:

> (1) declare and ajudge that the United States had violated and continued to violate international law;
> (2) state how the United States must cease its breaches of international law;
> (3) award compensation to Nicaragua, on its behalf and the behalf of its citizens, and determine such compensation in a subsequent proceeding.
> (4) Award 370,200,000 USD to Nicaragua as "the minimum valuation of the direct damages," excepting damages for the killing of Nicaraguan nationals.[144]

The ICJ held the public hearings on the merits on September 12–13 and 16–20, 1985.[145] The United States was not represented at the hearing.[146] On May 1, 1985, the United States had terminated the 1956 Treaty of Friendship, Commerce and Navigation

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[142] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 11 (June 27).

[143] The exact time of Nicaragua's request under art. 53 is ambiguous. While the ICJ's Judgment states that Nicaragua invoked art. 53 in its Memorial, the Nicaraguan Memorial makes reference to Nicaragua invoking art. 53 prior to the filing. *Compare* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 11 (June 27) *with* Memorial of Nicaragua, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Vol. IV, para. 4 (Apr. 30, 1985). *See also* Statute of the International Court of Justice art. 53(1) ("Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.").

[144] Memorial of Nicaragua, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Vol. IV, para. 507 (Apr. 30, 1985).

> As a matter of law, Nicaragua claims, *inter alia*, that the United States has acted in violation of Article 2, paragraph 4, of the United Nations Charter, and of a customary international law obligation to refrain from the threat or use of force; that its actions amount to intervention in the internal affairs of Nicaragua, in breach of the Charter of the Organization of American States and of rules of customary international law forbidding intervention; and that the United States has acted in violation of the sovereignty of Nicaragua, in in violation of a number of other obligations established in general customary international law and in the inter-American system. The actions of the United States are also claimed by Nicaragua to be such as to defeat the object and purpose of a Treaty of Friendship, Commerce and Navigation concluded between the Parties in 1956, and to be in breach of provisions of that Treaty.

Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 23 (June 27).

[145] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 13 (June 27).

[146] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 36 (June 27).

with Nicaragua, and on October 7, 1985, the United States deposited a notice terminating the ICJ's jurisdiction under article 36 of the ICJ Statute.[147]

ii. Facts

The ICJ noted the difficulty it encountered in trying to establish a factual record.[148] The disagreement between the United States and Nicaragua on the interpretation or existence of some facts; the United States's refusal to participate in the proceedings on the merits; and the secrecy under which the alleged actions were carried out made it "difficult for the Court not only to decide on the imputability of facts, but also to establish what the facts are."[149] Additionally, the fact that the conflict was ongoing further complicated establishing a trustworthy factual record.[150] The ICJ thus declared the somewhat rigorous standards by which it would evaluate the evidence that had been presented,[151] before analyzing whether specific factual allegations had been specifically established. The following subsections break down the factual allegations into thematic categories.

(1) The Historical Context

The dispute between Nicaragua and the United States arose from the events following the fall of Nicaraguan President Anastasio Somoza Debayle's government in July 1979 and the rise of the Sandinistas.[152] Somoza resigned on July 17, 1979, ceding to mounting pressure from the United States, and named Francisco Urcuyo Maleanos his successor.[153] Somoza fled to Miami four hours after resigning.[154] Urcuyo fled to

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[147] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 13 (June 27).

[148] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 57 (June 27) ("One of the Court's chief difficulties in the present case has been the determination of the facts relevant to the dispute.").

[149] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 57 (June 27).

[150] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 58 (June 27).

[151] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 58–74 (June 27).

[152] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 18 (June 27).

[153] Karen DeYoung, *Somoza Resigns, Successor Named*, WASH. POST, July 17, 1979, https://www.washingtonpost.com/archive/politics/1979/07/17/somoza-resigns-successor-named/484f5386-f93a-4df8-8409-93f56187f0dc/?utm_term=.226d4f3d3b03; John M. Goshko, *U.S. Is Pressing Somoza to Quit, Leave Nicaragua*, WASH. POST, June 28, 1979, https://www.washingtonpost.com/archive/politics/1979/06/28/us-is-pressing-somoza-to-quit-leave-nicaragua/a5c08c57-2b7f-4725-9581-e6529f834956/?utm_term=.20846babfd37.

[154] Ángel Luis de la Calle, *Somoza Abandonó Nicaragua en Compañía de Sus Colaboradores Directos*, PAÍS, July 18, 1979, http://elpais.com/diario/1979/07/18/internacional/301096808_850215.html. Somoza was denied entry into the United States and had to flee to Paraguay, instead. He was assassinated on September 18, 1980. Cynthia Gorney, *Somoza Is Assassinated in Ambush in Paraguay*, WASH. POST, Sept. 18, 1980,

Guatemala the next day, allowing the guerrilla Sandinista National Liberation Front (the "Sandinistas") to seize control of Managua, Nicaragua's capital.[155] The Junta of National Reconstruction, the Sandinista's governing wing, then became the controlling government of Nicaragua.[156]

The United States initially had friendly relations with the new Nicaraguan government, even adopting an economic aid program.[157] In January 1981, however, the United States suspended aid to Nicaragua based on evidence that Nicaragua may have supplied arms to left-wing guerrillas in El Salvador.[158] By April 1981, the United States terminated all economic aid for Nicaragua, but left open the possibility of continuing the aid program if Nicaragua ceased aiding Salvadoran guerrillas.[159] While diplomatic relations continued, Nicaragua alleged that the United States began to plan and conduct activities against Nicaragua in September 1981.[160]

In 1981, the Fuerza Democrática Nicaragüense (the "FDN") began conducting operations against the Sandinista government from the Honduran border.[161] By 1982, the Alianza Revolucionaria Democrática (the "ARDE") had formed and was operating against the Sandinista government from the Costa Rican border.[162] These two guerrilla forces comprised part of the "contras," forces fighting against the Sandinista government.[163]

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https://www.washingtonpost.com/archive/politics/1980/09/18/somoza-is-assassinated-in-ambush-in-paraguay/61c8684c-207a-4328-b957-14e5e944a8a3/?utm_term=.de8f3dc4f80e.

[155] Ángel Luis de la Calle, *La Junta de Reconstrucción Nacional Gobierna en Nicaragua Desde Ayer*, PAÍS, July 20, 1979, http://elpais.com/diario/1979/07/20/internacional/301269610_850215.html.

[156] Ángel Luis de la Calle, *La Junta de Reconstrucción Nacional Gobierna en Nicaragua Desde Ayer*, PAÍS, July 20, 1979, http://elpais.com/diario/1979/07/20/internacional/301269610_850215.html.

[157] International Security and Development Cooperation Act of 1980, Pub. L. No. 96-533, § 533, 94 Stat. 3131, ("The Congress finds that peaceful and democratic development in Central America is in the interest of the United States and of the community of American States generally, that the recent civil strife in Nicaragua has caused great human suffering and disruption to the economy of that country, and that substantial external assistance to Nicaragua is necessary to help alleviate that suffering and to promote economic recovery within a peaceful and democratic process.").

[158] Juan de Onis, *U.S. Halts Nicaragua Aid over Help for Guerilla*s, N.Y. TIMES, Jan. 23, 1981, http://www.nytimes.com/1981/01/23/world/us-halts-nicaragua-aid-over-help-for-guerillas.html.

[159] *U.S. Halts Economic Aid to Nicaragua*, N.Y. TIMES, Apr. 2, 1981, http://www.nytimes.com/1981/04/02/world/us-halts-economic-aid-to-nicaragua.html.

[160] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 19 (June 27).

[161] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 20 (June 27).

[162] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 20 (June 27).

[163] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 20 (June 27).

(2) U.S. Aquatic Mines

Beginning February 25, 1984, several watercraft were damaged by mines in the Nicaraguan ports of El Bluff, Corinto, and Puerto Sandino.[164] The mines effectively closed Nicaraguan ports for two months.[165] Nicaragua claimed that a total of 12 vessels or fishing boats were damaged, 14 people were wounded, and two people were killed.[166] The ICJ received no direct evidence of the size or nature of the mines—some were allegedly incapable of sinking a ship while others could have contained up to 300 pounds of explosives.[167] Press releases quoted U.S. administration officials saying that the CIA constructed mines in a U.S. Navy Laboratory.[168]

In a March 2, 1984 report in *Lloyds List and Shipping Gazette*, the ARDE claimed responsibility for the mining.[169] An affidavit by Edgar Chamorro, a former political leader of the FDN, alleged that CIA officials instructed him to claim via clandestine radio that the FDN had mined several Nicaraguan harbors on January 5, 1984.[170] A press report claimed the contras had announced they were mining all Nicaraguan ports on January 8, 1984.[171] The ICJ was unable to find evidence that the United States had warned other states of the existence of mines in Nicaraguan ports.[172]

On April 10, 1984, it was announced in the U.S. Senate that the Director of the CIA had informed the Senate Select Committee on Intelligence that U.S. President Ronald Reagan had approved a CIA plan to mine Nicaraguan ports in either December 1983 or February 1984.[173] In response to the announcement, the U.S. Senate passed the Deficit Reduction Act of 1984 which, in part, declared that "no funds heretofore or hereafter appropriated in any Act of Congress shall be obligated or expended for the purpose of planning, directing, executing or supporting the mining of the ports or territorial waters of Nicaragua."[174] Reagan, during a May 28, 1984 televised interview with Brian Farrell,

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[164] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 76 (June 27).
[165] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 76 (June 27).
[166] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 76 (June 27).
[167] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 76 (June 27).
[168] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 76 (June 27).
[169] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 77 (June 27).
[170] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 77 (June 27).
[171] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 77 (June 27).
[172] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 77 (June 27).
[173] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 78 (June 27).
[174] Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2907, 98 Stat. 494, 1210 (1984).

claimed that the mines were homemade and had been planted by Nicaraguan rebels.[175] Press reports quoting U.S. administration sources claimed that the mining was carried out by persons of the nationality of unidentified Latin American countries (referred to as "UCLAs")[176] who entered Nicaraguan territorial waters via speed boats provided by the U.S. government.[177] The speed boats were allegedly launched from vessels operated by U.S. nationals that remained outside of Nicaragua's territorial waters.[178]

Nicaragua also submitted evidence that the mining of its ports led to increased marine insurance rates for cargo to and from Nicaragua, in addition to some shipping companies stopping their voyages to Nicaraguan ports.[179]

The ICJ found that it had been sufficiently established that Reagan had authorized a U.S. government agency to mine Nicaraguan ports.[180] Moreover, the evidence presented established that such mining did occur in early 1984 in the ports of El Bluff, Corinto, and Puerto Sandino.[181] Persons paid by and acting under the instructions of that U.S. government agency carried out the mining operations under the supervision and with logistical support from U.S. agents.[182] Further, the ICJ found that the United States did not issue any warning about the location of the mines and that the mining caused personal and material injury, which caused a rise in marine insurance rates to vessels traveling to Nicaraguan ports.[183]

(3) Direct U.S. or UCLA Actions

Nicaragua presented evidence of ten actions apart from the mining of its ports that it directly attributed to U.S. personnel or UCLAs:

(1) September 8, 1983: An attack on the Sandino international airport in Managua by a Cessna aircraft, which was shot down;
(2) September 12, 1983: The explosion of an underwater oil pipeline and part of the oil terminal at Puerto Sandino;

[175] Interview by Brian Farrell, RTE-Television, with Ronald Reagan, U.S. President, in Dublin, Ir. (May 28, 1984), https://www.reaganlibrary.archives.gov/archives/speeches/1984/52884b.htm.
[176] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 75 (June 27).
[177] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 78 (June 27).
[178] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 78 (June 27).
[179] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 79 (June 27).
[180] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 80 (June 27).
[181] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 80 (June 27).
[182] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 80 (June 27).
[183] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 80 (June 27).

(3) October 2, 1983: An attack on the oil storage facilities at Benjamin Zeledon, resulting in the loss of a large quantity of fuel;
(4) October 10, 1983: A sea and air attack on the Corinto port, causing the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of a large number of the local population;
(5) October 14, 1983: A second explosion of the underwater oil pipeline at Puerto Sandino;
(6) January 4–5, 1984: An attack on the Potosí Naval Base by speedboats and helicopters using rockets;
(7) February 24–25, 1984: An unspecified incident at the El Bluff port, which probably involved U.S. mining at Nicaraguan ports;
(8) March 7, 1984: An attack on the oil and storage facility at San Juan del Sur by speedboats and helicopters;
(9) March 28–30, 1984: Clashes at Puerto Sandino during the minelaying operations by speedboats and a supporting helicopter against Nicaraguan patrol boats;
(10) April 9, 1984: A helicopter providing supporting fire to an ARDE attack on San Juan del Norte.[184]

At the time, the contras were the principle suspects behind the operations.[185] Nicaragua presented evidence that, in response to a question regarding the October 10, 1983 attack on the Corinto port, Reagan stated:

> I think covert actions have been a part of government and a part of government's responsibilities for as long as there has been a government. I'm not going to comment on what, if any, connection such activities might have had with what has been going on, or with some of the specific operations down there.
> But I do believe in the right of a country when it believes that its interests are best served to practice covert activity and then, while your people may have a right to know, you can't let your people know without letting the wrong people know, those that are in opposition to what you're doing.[186]

Nicaragua asserted that this statement constituted an admission "that the United States was habitually and systematically giving aid to mercenaries carrying out military operations against the Government of Nicaragua."[187] The ICJ refused to consider this statement

[184] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 81 (June 27).
[185] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 82 (June 27).
[186] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 83 (June 27).
[187] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 83 (June 27).

constituted an admission, but noted that it indicated the United States was involved in the Corinto attack.[188]

Relying on the affidavit and testimony of Commander Luis Carrión, Nicaragua's Vice-Minister of the Interior; an article in *The Wall Street Journal*;[189] and the affidavit of Chamorro, the ICJ determined that it could not consider the first and third allegations as being properly established and that the seventh allegation was already established by its consideration of the mining of Nicaragua's ports.[190] For the remaining allegations, the ICJ determined that they had been sufficiently established:

> A 'mother ship' was supplied (apparently leased) by the CIA; whether it was of United States registry does not appear. Speedboats, guns and ammunition were supplied by the United States administration, and the actual attacks were carried out by 'UCLAs'. Helicopters piloted by Nicaraguans and others piloted by United States nationals were also involved on some occasions. According to one report the pilots were United States civilians under contract by the CIA. Although it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations. The execution was the task rather of the 'UCLAs', while United States nationals participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established.[191]

(4) U.S. Violations of Nicaraguan Airspace

Nicaragua alleged that U.S. aircraft had violated Nicaraguan airspace in conducting high-altitude "overflights" for reconnaissance purposes, low-altitude supply drops for the contras, and sonic booms created by U.S. aircraft.[192] The ICJ considered that a "Background Paper" filed by the United States, which contained eight aerial photographs of Nicaraguan territory, indicated that the United States carried out sporadic overflights.[193] Additionally, the United States had made statements before the Security Council on March,

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[188] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 83 (June 27).
[189] The article was apparently titled "American Pilots Fired on Nicaragua, Report Says," though I have been unable to locate a digital or original copy of the article.
[190] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 85 (June 27).
[191] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 86 (June 27).
[192] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 87 (June 27).
[193] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 88, 91 (June 27).

2 1985 that indicated the United States was carrying out overflights at that time.[194] The ICJ considered that Nicaragua had failed to establish that the United States had conducted low-altitude supply drops in violation of Nicaraguan airspace because Nicaragua had not presented any specific evidence beyond indicating that the United States had made planes available to the contras for the purpose of supply operations.[195] As to the sonic booms created in November 1984, the ICJ found these events to be a matter of public knowledge, relying on Nicaragua's assertions before the Security Council and the United States's refusal to comment on the assertions.[196]

(5) U.S.-Honduran Military Maneuvers

Nicaragua claimed that the United States had conducted a number of joint military maneuvers with Honduras along the Honduran-Nicaraguan border.[197] Military equipment was allegedly flown into the country for the exercises and then turned over to the contras.[198] The maneuvers occurred in fall 1982, February 1983, August 1983, November 1984, February 1985, March 1985, and June 1985.[199] The ICJ considered this information to be public knowledge as there was no secrecy surrounding the maneuvers—thus it accepted that the maneuvers occurred as sufficiently established.[200]

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[194] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 88, 91 (June 27). *See also* U.N. SCOR, 37th Sess., 2335th mtg. para. 132, S/PV.2335 (Mar. 25, 1982), http://dag.un.org/bitstream/handle/11176/66588/S_PV.2335-EN.pdf?sequence=17&isAllowed=y ("These overflights, conducted by unarmed, high-flying planes, for the express and sole purpose of verifying reports of Nicaraguan intervention, are no threat to regional peace and stability; quite the contrary.").

[195] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 90–91 (June 27).

[196] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 89, 91 (June 27). *See also* U.N. SCOR, 39th Sess., 2562d mtg. para. 7, S/PV.2562 (Nov. 9, 1984), http://repository.un.org/bitstream/handle/11176/64532/S_PV.2562-EN.pdf?sequence=19&isAllowed=y ("The violations were accompanied by loud explosions, and immediately afterwards our military authorities were able to determine that it was a United States SR-71 aircraft, highly sophisticated and especially designed for espionage operations.").

[197] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 92 (June 27).

[198] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 92 (June 27).

[199] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 92 (June 27).

[200] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 92 (June 27).

(6) U.S. Aid to the Contras

a. U.S. Creation of the Contras

Nicaragua alleged that the United States had "conceived, created and organized a mercenary army, the *contra* force" shortly after March 9, 1981.[201] But the ICJ observed that Nicaragua's own evidence established that the contras had existed and conducted armed opposition against the government during 1979–80.[202] Commander Carrión testified that the armed groups prior to December 1981 consisted of "the ex-National Guardsmen who had fled to Honduras when the Somoza government fell and had been conducting sporadic raids on Nicaraguan border positions ever since."[203] The ICJ found this testimony constituted an admission that the United States did not create the contras.[204] The ICJ similarly rejected Nicaragua's assertion that the United States, acting through CIA operatives, unified opposition bands into the FDN.[205]

b. U.S. Financing

News reports indicated that the size of contra forces increased substantially after receiving U.S. financing. The forces allegedly grew from 500 men in December 1981 to 12,000 in November 1983.[206] When U.S. aid was cut off in September 1984, the contra forces were over 10,000 men.[207]

Financing apparently began in 1981 when the CIA provided 19.5 million USD to the contras out of funds allocated for covert actions.[208] An additional 19 million USD was provided in late 1981 under the authorization of the National Security Decision Directive 17.[209] Further financing operations were unclear, but it appeared that approximately 20 million USD had been provided for fiscal year 1982–83 through the Intelligence

[201] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 93 (June 27).
[202] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 93 (June 27).
[203] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 93 (June 27).
[204] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 93 (June 27).
[205] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 94 (June 27) ("Even on the face of the evidence offered by the Applicant, therefore, the Court is unable to find that the United States created an armed opposition in Nicaragua.").
[206] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 94 (June 27).
[207] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 94 (June 27).
[208] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 95 (June 27).
[209] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 95 (June 27).

Authorization Act and the Defense Appropriations Act.[210] The Permanent Select Committee on Intelligence of the House of Representatives attempted to amend the Defense Appropriations Act to prohibit U.S. support for military and paramilitary operations in Nicaragua in May 1983, but the Senate rejected the amendment.[211] When Reagan requested 45 million USD for operations in Nicaragua, the House and Senate reached a compromise on December 8, 1983, approving only 24 million USD for military and paramilitary operations in Nicaragua.[212] In March 1984, Reagan requested an additional 21 million USD, but the House of Representatives did not approve the request.[213] In June 1984, Reagan requested an additional 28 million USD, which resulted in the passage of the Continuing Appropriations Act of 1985.[214] The Act prohibited the use of funds for fiscal year 1984–85 to support the contras, but would provide 14 million USD if the President submitted a report to Congress justifying such an appropriation, to be approved by Congress.[215]

On April 10, 1985, Reagan submitted a report stating "United States policy toward Nicaragua since the Sandinistas' ascent to power has consistently sought to achieve changes in Nicaraguan government policy and behavior. We have not sought to overthrow the Nicaraguan Government nor to force on Nicaragua a specific system of government."[216] The changes sought were (1) the termination of Nicaraguan support to Central American insurgents; (2) a reduction of Nicaragua's military and security apparatus; (3) the severance of Nicaragua's military and security ties to the Soviet Bloc and Cuba; and (4) the implementation of Sandinista commitment to the Organization of American States to political pluralism, human rights, free elections, non-alignment, and a mixed economy.[217] The House of Representatives rejected the appropriation.[218]

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[210] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 95 (June 27).

[211] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 95 (June 27).

[212] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 95 (June 27). *See also* Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (Dec. 9, 1983) ("During fiscal year 1984, not more than $24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operation in Nicaragua by any nation, group, organization, movement, or individual.").

[213] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 96 (June 27).

[214] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 96 (June 27).

[215] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 96 (June 27).

[216] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 96 (June 27).

[217] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 96 (June 27).

[218] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 96 (June 27).

In June 1985, Reagan requested Congress appropriate 38 million USD to fund military and paramilitary operations against Nicaragua during fiscal year 1985–86.[219] While the Senate approved the appropriation, the House of Representatives only approved an appropriation of 27 million USD for humanitarian assistance to the contras, which was to be provided by any U.S. agency except the CIA or Department of Defense.[220]

The ICJ found that "from 1981 until 30 September 1984 the United States Government was providing funds for military and paramilitary activities by the *contras* in Nicaragua, and thereafter for 'humanitarian assistance.'"[221]

c. U.S. Control and Direction

Nicaragua asserted that the contras were so dependent upon U.S. financing as to give the United States effective control over the contras' actions.[222] Additionally, Nicaragua alleged that the United States developed the strategies of the FDN.[223] Nicaragua primarily relied on Chamorro's affidavit, which alleged that former National Guardsmen had been offered regular salaries by the CIA in 1981.[224] Chamorro claimed that the CIA began providing FAL and AK-47 assault rifles, mortars, ammunition, equipment, and food.[225] The CIA also allegedly provided funds for "communications, assistance to Nicaraguan refugees or family members of FDN combatants, and a military and logistics budget."[226] Chamorro asserted the CIA also provided training in "guerilla warfare, sabotage, demolitions, and in the use of a variety of weapons, including assault rifles, machine guns, mortars, grenade launchers, and explosives, such as Claymore mines."[227] Moreover, the CIA allegedly supplied intelligence and aircraft for reconnaissance and supply drops to the FDN.[228]

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[219] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 97 (June 27).
[220] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 97 (June 27).
[221] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 99 (June 27).
[222] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 102–03 (June 27).
[223] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 105 (June 27).
[224] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 100 (June 27).
[225] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 100 (June 27).
[226] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 100 (June 27).
[227] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 101 (June 27).
[228] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 101 (June 27).

Chamorro's affidavit also claimed that CIA advisers were highly involved in the planning and discussion of FDN strategy and tactics.[229] Specifically, Chamorro asserted that (1) CIA operatives "urg[ed]" the FDN to launch an offensive to take and hold Nicaraguan territory at the end of 1982; (2) CIA operatives issued a directive in 1983 to not destroy farms and crops, but reversed that directive in 1984; and (3) CIA operatives again encouraged the seizure of Nicaraguan territory, supplying intelligence and aircraft for the operation.[230]

The ICJ refused to find, based solely on the FDN's dependence on U.S. financing, that the United States planned the FDN's offensives.[231] Moreover, in light of the evidence, the ICJ was "not satisfied that all operations launched by the *contra* force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States."[232] Nevertheless, the ICJ found it "clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the *contras* by the United States."[233] These findings led the ICJ to conclude that the United States "largely financed, trained, equipped, armed and organized the FDN."[234] Additionally, the ICJ considered it established that the FDN had, at one point, been so dependent on U.S. financing that it could not conduct its operations without U.S. support.[235] These findings also led the ICJ to reject Nicaragua's assertion that the United States had effective control over the contras, such that the contras' violations of international law implicated U.S. legal responsibility.[236]

(7) CIA Psychological Warfare

Nicaragua presented two manuals to the ICJ that it claimed were prepared by the CIA and supplied to the contras in 1983: "*Operaciones sicológicas en guerra de guerrillas*," ("Psychological Operations in Guerrilla Warfare") and the "Freedom Fighter's

[229] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 104 (June 27).
[230] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 104 (June 27).
[231] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 103 (June 27).
[232] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 106 (June 27).
[233] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 106 (June 27).
[234] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 108 (June 27).
[235] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 111 (June 27).
[236] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 115 (June 27).

Manual."[237] The ICJ refused to conclude that the Freedom Fighter's Manual had been published by the CIA solely on the basis of newspaper articles claiming that the CIA authored the manual.[238]

The ICJ did consider that the CIA had authored the Psychological Operations manual on the basis of the Permanent Select Committee on Intelligence of the House of Representatives report that specifically stated the CIA had created it.[239] The ICJ noted that several parts of the manual, which was devoted to winning community support against Nicaraguan forces, contained sections which violated general international humanitarian law.[240] In particular, the section titled "Implicit and Explicit Terror" included directions to destroy military and police installations, cut lines of communication, kidnap Sandinista officials, and "to fire on a citizen who was trying to leave town" in order to prevent the citizen from informing government forces.[241] The section titled "Selective Use of Violence for Propagandistic Effects" stated

> It is possible to neutralize carefully selected and planned targets, such as court judges, *mesta* judges, police and State Security officials, CDS chiefs, etc. For psychological purposes it is necessary to take extreme precautions, and it is absolutely necessary to gather together the population affected, so that they will be present, take part in the act, and formulate accusations against the oppressor.[242]

Another section, titled "Control of mass concentrations and meetings," advocated hiring professional criminals "to carry out selective 'jobs,'" and contemplated having civilians shot by the authorities so that they would become martyrs.[243]

Chamorro took multiple conflicting positions on the effectiveness of the manual. At one point, he claimed to have distributed 2,000 copies to FDN members.[244] At another point, he claimed that no one read the report.[245] In his affidavit, Chamorro stated that some

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[237] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 117 (June 27).
[238] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 117 (June 27).
[239] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 118 (June 27).
[240] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 118 (June 27).
[241] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 118 (June 27).
[242] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 118 (June 27).
[243] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 118 (June 27).
[244] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 119 (June 27).
[245] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 119 (June 27).

unit commanders regarded "the best way to win the loyalty of the civilian population was to intimidate it . . . and make it fearful of us."[246]

The Permanent Select Committee on Intelligence of the House of Representatives attempted to discover the author of the manual. After extensive review, the Committee concluded:

> [T]he manual was written, edited, distributed and used without adequate supervision. No one but its author paid much attention to the manual. . . . The entire publication and distribution of the manual was marked within the [CIA] by confusion about who had authority and responsibility for the manual. . . . Negligence, not intent to violate the law, marked the manual's history.[247]

The ICJ concluded that it had been sufficiently established that a U.S. agency had provided the Psychological Operations manual to the FDN in 1983.[248] The manual, while discouraging indiscriminate violence against civilians advocated for violations of general international humanitarian law.[249]

(8) U.S. Economic Measures

Nicaragua alleged that the United States indirectly intervened in its internal affairs via economic measures including the suspension of economic aid in April 1981.[250] Prior to the suspension, the United States had provided more than 100 million USD in aid between July 1979 and January 1981.[251] Reagan suspended the aid pursuant to the Special Central American Assistance Act, which required the President to certify that Nicaragua was not "aiding, abetting or supporting acts of violence and terrorism in other countries."[252] Reagan refused to certify Nicaragua as compliant with the Act on April 1, 1981, terminating the aid.[253] Nicaragua claimed that the impact of this termination was in excess

[246] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 119 (June 27).
[247] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 120 (June 27).
[248] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 122 (June 27).
[249] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 122 (June 27).
[250] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 123 (June 27).
[251] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 123 (June 27).
[252] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 123 (June 27).
[253] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 123 (June 27).

of 36 million USD per year.[254] Nicaragua also alleged that the United States had acted to block loans to Nicaragua from the Bank for International Reconstruction and Development and the Inter-American Development Bank.[255] Additionally, Nicaragua alleged that Reagan had reduced U.S. quotas for imports of Nicaraguan sugar by 90%, which caused a damage of between 15 USD and 18 million USD.[256] Further, Reagan declared a public emergency via Executive Order on May 1, 1985 in order to impose a total trade embargo on Nicaragua.[257]

(9) Nicaraguan Arms Trafficking to Salvadoran Rebels

The ICJ interpreted the U.S. Counter-Memorial on jurisdiction and admissibility to assert that the United States had acted on the basis of collective self-defense in order to protect El Salvador, Honduras, and Costa Rica from Nicaragua's support of anti-government forces fighting against those states.[258] Nicaragua argued that the assertion of collective self-defense was merely pretext for U.S. operations against Nicaragua.[259] The ICJ concluded that even if the United States had used Nicaragua's support of armed opposition groups in El Salvador as pretext for operations against Nicaragua, that conclusion did not vitiate the right of collective self-defense.[260]

The United States had attached the affidavit of Secretary of State George P. Shultz to its Counter-Memorial, which claimed that "[t]he United States has abundant evidence that the Government of Nicaragua has actively supported armed groups engaged in military and paramilitary activities in and against El Salvador."[261] In supporting these armed groups, the affidavit alleged that Nicaragua had assisted with communications facilities, command and control headquarters, logistics, planning of operations, and training.[262] Additionally Nicaragua had acted as a transshipment point for ammunition, supplies, and

[254] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 123 (June 27).
[255] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 123 (June 27).
[256] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 124 (June 27).
[257] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 125 (June 27).
[258] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 126 (June 27).
[259] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 127 (June 27).
[260] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 127 (June 27) ("The existence of an additional motive, other than that officially proclaimed by the United States, could not deprive the latter of its right to collective self-defence.").
[261] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 128 (June 27).
[262] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 128 (June 27).

weapons bound for these armed groups.[263] The affidavit also alleged that Nicaragua was engaged in similar actions involving armed opposition groups in both Costa Rica and Honduras.[264] The affidavit contained references to protests by the Presidents of Costa Rica, El Salvador, and Honduras as to Nicaragua's actions.[265]

David MacMichael, a former CIA official, testifying on behalf of Nicaragua could "not rule it out" that Nicaragua had been engaged in the operations alleged by the United States.[266] In fact, MacMichael leaned toward "ruling [the operations] 'in' than ruling 'out.'"[267] A Nicaraguan report of a meeting held between Commander Ortega, the Coordinator of the Junta of the Government of Nicaragua, and Mr. Enders, the Assistant Secretary of State for Inter-American Affairs of the United States, also seemed to indicate that Nicaragua was engaged in the alleged operations.[268] Moreover the Permanent Select Committee on Intelligence of the House of Representatives had concluded that such operations were occurring.[269]

El Salvador had attempted to intervene in the ICJ proceedings, but the ICJ rejected its Declaration of Intervention.[270] Nevertheless, the ICJ noted that El Salvador had asserted that the Nicaraguan Foreign Minister had admitted to supplying armed opposition groups during a July 1983 meeting with other Foreign Ministers.[271] The ICJ refused to conclude that such an admission had occurred solely on the basis of El Salvador's Declaration of Intervention without further corroborative evidence.[272] Moreover, the ICJ refused to rely solely on press reports claiming that Nicaragua had aided Salvadoran rebels as sufficient to establish that fact.[273] These press reports included a *New York Times* interview with Nicaraguan President Daniel Ortega Saavedra, during which Ortega stated "We're willing to stop the movement of military aid, or any kind of aid through Nicaragua to El

[263] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 128 (June 27).
[264] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 128 (June 27).
[265] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 129 (June 27).
[266] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 134 (June 27).
[267] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 134 (June 27).
[268] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 136 (June 27).
[269] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 137 (June 27).
[270] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 138 (June 27).
[271] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 138 (June 27).
[272] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 138 (June 27).
[273] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 143 (June 27).

Salvador."[274] The ICJ stated that given "the background of firm denial by the Nicaraguan Government of complicity in an arms flow to El Salvador, the Court cannot regard remarks of this kind as an admission that the Government was in fact doing what it had already officially denied and continued subsequently to deny publicly."[275]

Nicaragua firmly denied that it had been supplying arms to Salvadoran armed groups.[276] Nicaragua also asserted that the geographic features of its northern and southern borders—rugged mountains and dense jungles—made patrol efforts difficult, and it was likely that rebel groups had taken advantage of the terrain to ship arms and supplies in spite of Nicaragua's efforts to halt such shipments.[277]

The ICJ was not blind to the similar doctrines of the Sandinistas and the Salvadoran rebels.[278] Based on the totality of the evidence, including evidence that Nicaragua controlled a small airstrip used to supply Salvadoran armed groups, the ICJ concluded that Nicaragua had provided at least some aid to Salvadoran armed groups between 1979 and 1981.[279] But it found that it did not have sufficient evidence before it to determine that Nicaragua had actively participated in supplying the Salvadoran rebels after 1981.[280] Based on the little evidence provided, the ICJ concluded that it was possible Nicaragua was unaware of the cross-border arms trafficking into El Salvador.[281] In any case, the ICJ determined that insufficient evidence had been presented to establish that Nicaragua was legally responsible for any arms trafficking into El Salvador.[282]

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[274] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 144 (June 27). *See also* Mario Vargas Llosa, *In Nicaragua*, N.Y. TIMES (Apr. 28, 1985), http://www.nytimes.com/1985/04/28/magazine/in-nicaragua.html?pagewanted=all (quoting President Ortega directly).

[275] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 145 (June 27).

[276] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 147 (June 27) ("Since my government came to power in July 19, 1979, its policy and practice has been to prevent our national territory from being used as a conduit for arms or other military supplies intended for other governments or rebel groups. In fact, on numerous occasions the security forces of my government have intercepted clandestine arms shipments, apparently destined for El Salvador, and confiscated them.").

[277] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 147 (June 27).

[278] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 150 (June 27).

[279] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 151–52 (June 27).

[280] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 153 (June 27).

[281] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 158 (June 27).

[282] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 160 (June 27).

(10) Nicaraguan Cross-Border Military Attacks in Honduras and Costa Rica

Nicaragua exclusively challenged the allegations that it had supplied arms or provided other assistance to groups in El Salvador,[283] while the United States had provided some evidence that Nicaragua had been involved in cross-border attacks into Honduras and Costa Rica.[284] The evidence included a diplomatic notes of protest for incidents in September 1983, February 1984, and April 1984.[285] The ICJ noted that Nicaragua's silence on the matter and concluded that Nicaragua had been involved in cross-border military attacks on both Costa Rica and Honduras.[286]

(11) Failure of the Sandinista Government to Comply with Its Promises to the Organization of American States

On July 12, 1979, representatives of the Sandinista government sent a telegram to the Secretary-General of the Organization of American States, which included the "Plan of the Government of National Reconstruction to Secure Peace."[287] The plan sought to ratify some goals in connection with a Resolution of the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States, which had called for the replacement of the Somoza government, the installation of a democratic government, the guarantee of respect for human rights in Nicaragua, and the holding of free elections.[288] The Sandinista statement declared, among other things, a firm intention to observe human rights and a plan to hold free elections.[289]

The ICJ noted that, at the time of the proceedings, the Sandinista government had failed to ratify several important human rights treaties and had a declared a state of emergency on numerous occasions.[290] Free elections had been held on November 4, 1984, but there were allegations that the conditions were unsatisfactory.[291]

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[283] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 131 (June 27).
[284] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 161–62 (June 27).
[285] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 162 (June 27).
[286] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 163–64 (June 27).
[287] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 167 (June 27).
[288] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 167 (June 27).
[289] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 167 (June 27).
[290] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 168 (June 27).
[291] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 168 (June 27).

iii. Judgment

The ICJ noted that "[a] special feature of the present case is that the United States only ceased to take part in the proceedings after a Judgment had been given adverse to its contentions on jurisdiction and admissibility."[292] The ICJ interpreted the U.S. Counter-Memorial on Jurisdiction and Admissibility to assert that the United States had acted pursuant to its right of collective self-defense under the article 51 of the UN Charter.[293]

The ICJ first dismissed the United States's assertion that it lacked jurisdiction to decide the dispute,[294] then addressed whether Nicaragua's claim was well founded in fact and law, per article 53 of the ICJ Statute.[295] In this consideration, the ICJ determined that the United States's absence could neither prejudice its decision in Nicaragua's favor, nor could it prejudice its decision in the United States's favor.[296] Consequently, the ICJ would apply a standard that "is not susceptible of rigid definition in the form of a precise general rule" in evaluating previous submissions by the United States.[297] The ICJ unsurprisingly rejected the justiciability claims that the United States raised in its Counter-Memorial on the jurisdiction and admissibility of Nicaragua's claim.[298] It also held that it still had jurisdiction to hear the dispute despite the United States's termination of both the 1956 Treaty of Friendship, Commerce and Navigation with Nicaragua and the optional clause under the ICJ Statute.[299]

The ICJ then went on to hold that it could not base any findings of violations on article 2(4) of the UN Charter nor articles 18, 20, and 21 of the Organization of American States Charter because the U.S. declaration under article 36 of the ICJ Statute excluded cases where other states that were not involved in the adjudication would be "affected" by a judgment on a dispute arising out of a multilateral treaty.[300] Specifically, the ICJ found that a judgment under the UN Charter or OAS Charter would affect the rights of El

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[292] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 26 (June 27).
[293] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 24 (June 27).
[294] The ICJ asserted that the U.S. position was logically flawed. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 27 (June 27) ("Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits. It is not possible to argue that the Court had jurisdiction only to declare that it lacked jurisdiction.").
[295] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 28–31 (June 27).
[296] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 31 (June 27).
[297] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 31 (June 27).
[298] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 32–35 (June 27).
[299] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 36 (June 27).
[300] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 56 (June 27).

Salvador.[301] The ICJ noted, however, that it could still rely on these treaties as sources of international law.[302]

The ICJ proceeded to undertake an extensive review of the types of evidence it would consider and the persuasiveness of the evidence presented, given that the United States had not participated in the proceedings on the merits.[303] The ICJ rejected Nicaragua's contention that asserting the right of collective self-defense was tantamount to admitting that the United States had direct and substantial involvement in the military and paramilitary operations against Nicaragua.[304]

After determining the factual record on which the ICJ could base its findings, discussed above, the ICJ proceeded to address the relevant law it could apply to the case. The United States had previously declared a reservation to ICJ jurisdiction, prohibiting it from extending to "disputes arising under multilateral treaties, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of American specifically agrees to jurisdiction."[305] As a result, the ICJ found it was unable to find violations of multilateral treaties.[306] In spite of this finding, the ICJ observed that it could use those multilateral treaties as evidence of customary international law and could apply customary international law to the case.[307] The ICJ then determined the customary international law relevant to the case, referring to the principle of non-intervention, the prohibition of the threat or use of force, state sovereignty, and international humanitarian law.[308] Additionally, the ICJ interpreted the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, which did not fall under the U.S. multilateral treaty reservation to ICJ jurisdiction, as requiring a determination of whether threats posed by Nicaragua constituted a reasonable threat to essential security interests and whether U.S. measures taken against those threats were necessary.[309]

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[301] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 52 (June 27).

[302] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 56 (June 27).

[303] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 57–74 (June 27).

[304] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 74 (June 27).

[305] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 42 (June 27).

[306] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 172 (June 27).

[307] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 182 (June 27). In so finding, the ICJ rejected the U.S. assertion that treaty law and customary international law were mutually exclusive. *Id.* para. 175 ("[E]ven if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability.").

[308] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 183–201 (June 27).

[309] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 224 (June 27).

The ICJ first analyzed whether U.S. actions—specifically the mining of Nicaraguan ports, the attacks on oil installations, and arming and training the contras—violated the prohibition of the threat or use of force. The ICJ rejected Nicaragua's claim that the U.S.-Honduran military maneuvers violated the prohibition.[310] Nevertheless, the ICJ found that the United States had committed a prima facie violation of the prohibition, but that not all of the assistance the United States provided constituted a violation of the prohibition, especially the financing of the contras.[311] In order to justify its actions under the doctrine of collective self-defense, the United States had to establish that an armed attack had occurred against El Salvador, Honduras, or Costa Rica.[312] The ICJ found that Nicaragua's provision of arms to rebel groups did not constitute an armed attack, thus rejecting the claim that an armed attack had occurred on El Salvador.[313] Moreover, in spite of having found that Nicaragua committed cross-border incursions against Costa Rica and Honduras from 1982–1984, the ICJ found that no armed attacks had occurred, relying on those states not explicitly declaring that they had suffered an armed attack or invoking the right of collective self-defense in their statements to international bodies.[314] The ICJ also noted that the United States's failure to declare to the Security Council that it was acting in collective self-defense indicated that the claim was not legitimate.[315] Additionally, the ICJ found that even assuming a Nicaraguan armed attack against El Salvador had occurred, the United States's actions failed the international humanitarian law constraints of necessity and proportionality.[316] The ICJ thus concluded that the United States had violated the customary international law prohibition of the threat or use of force.[317]

Next, the ICJ found that "the support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the *contras* in Nicaragua, by

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[310] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 227 (June 27).

[311] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 227 (June 27).

[312] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 229 (June 27).

[313] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 230 (June 27).

[314] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 231–34 (June 27).

[315] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 235 (June 27). The ICJ was forced to acknowledge that failing to invoke collective self-defense before the Security Council was not itself a violation of customary international law, the only basis on which the ICJ could find violations in *Nicaragua*. *Id.* Considering the failure to specifically invoke collect self-defense as evidence thus appears somewhat contrived.

[316] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 237 (June 27). The ICJ specifically stated that the mining of Nicaraguan ports and the attacks on various Nicaraguan installations were unnecessary because they occurred several months after the main rebel attack against El Salvador had been "completely repulsed." *Id.* The ICJ did not elaborate on its finding of disproportionality, simply stating "[w]hatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question [referring to the mining and attacks] could not have been proportionate to that aid." *Id.*

[317] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 238 (June 27).

financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention."[318] The unlawful support included the humanitarian aid provided by statute, for the ICJ found that for aid to truly be humanitarian, it must be given without discrimination—the aid at issue was only given to the contras.[319] The ICJ refused to find that the withdrawal of economic aid, the reduction of the sugar quota, and the trade embargo constituted a breach of the customary international law principle of non-intervention.[320] The ICJ rejected the implied U.S. defense that its actions were an exception to the principle of non-intervention on the basis that Nicaragua had intervened in the affairs of Costa Rica, El Salvador, and Honduras.[321] Having found that Nicaragua's actions did not constitute an armed attack, the ICJ stated that the United States was not permitted to respond by the use of force.[322]

As to violations of Nicaragua's sovereignty, the ICJ considered only the allegations of U.S. attacks on Nicaraguan territory, incursions into Nicaragua's territorial sea, and overflights.[323] The ICJ concluded that "the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention."[324] Thus the mining of Nicaraguan ports and the attacks on Nicaraguan installations violated Nicaragua's sovereignty.[325] Additionally, the overflights constituted a violation of Nicaragua's airspace.[326] These actions were similarly not excused by Nicaragua's actions in Costa Rica, El Salvador, or Honduras.[327] Moreover, the mining of Nicaraguan ports was a violation of the customary international law rights of freedom of communications and of maritime commerce.[328]

Turning to customary international humanitarian law, the ICJ noted that Nicaragua had only alleged that the contras' violations of international humanitarian law were

[318] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 241 (June 27).
[319] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 243 (June 27).
[320] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 245 (June 27).
[321] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 249 (June 27).
[322] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 249 (June 27).
[323] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 250 (June 27).
[324] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 251 (June 27).
[325] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 251 (June 27).
[326] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 251 (June 27).
[327] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 252 (June 27).
[328] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 253 (June 27).

imputable to the United States.[329] The ICJ had found the evidence insufficient to establish that claim.[330] In spite of that finding, the ICJ concluded that the United States was "bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of 12 August 1949."[331] The publication and dissemination of the Psychological Operations manual violated that obligation.[332]

The ICJ next examined whether Nicaragua's conduct justified any countermeasures.[333] In analyzing Nicaragua's promises to the Organization of American States, the ICJ noted that a state may undertake binding international obligations relating to issues of domestic policy that are exclusively within the state's sovereign prerogative.[334] Nevertheless the ICJ found that Nicaragua had not undertaken any binding international obligation in its communications with the Organization of American States.[335] Even if an obligation had been incurred, Nicaragua would have owed it to the Organization of American States and not to the United States—thus Nicaragua's failure to uphold its obligations would not have justified U.S. countermeasures.[336] Moreover, the Sandinista creation of a totalitarian government could not justify countermeasures as the structure of domestic government falls within states' sovereignty.[337] Similar considerations, the ICJ found, applied to a state's conduct of its foreign relations.[338] Finally, the ICJ noted that no provision of general international law regulated the level of armaments a state could maintain.[339]

In analyzing the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, the ICJ found that the mining of Nicaraguan ports and the attacks on Nicaraguan oil installations defeated the object and purpose of the treaty, as did

[329] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 254 (June 27).
[330] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 115 (June 27).
[331] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 255 (June 27).
[332] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 255 (June 27).
[333] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 257 (June 27).
[334] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 258–59 (June 27).
[335] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 261 (June 27).
[336] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 262 (June 27).
[337] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 263 (June 27).
[338] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 265 (June 27).
[339] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 269 (June 27).

the imposition of a general trade embargo.[340] The mining of Nicaraguan ports also violated the treaty's provisions on freedom of navigation and commerce.[341] The 90% cut of the sugar quota, the cessation of economic aid, and the U.S. actions with international loaning institutions, however, did not violate the treaty's object and purpose.[342] The ICJ observed once again that it could not impute the contras' actions to the United States, and so rejected Nicaragua's claims under the treaty insofar as they alleged that the United States controlled and directed the contras.[343]

The ICJ determined that it must address whether U.S. conduct fell under the treaty's exceptions for measures necessary to protect U.S. essential security interests.[344] The precise timing of each action had to be considered in order to determine if it satisfied the treaty's exception.[345] In light of the whole circumstances, the ICJ stated that the mining of Nicaraguan ports and attacks on Nicaraguan installations "cannot possibly be justified as 'necessary' to protect the essential security interests of the United States."[346] While the trade embargo subjectively satisfied the treaty's exception, given that Reagan's May 1, 1985 statement on the threats of Nicaragua, the United States had failed to provide evidence that the embargo was necessary to protect its essential interests.[347]

Finally, the ICJ considered the issue of compensation. The ICJ determined that it had jurisdiction to determine the nature and amount of reparation due to Nicaragua in a later proceeding.[348] But the ICJ rejected Nicaragua's claim for 370,200,000 USD as the minimum valuation of direct damages.[349] The ICJ noted that it should avoid making awards of this kind except in exceptional circumstances where the entitlement of the awarded state "was already established with certainty and precision."[350] The ICJ also

[340] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 275–76 (June 27).
[341] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 278 (June 27).
[342] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 276 (June 27).
[343] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 277 (June 27).
[344] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 272 (June 27).
[345] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 281 (June 27).
[346] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 282 (June 27).
[347] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 281–82 (June 27).
[348] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 284 (June 27). The ICJ noted that the United States would not be procedurally barred from participating in that proceeding despite its refusal to appear in the proceeding on the merits. *Id.*
[349] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 285 (June 27).
[350] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 285 (June 27).

observed that such an award could potentially be an obstacle to a friendly settlement of the dispute.[351]

The ICJ concluded that, in light of these violations, the United States "is under a duty immediately to cease and to refrain from all such acts as my constitute breaches of the foregoing legal obligations."[352] The ICJ held that the United States was to make necessary reparations for its breaches of customary international law and the 1956 Treaty of Friendship, Commerce and Navigation.[353] If the United States and Nicaragua were unable to agree on the appropriate reparation, the ICJ would decide it in a subsequent procedure.[354]

b. *The Territorial Dispute*

i. Procedure

On August 31, 1990, the Government of the Great Socialist People's Libyan Arab Jamahiriya ("Libya") filed a notification in the ICJ Registry which contained an annexed copy of an agreement called "Framework Agreement [Accord-Cadre] on the Peaceful Settlement of the Territorial Dispute between the Great Socialist People's Libyan Arab Jamahiriya and the Republic of Chad" (the "Accord-Cadre").[355] The Accord-Cadre provided that Libya the Republic of Chad ("Chad") would attempt to resolve their territorial disputes peacefully within one year, unless their respective heads of state decided otherwise.[356] Failing that, both states would submit the dispute to the ICJ.[357] Accordingly, Libya requested the ICJ to resolve the territorial dispute with regards to the applicable international law, as a year had expired since the Accord-Cadre had been signed and the heads of state had been unable to reach an agreement to vary the procedures for resolution.[358]

On September 3, 1990, Chad filed an Application with the ICJ to institute proceedings against Libya on the basis of the Accord-Cadre.[359] Chad requested that the ICJ "determine the course of the frontier between the Republic of Chad and the Libyan Arab Jamahiriya, in accordance with the principles and rules of international law applicable in the matter as between the parties."[360] The states agreed that each filing referred to the same matter, and the ICJ proceeded to order the dates of various filings, each of which was

[351] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 285 (June 27).
[352] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 292(12) (June 27).
[353] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 292(13)–(14) (June 27).
[354] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 292(15) (June 27).
[355] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 1 (Feb. 3).
[356] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 2 (Feb. 3).
[357] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 2 (Feb. 3).
[358] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 3 (Feb. 3).
[359] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 5 (Feb. 3).
[360] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 5 (Feb. 3).

timely met.[361] Chad filed additional documents past the closure of the written proceedings, but Libya did not object to those filings.[362] The public hearings were held between June 14 and July 14, 1993.[363]

In its August 31, 1990 notification, Libya stated "[t]he determination of the limits of the respective territories of the Parties in this region involves, *inter alia*, a consideration of a series of international agreements although, in the view of Libya, none of these agreements finally fixed the boundary between the Parties which, accordingly, remains to be established in accordance with the applicable principles of international law."[364] On that basis, Libya requested the ICJ "to decide the limits of [the parties'] respective territories in accordance with the rules of international law applicable in the matter."[365] Libya argued that while no boundary existed as a result of any international agreement, Libya had "clear title" to lands north of a line that matched the 15º0'N line for much of its length.[366] Libya based its claim to the disputed area "on a coalescence of rights and titles: those of the indigenous inhabitants, those of the Senoussi Order (a religious confraternity . . .), and those of a succession of sovereign States, namely the Ottoman Empire, Italy, and finally Libya itself."[367]

Chad, in its September 3, 1990 Application, noted that the purpose of the dispute was "to arrive at a firm definition of [the] frontier" and on that basis requested the ICJ "to determine the course of the frontier between the Republic of Chad and the Libyan Arab Jamahiriya."[368] Chad argued that the boundary should be determined on the basis of the 1955 Treaty of Friendship and Good Neighbourliness (the "1955 Treaty"), which was concluded between the French Republic—Chad claimed it was its successor in the treaty—and the United Kingdom of Libya.[369] In the alternative, Chad claimed that the boundaries referred to in the 1955 Treaty had acquired the character of boundaries through French *effectivités*[370] and that Chad could rely on those *effectivités*.[371]

The ICJ noted that both Libya and Chad's requests revealed a fundamental disagreement about the nature of the dispute.[372] On the one hand, Libya argued that no

[361] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, paras. 8–13 (Feb. 3).
[362] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 14 (Feb. 3).
[363] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 16 (Feb. 3).
[364] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 18 (Feb. 3).
[365] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 18 (Feb. 3).
[366] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 20 (Feb. 3).
[367] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 20 (Feb. 3). *See generally* Memorial of Libyan Arab Jamahiriya (Judgment), The Territorial Dispute
[368] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 18 (Feb. 3).
[369] Memorial of Chad (Judgment), The Territorial Dispute (Libya Arab Jamahiriya/Chad), 1991 I.C.J. Pleadings vol. 1, p. 375 (Aug. 26, 1991).
[370] The ICJ previously defined *effectivités* as "the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period." The Frontier Dispute (Burk. Faso v. Rep. of Mali), Judgment, 1986 I.C.J. 554, para. 63 (Dec. 22).
[371] Memorial of Chad (Judgment), The Territorial Dispute (Libya Arab Jamahiriya/Chad), 1991 I.C.J. Pleadings vol. 1, p. 377 (Aug. 26, 1991).
[372] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 19 (Feb. 3).

boundary existed and asked the ICJ to determine that boundary.[373] On the other hand, Chad presumed a boundary existed and requested the ICJ to determine its precise limits.[374]

The map below shows the exact lines that both Chad and Libya claimed, while the following map is more detailed and shows the state of Chad today.

[373] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 19 (Feb. 3).
[374] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 19 (Feb. 3).

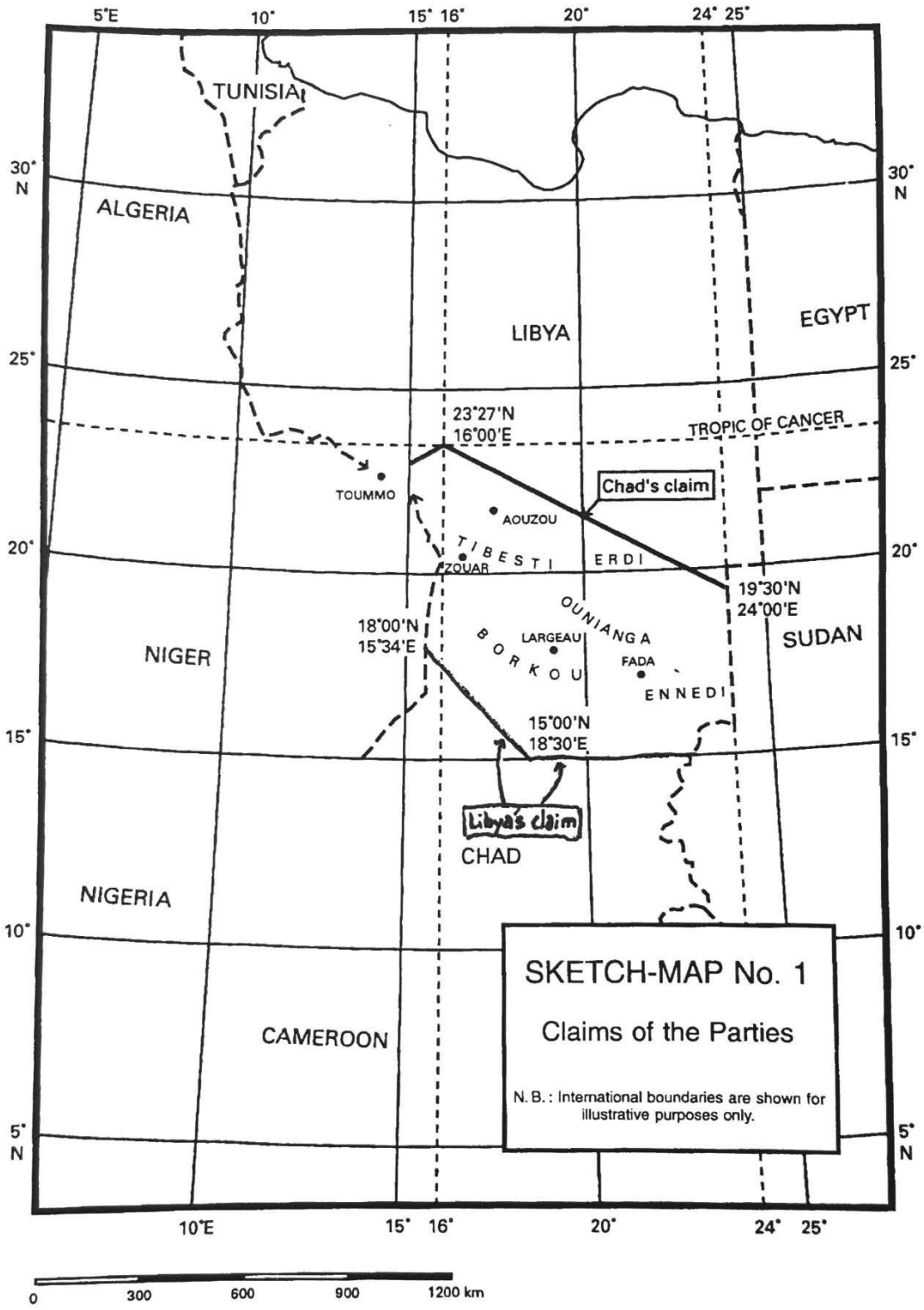

Figure 1: The Territorial Dispute (Libya Arab Jamahiriya v. Chad), Judgment, 1994 I.C.J. 6, page 16 (Feb. 3).

Figure 2: Perry-Castañeda Library Map Collection, http://www.lib.utexas.edu/maps/africa/chad_rel_1991.pdf.

ii. Facts

"The dispute between the Parties is set against the background of a long and complex history of military, diplomatic and administrative activity on the part of the Ottoman Empire, France, Great Britain and Italy, as well as the Senoussi Order."[375] Libya became a sovereign state on December 24, 1951.[376] Prior to then, Libya had been administered by France, the United Kingdom, the United States, and the Union of Soviet Socialist Republics following the end of World War II.[377] Chad had been a French colony in French Equatorial Africa—it gained its independence on August 11, 1960.[378]

In Africa, the 19th and early 20th centuries were characterized by numerous agreements between foreign powers seeking to delimit their spheres of influence following the Scramble for Africa.[379] The following are the agreements relevant to the dispute:

- The 1898 Convention: An agreement between France and Great Britain that, following an 1899 Declaration, established French territory north of the 15º0'N line would be delimited by a specified line, presumably that attached to the *Livre jaune* the French published a few days after the 1898 Convention's adoption.[380]
- The 1900 and 1902 Letters: An exchange of letters between France and Italy in which Italy was reassured that "the limit to French expansion in North Africa . . . is to be taken as corresponding to the frontier of Tripolitania as shown on [the *Livre jaune*]."[381]
- The 1910 Convention: An agreement between the Tunisian government and the Ottoman Empire delimiting the frontier between the Regency of Tunis and the Vilayet of Tripoli.[382] Following the Treaties of Ouchy and Lausanne in October 15 and 18, 1912 respectively, Italy established sovereignty over the Turkish provinces of Tripolitania and Cyrenaica.[383]
- The 1919 Convention: A supplementary agreement to the 1898 Convention between France and Great Britain recording an interpretation of the 1899 Declaration.[384]

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[375] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 24 (Feb. 3).
[376] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 23 (Feb. 3).
[377] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 23 (Feb. 3).
[378] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 23 (Feb. 3).
[379] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 25 (Feb. 3). The relevant actors were France, Great Britain, Italy, and the Ottoman Empire. *Id.* During the same period, the Senoussi Order was active in the region, having established *zawiyas* that "fostered trade, regulated caravan traffic, arbitrated disputes and functioned as religious centres . . . [which] comprised mosques, schools and guesthouses for travellers, and also sometimes had in residence a *qadi* or judge." *Id.* para. 26.
[380] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 28 (Feb. 3). The *Livre jaune* line roughly corresponds to Chad's claim.
[381] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 29 (Feb. 3).
[382] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 30 (Feb. 3).
[383] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 30 (Feb. 3).
[384] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 31 (Feb. 3).

- The 1919 Agreement: An agreement between France and Italy that established the boundary between Tripolitania and the French African possessions west of Toummo.[385]
- The 1924 Protocol: An amendment to the 1923 Treaty of Lausanne—which established peace between Turkey, France, Great Britain, and Italy—that established the boundary between French Equatorial Africa and the Anglo-Egyptian Sudan.[386]
- The unratified 1935 Treaty: An agreement that never came into force between France and Italy, which established a boundary between Libya and the adjacent French colonies east of Toummo.[387]
- The 1955 Treaty: An agreement between a newly-independent Libya and France that dealt with a variety of matters, particularly border frontiers.[388] Article 3 of the treaty claimed "the frontiers between the territories of Tunisia, Algeria, French West Africa and French Equatorial Africa . . . and . . . Libya . . . result from international instruments in force on the date of [Libya's] constitution . . . as listed in the attached Exchange of Letters (Ann. I)."[389] Annex I listed 1898 Convention; the 1899 Declaration; the 1900 and 1902 Letters; the 1919 Convention; and the 1919 Agreement.[390]

The dispute focused on ownership of the Aouzou strip, an area thought to be rich in minerals[391] that had been occupied by Libya in 1973 and annexed in 1975.[392] Chad and Libya had been at war for control of the Aouzou strip from 1986 to 1987.[393] While the Aouzou strip had no military or strategic value, Chad and Libya fiercely contested ownership over the area.[394] Libya funded anti-Chad opposition groups, invaded Chadian territory, and even sought the replacement of Chad's government with a more Libya-

[385] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 31 (Feb. 3).
[386] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 32 (Feb. 3).
[387] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 33 (Feb. 3).
[388] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 37 (Feb. 3).
[389] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 39 (Feb. 3).
[390] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 40 (Feb. 3).
[391] There is some debate about whether or not the Aouzou strip contained uranium deposits. While Jeffrey L. Dunoff, Steven R. Ratner, and David Wippman asserted that the Aouzou strip contained no economic value, Michelle L. Burgis asserted that the Aouzou strip contained possible uranium deposits and that Dunoff, Ratner, and Wippman were likely unaware of the deposits because they are not referenced in the legal literature. *Compare* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 3 (2015), *with* MICHELLE L. BURGIS, BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTES 121 n.25 (2009).
[392] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 229 (Philippe Sands et al. eds., 2004).
[393] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 229 (Philippe Sands et al. eds., 2004).
[394] JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 3 (2015).

friendly regime.[395] The Organization of African Unity (the "OAU") backed Chad's claim to the Aouzou strip, and coerced Libya to withdraw many of its troops from the area by threatening to cancel a summit scheduled to take in Tripoli in 1982.[396] In 1983, the Soviet Union, which backed Libya, blocked a Chadian appeal to the Security Council calling for Libya's withdraw from the Aouzou strip.[397] After Chad succeeded in driving Libya out of much of northern Chad but not the Aouzou strip in 1987, the parties concluded the Cadre-Accord which led to the ICJ case.[398]

Both Libya and Chad argued that the "logical starting-point" for the dispute's resolution was the 1955 Treaty.[399] While Libya never argued that the 1955 Treaty was invalid, it asserted that the ICJ should take into account that France had taken advantage of Libya's lack of knowledge of the relevant facts and Libya's inexperience in concluding these types of agreements.[400]

iii. Judgment

The ICJ reviewed the 1955 Treaty through the lens of the 1969 Vienna Convention on the Law of Treaties by first determining its object and purpose.[401] It found that Libya and France had intended to finally settle all boundary disputes in the 1955 Treaty.[402] The ICJ also rejected Libya's assertion that, of the treaties listed in Annex I, only the 1910 Convention and the 1919 Agreement produced binding frontiers.[403] The ICJ found that article 3 of the 1955 Treaty also established which agreements were in force at the time, specifically excluding the 1935 Treaty.[404] The ICJ next reviewed the context of the 1955 Treaty, finding that the 1955 Convention of Good Neighbourliness between France and Libya implicitly recognized that cities north of Libya's claim lay in French territory.[405] The ICJ also considered that the *travaux préparatoires* of the 1955 Treaty established that Libya and France had intended to definitively establish their frontier.[406]

The ICJ then reviewed the treaties referenced in Annex I. It found that the 1919 Convention, which interpreted the 1899 Declaration that established the lines drawn in the

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[395] JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 3–4 (2015).
[396] JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 4 (2015).
[397] JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 4 (2015).
[398] JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 4 (2015).
[399] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 36 (Feb. 3).
[400] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 36 (Feb. 3).
[401] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 41 (Feb. 3).
[402] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, paras. 42–43, 48 (Feb. 3) ("The Court considers that Article 3 of the 1955 Treaty was aimed at settling all the frontier questions, and not just some of them.").
[403] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, paras. 44–47 (Feb. 3).
[404] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, paras. 50–51 (Feb. 3).
[405] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, paras. 53–54 (Feb. 3).
[406] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 55 (Feb. 3).

Livre jaune, definitively established the boundary between Libya and Chad in the dispute.[407] The 1919 Convention thus established the boundary from 19º30'N, 24º00'E to 23º27'N, 16º00'E—the northernmost point of Chad.[408] The ICJ found that the 1900 and 1902 Letters determined the remaining boundary to be from 23º27'N, 16º00'E to 23º00'N, 15º00'E.[409]

The ICJ also held that, in spite of article 11 of the 1955 Treaty that established the date of expiration of the treaty, the boundary created by the treaty was to be permanent: "The establishment of this boundary is a fact which, from the outset has had a legal life of its own, independently of the fate of the 1955 Treaty . . . . A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy."[410]

The ICJ was extremely careful to base its findings exclusively on the 1955 Treaty and made no findings on the other arguments presented by the parties.[411]

c. *Armed Activities on the Territory of the Congo*

i. Procedure

On June 23, 1999, the Democratic Republic of the Congo (the "DRC") filed an Application with the ICJ alleging that the Republic of Uganda ("Uganda") had committed acts of armed aggression on the DRC's territory in violation of the UN Charter and the Charter of the Organization of African Unity.[412] The DRC requested that the ICJ find that:

> (1) Uganda had committed an act of aggression according to ICJ case law and UN General Assembly Resolution 3314 and in contravention of article 2(4) of the UN Charter;
> (2) Uganda had committed repeated violations of the Geneva Conventions and their Additional Protocols, as well as "massive human rights violations in defiance of the most basic customary law;"
> (3) Uganda was responsible for heavy losses of life in the area surrounding the city of Kinshasa [the DRC's capital] due to its forcible possession of the Inga hydroelectric dam and its termination of the dams power generation;
> (4) Uganda had caused the death of 40 civilians by shooting down a Boeing 727 at Kindu on October 9, 1998, in violation of the Convention on International Civil Aviation, the Hague Convention for the Suppression

[407] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, paras. 59–60 (Feb. 3).
[408] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, para. 63 (Feb. 3).
[409] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, paras. 63–65 (Feb. 3).
[410] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, paras. 72–73 (Feb. 3).
[411] The Territorial Dispute (Libya Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6, paras. 75–76 (Feb. 3).
[412] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 1 (Dec. 19).

> of Unlawful Seizure of Aircraft, and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[413]

The DRC requested that the ICJ order that Ugandan armed forces vacate the DRC's territory, that Uganda immediately and unconditionally withdraw its nationals from the DRC's territory, and that Uganda provide the DRC with compensation for the looting, destruction, removal of property and persons, and all other unlawful acts attributable to Uganda.[414] As a basis for jurisdiction, the DRC invoked the ICJ's compulsory jurisdiction under article 36(2) of the ICJ Statute.[415]

On June 19, 2000, the DRC requested the ICJ implement several provisional measures:

> (1) Uganda must order its army to withdraw from Kisangani;
> (2) Uganda must cease all fighting or military activity within the DRC and must immediately withdraw from the DRC's territory, in addition to halting any direct or indirect support to any state, group, organization, movement, or individual engaged in military activity against the DRC;
> (3) Uganda must take all measures to stop war crimes from being committed by entities or persons under its authority, which enjoy its support, or could be under its control, authority, or influence;
> (4) Uganda must stop any act aiming or causing the disruption or interference of the fundamental human rights of persons within occupied zones;
> (5) Uganda must stop the illegal exploitation of the DRC's natural resources and the illegal transfer of assets, equipment, or persons to its territory; and
> (6) Uganda must respect the DRC's sovereignty, political independence, territorial integrity, and the fundamental rights of persons within the DRC's territory.[416]

The ICJ ordered that both parties refrain from any action, particularly armed action, that might prejudice the rights of the other party with respect to whatever judgment the ICJ might render or that might aggravate or extend the dispute before the ICJ.[417] The ICJ also ordered that both parties take all measures to comply with their international obligations

[413] Application of the Democratic Republic of the Congo, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 17–19 (June 23, 1999), http://www.icj-cij.org/docket/files/116/7151.pdf.
[414] Application of the Democratic Republic of the Congo, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 17–19 (June 23, 1999), http://www.icj-cij.org/docket/files/116/7151.pdf.
[415] Application of the Democratic Republic of the Congo, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 17–19 (June 23, 1999), http://www.icj-cij.org/docket/files/116/7151.pdf.
[416] Request for Provisional Measures Against the Republic of Uganda, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 3–4 (June 19, 2000), http://www.icj-cij.org/docket/files/116/8311.pdf.
[417] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Provisional Measures, Order of 1 July 2000, 2000 I.C.J. 111, para. 47(1) (July 1).

under the UN Charter, the Charter of the Organization of African Unity, and Security Council Resolution 1304.[418] Finally, the ICJ ordered that both parties take measures to ensure the full respect for fundamental human rights within the zone of conflict, as well as to comply with international humanitarian law.[419]

The DRC filed its Memorial on July 6, 2000.[420] In the Memorial, the DRC alleged that Uganda had engaged in military and paramilitary activities against the DRC, had occupied the DRC's territory, and had actively extended military, logistic, economic, and financial support to armed opposition groups with the DRC.[421] These actions, the DRC alleged, violated the prohibition on the use of force (including the prohibition of aggression), the obligation to peacefully settle international disputes, the DRC's sovereignty, its peoples' rights to self-determination, and the principle of non-interference.[422] The DRC also alleged that Uganda, in illegally exploiting the DRC's natural resources, violated the DRC's sovereignty over its natural resources, the DRC's peoples' rights to self-determination, and the principle of non-interference.[423] Further, the DRC alleged that Uganda had committed acts of oppression against DRC nationals by killing, injuring, abducting, and despoiling them.[424] The DRC argued these actions violated the obligation to respect fundamental human rights in armed conflict and the civil, political, economic, social, and cultural rights of DRC nationals.[425]

The DRC requested the ICJ find that Uganda should cease its internationally wrongful acts in the DRC's territory, including support for armed opposition groups, the unlawful detention of DRC nationals, and the illegal exploitation of the DRC's natural resources.[426] The DRC also requested the ICJ require Uganda to pay reparations for all wrongful acts attributable to Uganda and to restore DRC resources in its possession.[427] Failing that, the DRC requested the ICJ require Uganda to make a payment to the DRC covering the totality of the damage the DRC suffered.[428] Finally, the DRC requested the

[418] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Provisional Measures, Order of 1 July 2000, 2000 I.C.J. 111, para. 47(2) (July 1).
[419] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Provisional Measures, Order of 1 July 2000, 2000 I.C.J. 111, para. 47(3) (July 1).
[420] Memorial of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2000 I.C.J. Pleadings vol. I (July 6, 2000).
[421] Memorial of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2000 I.C.J. Pleadings vol. I, at 273 (July 6, 2000).
[422] Memorial of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2000 I.C.J. Pleadings vol. I, at 273 (July 6, 2000).
[423] Memorial of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2000 I.C.J. Pleadings vol. I, at 273–74 (July 6, 2000).
[424] Memorial of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2000 I.C.J. Pleadings vol. I, at 274 (July 6, 2000).
[425] Memorial of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2000 I.C.J. Pleadings vol. I, at 274 (July 6, 2000).
[426] Memorial of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2000 I.C.J. Pleadings vol. I, at 274 (July 6, 2000).
[427] Memorial of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2000 I.C.J. Pleadings vol. I, at 274–75 (July 6, 2000).
[428] Memorial of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2000 I.C.J. Pleadings vol. I, at 275 (July 6, 2000).

ICJ require Uganda to render satisfaction to the DRC in the form of official apologies, the payment of damages, and the prosecution of those responsible for Uganda's wrongful acts, as well as requiring Uganda to make specific guarantees and assurances that it would not commit similar violations against the DRC in the future.[429]

Uganda filed its Counter-Memorial on April 21, 2001, which included several counter-claims.[430] Uganda argued that the ICJ should find the DRC's allegations of all violations of international law that involved Rwanda or its agents are inadmissible because Rwanda was not involved in the suit.[431] On this basis, Uganda argued that the ICJ should refuse to exercise jurisdiction, even if it had it, in order to preserve the ICJ's "judicial function."[432] Uganda also requested the ICJ reject the DRC's accusations that Uganda had violated international law.[433] Uganda then requested the ICJ uphold Uganda's counter-claims against the DRC:

> (1) The DRC had violated the prohibition of the use of force against Uganda;
> (2) The DRC had intervened in Uganda's domestic affairs; and
> (3) The DRC had provided assistance to armed groups carrying out military and paramilitary activities against Uganda by training, equipping, financing, and supplying those groups.[434]

Finally, Uganda requested the ICJ determine reparations for its counter-claims in a later proceeding.[435]

The DRC challenged the admissibility of Uganda's counter-claims via written observations filed with the ICJ on June 28, 2001.[436] The DRC requested the ICJ dismiss Uganda's counter-claims because (1) they were not presented in the manner required by the Rules of the Court; (2) there was not a "direct connection" with the DRC's allegations against Uganda, as the counter-claims dealt with matters that occurred prior to the events

[429] Memorial of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2000 I.C.J. Pleadings vol. I, at 275 (July 6, 2000).
[430] Counter-Memorial Submitted by the Republic of Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2001 I.C.J. Pleadings vol. I (Apr. 21, 2001).
[431] Counter-Memorial Submitted by the Republic of Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2001 I.C.J. Pleadings vol. I, at 159 (Apr. 21, 2001).
[432] Counter-Memorial Submitted by the Republic of Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2001 I.C.J. Pleadings vol. I, at 159 (Apr. 21, 2001).
[433] Counter-Memorial Submitted by the Republic of Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2001 I.C.J. Pleadings vol. I, at 231 (Apr. 21, 2001).
[434] Counter-Memorial Submitted by the Republic of Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2001 I.C.J. Pleadings vol. I, at 219–20 (Apr. 21, 2001).
[435] Counter-Memorial Submitted by the Republic of Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2001 I.C.J. Pleadings vol. I, at 231 (Apr. 21, 2001).
[436] Written Observations of the Democratic Republic of the Congo on the Question of the Admissibility of the Counter-Claims Submitted by Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), (June 25, 2001), http://www.icj-cij.org/docket/files/116/8317.pdf.

of the DRC's claims; and (3) entertaining the counter-claims would be contrary to administration of justice.[437]

Uganda filed its written observations in support of its counter-claims on August 15, 2001.[438] Uganda requested that the ICJ find its counter-claims complied with the Statute of the ICJ and that the ICJ reject the DRC's claims in its written observations on Uganda's counterclaims.[439]

In a November 29, 2001 order, the ICJ held that the first two counter-claims were admissible, but the third was not.[440] The ICJ ordered that the DRC file a Reply and Uganda file a Rejoinder addressing Uganda's counter-claims.[441]

On May 29, 2002, the DRC filed its Reply.[442] In the Reply, the DRC essentially restated the requests it made in its Memorial.[443] The DRC added that the ICJ should find that Uganda had also violated the principle of distinction, which requires armed forces to distinguish between civilian and military objectives during an armed conflict.[444] The DRC also responded the Uganda's counter-claims. The DRC requested the ICJ dismiss Uganda's claim that the DRC had participated in armed attacks against Uganda because the claim occurred before Laurent-Désiré Kabila came to power, Uganda had waived its right to raise the claim, and Uganda had failed to establish the facts of the claim.[445] Additionally, the DRC argued that Uganda had failed to establish the facts of the claim for the period following when Laurent-Désiré Kabila came to power.[446] As to the second counter-claim, which alleged the DRC was involved in an attack on the Ugandan embassy and on Ugandan nationals in Kinshasa, the DRC requested the ICJ dismiss the claim because Uganda had failed to establish that the injured persons were Ugandan nationals

[437] Written Observations of the Democratic Republic of the Congo on the Question of the Admissibility of the Counter-Claims Submitted by Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 69 (June 25, 2001), http://www.icj-cij.org/docket/files/116/8317.pdf.

[438] Written Observations of the Republic of Uganda on the Question of the Admissibility of the Counter-Claims Made in the Counter-Memorial of the Republic of Uganda of 21 April 2001 (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), (Aug. 15, 2001), http://www.icj-cij.org/docket/files/116/13467.pdf.

[439] Written Observations of the Republic of Uganda on the Question of the Admissibility of the Counter-Claims Made in the Counter-Memorial of the Republic of Uganda of 21 April 2001 (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 45 (Aug. 15, 2001), http://www.icj-cij.org/docket/files/116/13467.pdf.

[440] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Order of 29 November 2001, 2001 I.C.J. 660, para. 51(A) (Nov. 29).

[441] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Order of 29 November 2001, 2001 I.C.J. 660, para. 51(B) (Nov. 29).

[442] Reply of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), (May 29, 2002), http://www.icj-cij.org/docket/files/116/8315.pdf.

[443] Reply of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 398–400 (May 29, 2002), http://www.icj-cij.org/docket/files/116/8315.pdf.

[444] Reply of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 398 (May 29, 2002), http://www.icj-cij.org/docket/files/116/8315.pdf.

[445] Reply of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 399 (May 29, 2002), http://www.icj-cij.org/docket/files/116/8315.pdf.

[446] Reply of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 399 (May 29, 2002), http://www.icj-cij.org/docket/files/116/8315.pdf.

and that they had exhausted domestic remedies, as well as failing to establish the facts of its claim.[447] Additionally, the DRC requested the ICJ dismiss Uganda's claim that the DRC was involved in an attack on Uganda's embassy because Uganda had failed to establish the facts of that claim.[448]

On December 6, 2002, Uganda filed its Rejoinder.[449] Uganda reiterated its request presented in its Counter-Memorial that the ICJ find the DRC's claims involving Rwanda inadmissible.[450] Uganda also requested that the ICJ reject the DRC's claims that Uganda had violated international law.[451] Uganda requested the ICJ uphold the counter-claims presented in Uganda's Counter-Memorial.[452] Lastly, Uganda repeated its request that the ICJ award reparations for its counter-claims in a later proceeding.[453]

On February 28, 2003, the DRC filed a document titled "Additional Written Observations of the Democratic Republic of the Congo on the Counter-Claims Submitted by Uganda" ("Additional Written Observations").[454] In that document, the DRC once again challenged Uganda's counter-claims:

> As regards the *first counter-claim presented by Uganda:*
>
> (1) to the extent that it relates to the period before Laurent-Désiré Kabila came to power, the claim is inadmissible because Uganda had previously waived it right to lodge such a claim and, in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;
>
> (2) to the extent that it relates to the period from when Laurent-Désiré Kabila came to power until the onset of Ugandan aggression, the claim is unfounded in fact because Uganda has failed to establish the facts on which it is based;
>
> (3) to the extent that it relates to the period after the onset of Ugandan aggression, the claim is founded neither in fact nor in law because Uganda has failed to establish the facts on which it is based, and

[447] Reply of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 400 (May 29, 2002), http://www.icj-cij.org/docket/files/116/8315.pdf.
[448] Reply of the Democratic Republic of the Congo (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 400 (May 29, 2002), http://www.icj-cij.org/docket/files/116/8315.pdf.
[449] Rejoinder Submitted by the Republic of Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), (Dec. 6, 2002), http://www.icj-cij.org/docket/files/116/8314.pdf.
[450] Rejoinder Submitted by the Republic of Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 333 (Dec. 6, 2002), http://www.icj-cij.org/docket/files/116/8314.pdf.
[451] Rejoinder Submitted by the Republic of Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 333 (Dec. 6, 2002), http://www.icj-cij.org/docket/files/116/8314.pdf.
[452] Rejoinder Submitted by the Republic of Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 333 (Dec. 6, 2002), http://www.icj-cij.org/docket/files/116/8314.pdf.
[453] Rejoinder Submitted by the Republic of Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 333 (Dec. 6, 2002), http://www.icj-cij.org/docket/files/116/8314.pdf.
[454] Additional Written Observations of the Democratic Republic of the Congo on the Counter-Claims Submitted by Uganda (Merits), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), at 398 (Feb. 28, 2003), http://www.icj-cij.org/docket/files/116/11074.pdf.

because, from 2 August 1998, the DRC was in any event in a situation of self-defence.

As regards the *second counter-claim presented by Uganda:*

(1) to the extent that it is now centred on the interpretation and application of the Vienna Convention of 1961 on Diplomatic Relations, the claim presented by Uganda radically modifies the subject-matter of the dispute, contrary to the Statute and Rules of Court; this aspect of the claim must therefore be dismissed from the present proceedings;

(2) the aspect of the claim relating to the inhumane treatment allegedly suffered by certain Ugandan nationals remains inadmissible, as Uganda has still not shown that the conditions laid down by international law for the exercise of its diplomatic protection have been met; in the alternative, this aspect of the claim is unfounded, as Uganda is still unable to establish the factual and legal bases for its claims;

(3) the aspect of the claim relating to the alleged expropriation of Ugandan public property is unfounded, as Uganda is still unable to establish the factual and legal bases for its claims.[455]

The oral proceedings were held between April 11 and 29, 2005.[456] During the oral proceedings, the DRC reiterated the requests it made in its Reply and its Additional Written Observations.[457] Similarly, Uganda reiterated the requests it made in its Rejoinder.[458]

ii. Facts

(1) The Historical Context

The underlying case arose in the origins and aftermaths of the First and Second Congo Wars, which occurred July 1996 through July 1998 and August 2, 1998 through July 2003 respectively.[459] The DRC, formerly known as Zaire, gained its independence in 1960.[460] Tensions existed in Zaire between the "indigenous" groups—composed of the Hunde, Nande, and Nyanga communities—and the Banyarwanda "immigrant" groups—

[455] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 24 (Dec. 19).
[456] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 21 (Dec. 19).
[457] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 25 (Dec. 19).
[458] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 25 (Dec. 19).
[459] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 156, 167 (Elizabeth Wilmshurst ed., 2012).
[460] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 148 (Elizabeth Wilmshurst ed., 2012).

composed of refugees from Rwanda.[461] On March 20, 1993, the governor of the DRC's North Kivu province called on Zairian security forces to join with the Hunde and Nyanga in order to exterminate the Banyarwanda, resulting in 500 civilian deaths at the Ntoto market.[462] Violence continued over several months as Hunde and Nyanga groups, sometimes called the Mai-Mai, continued killing the Banyarwanda, which included both Hutus and Tutsis.[463] The Zairian Armed Forces (the "FAZ") began assisting Hutu-armed units in targeting Hunde civilians in retaliation.[464] Thousands were killed and up to a quarter of a million were displaced as a result of the violence.[465]

North Kivu became relatively stable by February 1994, but violence erupted again as the Rwandan Patriotic Front (the "RPF") began gaining ground against the Rwandan Armed Forces (the "FAR") and the Interahamwe, the main perpetrators of the Rwandan Genocide, which caused over 700,000 Rwandan refugees to flee into North Kivu.[466] Among the refugees were members of the FAR and Interahamwe.[467] While the local Congolese nationals began uniting to oppose the Rwandan refugees, who had been causing concerns about damage to the local ecology and the socio-economic and security conditions of the locals, Zairian President Mobuto Sese Seko's response was nugatory.[468] It is possible that Mobuto had been supplying arms to the FAR to encourage their attacks in Rwanda.[469] Between July 1994 and mid-1996, ex-members of the FAR and other armed groups had been staging attacks in Rwanda from North Kivu.[470] By late 1995, the Hunde and Nyanga had organized militias that initiated bloody attacks on Hutu communities, following an announcement by Zaire that all Rwandan refugees would be expelled from UN refugee camps.[471] In spring 1996, full-scale ethnic violence dominated North Kivu

[461] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 148 (Elizabeth Wilmshurst ed., 2012).
[462] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 148 (Elizabeth Wilmshurst ed., 2012).
[463] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 148–49 (Elizabeth Wilmshurst ed., 2012).
[464] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 149 (Elizabeth Wilmshurst ed., 2012).
[465] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 149 (Elizabeth Wilmshurst ed., 2012).
[466] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 149 (Elizabeth Wilmshurst ed., 2012).
[467] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 149 (Elizabeth Wilmshurst ed., 2012).
[468] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 149 (Elizabeth Wilmshurst ed., 2012).
[469] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 149–50 (Elizabeth Wilmshurst ed., 2012).
[470] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 149 (Elizabeth Wilmshurst ed., 2012).
[471] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 150 (Elizabeth Wilmshurst ed., 2012).

and South Kivu.[472] The FAZ launched two campaigns to restore order, but both failed.[473] During this period, between 6,000 and 40,000 people died and 400,000 people were displaced.[474]

In October 1996, the First Congo War began as large-scale violence erupted in South Kivu in response to the brutal suppression of the Banyamulenge, ethnic Tutsis who were DRC nationals.[475] The violence was widely recognized as a full-scale civil war in Zaire.[476] During the civil war, Angola, Rwanda, and Uganda directly intervened in Zaire's territory to combat various armed opposition groups that had used the DRC's instability to launch cross-border attacks into each state.[477] While Zaire accused the RPF of causing the initial violence, the armed opposition group the Alliance of Democratic Forces for the Liberation of the Congo (the "AFDL") took credit for creating the uprising.[478]

During the First Congo War, the AFDL, the RPF, and Uganda's military, the Uganda Peoples' Defence Forces (the "UPDF"), targeted UN refugee camps that were being used as safe havens for armed insurgents.[479] By November 1996, the AFDL and RPF had seized the three major Zairian towns along the Rwandan border: Uvira, Bukavu, and Goma.[480] The AFDL was largely supported by the RPF—both forces were responsible for mass atrocities against Hutu refugees.[481] The UPDF and the Angolan military also assisted the AFDL.[482]

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[472] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 150 (Elizabeth Wilmshurst ed., 2012).

[473] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 151 (Elizabeth Wilmshurst ed., 2012).

[474] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 151 (Elizabeth Wilmshurst ed., 2012).

[475] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 156–57 (Elizabeth Wilmshurst ed., 2012).

[476] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 157 (Elizabeth Wilmshurst ed., 2012).

[477] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 157 (Elizabeth Wilmshurst ed., 2012). Burundi also indirectly intervened. *Id.*

[478] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 157 (Elizabeth Wilmshurst ed., 2012).

[479] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 158 (Elizabeth Wilmshurst ed., 2012).

[480] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 158 (Elizabeth Wilmshurst ed., 2012).

[481] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 158–59 (Elizabeth Wilmshurst ed., 2012). In fact, then Rwandan Defence Minister and Vice-President Paul Kagame openly admitted to planning to dismantle refugee camps, to destroy the structure of the Hutu armed units, and to depose Mobuto. John Pomfret, *Rwandans Led Revolt in Congo*, WASH. POST (July 9, 1997), http://www.washingtonpost.com/wp-srv/inatl/longterm/congo/stories/070997.htm.

[482] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 159 (Elizabeth Wilmshurst ed., 2012).

On May 16, 1997, Mobuto fled the capital and Laurent-Désiré Kabila, the head of the AFDL, declared himself President.[483] On May 29, 1997, Kabila officially became the President of Zaire, which was renamed the DRC.[484] While relative peace returned to the DRC, violence continued in the east, especially in North and South Kivu.[485] The DRC entered into several security agreements with Burundi, Rwanda and Uganda.[486] By September 1997, the DRC's military, the Congolese Armed Forces (the "FAC"), acted under command of the RPF in the eastern DRC.[487] Frequently, the RPF acted unilaterally to combat unnamed Tutsi armed groups, which resulted in massive civilian deaths, in retaliation for frequent cross-border attacks.[488] The DRC also granted permission to the UPDF to operate in the eastern DRC, at times unilaterally, to combat armed opposition groups targeting Uganda.[489]

Tensions once again grew in the eastern DRC as locals became dissatisfied with the prolonged presence of foreign troops.[490] The Tutsi RPF and the Banyamulenge in the FAC began to refuse orders given by non-Tutsi officers.[491] When Kabila deployed other contingents of the FAC to dilute the Tutsi presence in the eastern DRC, the Tutsis and non-Tutsis began to violently clash.[492] As a result, the non-Tutsi officers became increasingly hesitant to attack the Tutsi's enemies, the Mai-Mai, ex-FAR members, and Interahamwe rebels, at times even tacitly aiding those groups.[493] It was amidst these tensions in 1998 that the Second Congo War began. The dispute before the ICJ focused on the events of the Second Congo War. It is important to keep in mind that while this case is against Uganda, Rwanda was also heavily involved in attacks against the DRC, at times coordinating with Uganda and various rebel groups.[494] It is also important to acknowledge the human

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[483] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 29 (Dec. 19).
[484] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 29 (Dec. 19).
[485] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 167 (Elizabeth Wilmshurst ed., 2012).
[486] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 167 (Elizabeth Wilmshurst ed., 2012).
[487] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 167 (Elizabeth Wilmshurst ed., 2012).
[488] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 167 (Elizabeth Wilmshurst ed., 2012).
[489] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 167 (Elizabeth Wilmshurst ed., 2012).
[490] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 168 (Elizabeth Wilmshurst ed., 2012).
[491] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 168 (Elizabeth Wilmshurst ed., 2012).
[492] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 168 (Elizabeth Wilmshurst ed., 2012).
[493] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 168 (Elizabeth Wilmshurst ed., 2012).
[494] *Old Friends, New War*, ECONOMIST (Aug. 19, 1999), http://www.economist.com/node/233381.

suffering of the Second Congo War: Approximately four million people died and another four million were displaced.[495]

(2) Military and Paramilitary Activities in the DRC

The DRC argued that by the end of July 1998, Kabila had learned that the Chief of Staff of the FAC, Colonel Kaberebe, a Rwandan national, was planning a coup d'état.[496] On July 28, 1998, Kabila published an official statement calling for the withdrawal of all foreign troops from Congolese territory, though it was primarily addressed to Rwandan troops.[497] The DRC alleged that on August 2, 1998, the 10th Brigade of the FAC rebelled against the DRC in North Kivu, assisted by Rwandan soldiers.[498] The DRC asserted that on August 4, 1998, Rwanda and Uganda organized an airborne operation to fly troops from Goma—on the DRC-Rwanda border—to Kitona, a town approximately 190 miles southwest of Kinshasa.[499] The DRC argued that Rwandan and Ugandan forces occupied the Inga Dam, which provided hydroelectric power to Kinshasa.[500]

The DRC also alleged that Rwanda and Uganda created the Congolese Rally for Democracy (the "RCD") on August 12, 1998 and the Congo Liberation Movement (the "MLC"), which included its military wing the Congo Liberation Army (the "ALC"), at the end of September 1998.[501] The DRC argued that Uganda cooperated with the ALC to produce a united military front, by providing tactical support, recruitment, education, training, equipment, and supplies.[502]

During the Victoria Falls Summit, August 7–8, 1998, members of the Southern African Development Community (the "SADC") condemned the aggression suffered by the DRC and the occupation of its territory.[503] As a result of the SADC efforts, the DRC and Uganda concluded the Sirte Peace Agreement, which required Uganda to cease hostilities and withdraw from the DRC's territory.[504] On July 10, 1999, Angola, the DRC,

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[495] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 172 (Elizabeth Wilmshurst ed., 2012).
[496] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 30 (Dec. 19).
[497] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 30 (Dec. 19).
[498] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 30 (Dec. 19).
[499] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 31 (Dec. 19).
[500] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 31 (Dec. 19).
[501] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 31 (Dec. 19).
[502] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 32 (Dec. 19).
[503] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 33 (Dec. 19).
[504] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 33 (Dec. 19).

Namibia, Rwanda, Ugandan, and Zimbabwe signed the Lusaka Ceasefire Agreement.[505] The Lusaka Agreement required an immediate cessation of hostilities and the withdrawal of foreign forces from the DRC's territory.[506] Through further efforts, Uganda signed the Kampala plan on April 8, 2000 and the Harare plan on December 6, 2000, both of which provided for troop disengagement.[507] The DRC alleged that, in spite of these agreements, Uganda continued to provide arms to ethnic groups in the Ituri region along the DRC-Uganda border.[508]

Uganda argued that its presence in the eastern DRC prior to Mobuto's downfall was based on Kabila's invitation to attack anti-Ugandan insurgents and to secure the border region, which the DRC did not have the resources to do.[509] Following the invitation, Uganda sent three UPDF battalions into the eastern DRC.[510] Kabila's invitation was made official in the 1998 Protocol on Security Along the Common Border.[511] Uganda alleged that after breaking its alliance with Uganda in July 1998, Kabila established alliances with Chad, the Sudan, and anti-Ugandan insurgent groups.[512] Uganda argued that the July 28, 1998 statement called only for the withdrawal of Rwandan troops in the DRC and thus did not apply to Ugandan forces.[513] Uganda also argued that it did not participate in the FAC rebellion nor the attempted coup d'état.[514] Uganda denied that it participated in the attack on the Kitona military base or had troops board planes flying to Kitona.[515]

Uganda did acknowledge, however, that by August 1998 it had sent troops into the DRC to defend itself against an attack planned by Sudanese forces.[516] By July 3, 1999, Uganda "gain[ed] control of the strategic airfields and river ports in northern and eastern Congo in order to stop the combined forces of the Congolese and Sudanese armies as well

[505] Lusaka Ceasefire Agreement, July 10, 1999, U.N. Doc. S/1999/815.
[506] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 33(Dec. 19).
[507] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 33 (Dec. 19).
[508] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 34 (Dec. 19).
[509] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 35–36 (Dec. 19).
[510] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 36 (Dec. 19).
[511] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 36 (Dec. 19).
[512] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 37 (Dec. 19).
[513] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 37 (Dec. 19).
[514] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 38 (Dec. 19).
[515] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 38 (Dec. 19).
[516] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 39 (Dec. 19).

as the anti-Ugandan insurgent groups from reaching Uganda's borders."[517] Uganda argued that neither the Lusaka Peace Agreement, the Kampala plan, nor the Harare plan called for immediate withdrawal of Ugandan troops, but Uganda began withdrawing five battalions from the DRC on June 22, 2000, while withdrawing two more battalions on February 20, 2001.[518] On September 6, 2002, Uganda noted that the DRC and Uganda signed the Luanda Agreement, which required Uganda to withdraw all its troops except for those expressly authorized to remain on the slopes of Mr. Rewenzori.[519] Uganda claimed it fulfilled its obligations by June 2003 and had not deployed troops inside the Congo since then.[520] Uganda did not deny providing political and military assistance to the MLC and RCD, but it denied participating in the formation of those groups.[521]

(3) Use of Force in Kitona

The ICJ next turned to the issue of the use of force in Kitona, which was discussed above. While the DRC alleged that Uganda participated in an assault on the military base in Kitona, Uganda denied that its troops were even present.[522] Specifically, the DRC alleged that three airplanes in Goma were boarded by other states' armed forces, including Uganda's, on August 4, 1998.[523] The planes flew to Kigali, where they refueled and acquired ammunition, and then proceeded to Kitona.[524] The DRC alleged that during the ensuing battles, Uganda seized Kitona, Boma, Matadi, and Inga, as well as the Inga Dam with the ultimate goal of taking Kinshasa and overthrowing Kabila.[525]

(4) Military Action in the East DRC

Uganda acknowledged that three battalions of UPDF troops were present in the eastern DRC as of August 1, 1998 and that it had reinforced those battalions throughout

[517] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 39 (Dec. 19).
[518] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 40 (Dec. 19).
[519] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 40 (Dec. 19).
[520] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 40 (Dec. 19).
[521] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 41 (Dec. 19).
[522] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 55–56 (Dec. 19).
[523] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 62 (Dec. 19).
[524] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 62 (Dec. 19).
[525] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 62 (Dec. 19).

the conflict.[526] Between August 1998 and November July 10, 1999, UPDF forces took control of or traversed through a large number of DRC towns in the area.[527] There was "considerable controversy" over whether UPDF forces seized towns after July 10, 1999 because the Lusaka Ceasefire Agreement took effect on that date.[528] The ICJ accepted that UPDF forces had seized the vast majority of the towns, but concluded that it did not have sufficient evidence that Ugandan forces were present at Bomongo, Bururu, Mobenzene, or Moboza during that period.[529] The DRC asserted that Uganda had occupied one-third of the DRC and that Ugandan forces did not leave until April 2003.[530]

Uganda argued that its actions prior to September 11, 1998 were carried out at the consent of the DRC, and that following that point Uganda was acting in self-defense until July 10, 1999 with the conclusion of the Lusaka Ceasefire Agreement, which Uganda argued also granted consent for the presence of Ugandan soldiers.[531]

As discussed above, the ICJ acknowledged that, at the latest, the DRC had withdrawn consent for the presence of Ugandan troops within its territory during the Victoria Falls Summit on August 8, 1998.

Uganda had asserted its claim of self-defense with reference to a document entitled "Position of the High Command on the Presence of the UPDF in the DRC."[532] That document established five bases for the claim of self-defense: (1) To deny Sudan the opportunity to use DRC territory for operations against Uganda; (2) to neutralize anti-Uganda opposition groups that received support from the DRC and Sudan; (3) to ensure that the instability in the eastern DRC did not spill over into Uganda; (4) to prevent the Interahamwe and FAR members from launching attacks into Uganda; and (5) to ensure that Uganda was in a position to resist invasions into its territories.[533]

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[526] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 76 (Dec. 19).

[527] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 76–91 (Dec. 19). The towns were Abuzi, Aketi, Akula Port, Bafwasende, Banalia, Basankusu, Baso Adia, Bengamisa, Benda, Beni, Bogbonga, Bokota, Bolomudanda Junction, Bomorge, Bondo, Bongandanga, Bonzanga, Bosobata, Bosobolo, Bosomera, Bumba, Buna, Businga, Businga loko Bridge, Buta, Djombo, Dongo, Ebonga, Faladje, Gbadolite, Gemena, Inese, Isiro, Kalawa Junchai, Katakoli, Katete, Kisangani, Kuna, Libenge, Lino, Lino-Mbambe, Lisala, Mabaye, Makanza, Mobeka, Mowaka, Munubele, Ndanga, Nduu, Ngai, Pambwa Junction, Pimu Bridge, Poko, Pumtsi, Tele Bridge, Titure, Wapinda, Watsa, Yakoma, Yakoma Bridge, and Zongo. *Id.*

[528] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 89 (Dec. 19).

[529] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 91 (Dec. 19).

[530] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 107 (Dec. 19).

[531] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 108 (Dec. 19).

[532] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 107 (Dec. 19).

[533] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 109 (Dec. 19).

(5) Belligerent Occupation

The DRC asserted that Uganda had occupied its territory from August 7, 1998 until June 2, 2003, though the size of the territory occupied by Uganda had fluctuated throughout the conflict.[534] The DRC argued that Uganda had established a new province in the eastern DRC, the Kibali-Ituri province, over which it appointed a deputy governor to administer the territory.[535] The DRC asserted that at all times the Ugandan military exercised de facto control over the seized territory.[536] Uganda, on the other hand, claimed that the small number of troops deployed in the DRC, their deployment being confined to strategic areas, and a prohibition of interference in local affairs proved that Uganda was not an occupying power.[537] Further, Uganda asserted that it was the MLC and the RCD that exercised de facto control over the territory.[538] Finally, Uganda claimed that the appointment of a governor was motivated by a desire to restore stability to the area, though the Ugandan military official who made the appointment was reprimanded for interfering in local affairs.[539]

(6) Violations of Human Rights Law and International Humanitarian Law

The DRC made numerous claims that Uganda had violated international human rights and humanitarian law:

- Wide-scale massacres by the UPDF of Congolese civilians in the Ituri region, involving torture and inhumane and degrading treatment, and mass killings of civilians suspected of having aided anti-Uganda opposition groups;
- The plundering of civilian property by the UPDF and the destruction of villages and private property as part of scorched earth tactics, notably in Kisangani in 1999 and 2000;
- Forcibly recruiting Congolese children into the UPDF, including ideological and military indoctrination in 2000, particularly in the areas of Bunia, Beni, and Butembo;

[534] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 167 (Dec. 19).
[535] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 168 (Dec. 19).
[536] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 168 (Dec. 19).
[537] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 170 (Dec. 19).
[538] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 170 (Dec. 19).
[539] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 171 (Dec. 19).

- Failing to protect Congolese civilians during combat operations with other belligerents and the failure by the UPDF to distinguish between combatants and non-combatants, notably during the clashes between Rwandan and Ugandan forces in Kisangani in 1999 and 2000;
- The participation and perpetuation of ethnic violence in Ituri by providing direct military support, training, and supplies to the Hema in their confrontations with the Lendu, resulting in thousands of civilian casualties;
- Failing to prevent mass atrocities committed by ethnic groups in the Ituri region; and
- Failing to enforce respect for human rights and international humanitarian law in occupied regions.[540]

Uganda principally contested the evidence the DRC used, alleging the evidence was uncredible, partisan, or insufficient to prove the allegations.[541] Uganda also claimed that it did not forcibly recruit Congolese children into its military, but that Uganda had rescued these children during conflicts between rebel opposition groups.[542] Further, Uganda asserted that its troops were insufficient to control ethnic violence in the Ituri regions, "and that only an international force under United Nations auspices had any chance of doing so."[543] Finally, Uganda disputed that the ICJ had jurisdiction over events in Kisangani in June 2000 because Rwanda was not a participant in the proceedings.[544] In any case, Uganda argued that the ICJ should not assert its jurisdiction over the matter "in order to safeguard the judicial function of the Court."[545] In response to Uganda's final claims, the DRC argued that it requested the ICJ to make findings only on the legality of Uganda's actions in the Kisangani area, and such findings would be independent of whether Rwanda or Uganda were responsible for initiating the hostilities that led to the violence.[546]

[540] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 183–90 (Dec. 19).
[541] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 191–95 (Dec. 19).
[542] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 192 (Dec. 19).
[543] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 195 (Dec. 19).
[544] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 197–98 (Dec. 19).
[545] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 197–98 (Dec. 19).
[546] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 199–202 (Dec. 19).

(7) Illegal Exploitation of Natural Resources

The DRC accused Uganda of several actions relating to the illegal exploitation of the DRC's natural resources:

- Taking "outright control of the entire economic and commercial system in the occupied areas, with almost the entire market in consumer goods being controlled by Ugandan companies and businessmen;
- Hunting protected species; and
- Encouraging the UPDF and rebel groups to exploit the DRC's natural resources.[547]

The DRC claimed that Uganda's highest authorities were aware of these activities and the UPDF's involvement, but actively encouraged the exploitations to finance the Ugandan military offensives.[548] These actions, the DRC contended, violated the DRC's sovereignty and the Congolese peoples' sovereignty over the DRC's natural resources.[549] The DRC also argued that Uganda violated a "duty of vigilance" to ensure that its military forces, nationals, or groups controlled by Uganda did not engage in the illegal exploitation of the DRC's natural resources.[550] Additionally, the DRC argued that these actions violated Uganda's responsibilities as an occupying power under international humanitarian law.[551]

Uganda argued that the DRC had not provided reliable evidence to prove its allegations.[552] Uganda also argued that the limited nature of its intervention in the DRC precluded it from occupying the DRC in order to exploit its natural resources, nor could Uganda exercise the effective economic control over the eastern DRC.[553] Uganda also denied that it violated the Congolese peoples' sovereignty over the DRC's natural resources, as well as denying that Uganda had a duty of vigilance.[554] Uganda further denied the DRC's assertion that it failed to take action to prevent the illegal exploitation of natural resources.[555] Finally, Uganda argued that it was not responsible for the acts of individuals

[547] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 223 (Dec. 19).
[548] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 224 (Dec. 19).
[549] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 226 (Dec. 19).
[550] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 228 (Dec. 19).
[551] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 229 (Dec. 19).
[552] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 230 (Dec. 19).
[553] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 230 (Dec. 19).
[554] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 231–33 (Dec. 19).
[555] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 234 (Dec. 19).

that may have exploited the DRC's natural resources and that the DRC had never precisely alleged which acts should be imputed to Uganda to invoke its legal responsibility.[556]

(8) Uganda's First Counter-Claim

In the first counter-claim, Uganda alleged that it had been the victim of military operations and destabilizing operations carried out by armed opposition groups operating in the eastern DRC, which included Sudanese forces.[557] Uganda argued that the DRC and Zaire had supported the actions of these groups or at the least had tolerated the actions of those groups, violating the prohibition on the threat or use of force and the principle of non-intervention.[558]

The DRC argued that the first counter-claim should be analyzed with respect to three time periods: (1) The period of Zaire under Mobuto; (2) the period of the DRC under Kabila until August 2, 1998; and (3) the period after August 2, 1998, which was the date Uganda began its military attack on the DRC.[559] The DRC argued that the claim, insofar as it related to the first period, was inadmissible because Uganda had "renounced its right to invoke the international responsibility of the DRC (Zaire at the time) in respect of acts dating back to that period."[560] In the alternative, the DRC argued that Uganda had failed to meet the required evidentiary threshold to prove its claim with respect to the first period, as well as denying having violated the duty of vigilance and supporting anti-Uganda groups.[561]

As for the second period, the DRC argued that Uganda had failed to establish that the actions of anti-Uganda rebel groups could be imputed to the DRC and, in any case, that the DRC had engaged in planning, preparation, or attacks with those groups.[562] The DRC also refuted Uganda's allegation that the DRC had entered into a military alliance with the Sudan for the purpose of destabilizing Uganda.[563]

With respect to the third period, the DRC asserted that Uganda had failed to establish that the DRC was involved in any military attacks against Uganda or that the DRC

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[556] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 235–36 (Dec. 19).
[557] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 276 (Dec. 19).
[558] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 277 (Dec. 19).
[559] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 280 (Dec. 19).
[560] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 281 (Dec. 19).
[561] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 282–83 (Dec. 19).
[562] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 284 (Dec. 19).
[563] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 285 (Dec. 19).

had supported anti-Uganda rebels.[564] In the alternative, the DRC argued that such actions would be justified by self-defense under the UN Charter.[565]

(9) Uganda's Second Counter-Claim

In the second counter-claim, Uganda alleged that the DRC had conducted three separate attacks on the Ugandan embassy in Kinshasa, in August, September, and November 1998; confiscated Ugandan government property; and maltreated diplomats and other Ugandan nationals in the embassy.[566] Uganda also claimed that 17 Ugandan diplomats and nationals were subjected to inhumane treatment by FAC forces at the Ndjili International Airport during their evacuation from the DRC on August 20, 1998.[567] Uganda further alleged that the DRC had permitted West Nile Bank Front commander Taban Amin, the son of former Ugandan dictator Idi Amin, to occupy the Ugandan embassy in Kinshasa and establish it as his official headquarters.[568] Uganda contended that these actions breached various provisions of the 1961 Vienna Convention on Diplomatic Relations as well as the "customary or general international law" relating to the minimum standards for the treatment of foreign nationals.[569]

The DRC argued that the second counter-claim was procedurally inadmissible.[570] The DRC asserted that the ICJ could not entertain the claim because Uganda had failed to establish that the persons subjected to inhumane treatment were Ugandan nationals and that those persons had exhausted local remedies.[571] The DRC also argued that Uganda had been unable to establish the factual and legal bases for its claim, denying that it had participated in the August 1998 attack on the Ugandan embassy in Kinshasa as well as the existence of attacks on that embassy in September and November 1998.[572] Further, the DRC disputed that it had permitted Taban Amin to establish his headquarters in the

[564] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 286 (Dec. 19).
[565] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 287 (Dec. 19).
[566] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 306 (Dec. 19).
[567] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 308 (Dec. 19).
[568] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 311 (Dec. 19).
[569] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 313 (Dec. 19).
[570] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 314 (Dec. 19).
[571] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 315 (Dec. 19).
[572] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 318–19 (Dec. 19).

Ugandan embassy; that it had treated Ugandan nationals inhumanely at the Ndjili International Airport; and that it had expropriated Ugandan property.[573]

Uganda challenged the DRC's procedural claims, as well as arguing that the DRC owed an obligation to Uganda to not inhumanely treat its nationals in addition to the separate obligation owed to those persons to be treated humanely.[574] Because this claim arose out of a state-state obligation, Uganda argued that it did not need to exhaust local remedies prior to bringing the claim to the ICJ.[575]

iii. Judgment

The ICJ concluded that Uganda did have the DRC's consent to operate in the eastern DRC prior to August 1998.[576] While the 1998 Protocol on Security Along the Common Border was a continuation of the authorization for Uganda's military presence in the DRC, the real source of consent was when Kabila authorized Uganda's military presence in the eastern DRC in 1997.[577] The ICJ noted that Kabila's July 28, 1998 official statement, which the DRC alleged ordered all foreign forces out of the DRC's territory, was ambiguous as to whether it included Ugandan forces.[578] Nevertheless, the ICJ determined that the DRC had definitively withdrawn its consent by the Victoria Falls Summit on August 8, 1998, when the DRC accused Rwanda and Uganda of invading its territory.[579]

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[573] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 320–21 (Dec. 19).
[574] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 317 (Dec. 19).
[575] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 317 (Dec. 19).
[576] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 45 (Dec. 19).
[577] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 46–47 (Dec. 19).
[578] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 50 (Dec. 19). The statement was as follows:

> The Supreme Commander of the Congolese National Armed Forces, the Head of State of the Republic of the Congo and the Minister of National Defence, advises the Congolese people that he has just terminated, with effect from this Monday 27 July 1998, the Rwandan military presence which has assisted us during the period of the country's liberation. Through these military forces, he would like to thank all of the Rwandan people for the solidarity they have demonstrated to date. He would also like to congratulate the democratic Congolese people on their generosity of spirit for having tolerated, provided shelter for and trained these friendly forces during their stay in our country. This marks the end of the presence of all foreign military forces in the Congo.

Id. para. 49.
[579] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 53 (Dec. 19).

The ICJ concluded that the DRC had failed to establish a factual basis for Uganda's involvement in the attack on Kitona.[580] It found the testimony of the DRC's witnesses unreliable and that journalistic accounts of the event were not wholly consistent or concordant to support the allegations.[581] Moreover, the ICJ noted that the DRC considered Rwanda to be the perpetrator of the attack on Kitona at the time of the attack.[582]

The ICJ acknowledged that Uganda did not argue that its operations in the towns of Beni, Bunia, and Watsa were justified on self-defense and held that the operations were clearly beyond the scope of any alleged consent for border security.[583] The ICJ considered the remainder of Ugandan military operations as a whole, reasoning that they would not be individual instances of self-defense if they were not collectively self-defense.[584] The ICJ noted that the Ugandan High Command document itself did not accord with the international law of self-defense.[585] The ICJ held that Uganda had failed to establish that the DRC had allowed Sudanese or anti-Uganda opposition groups to conduct operations against Uganda, noting that the DRC was entitled to grant permission to foreign nationals to assist it during the civil war period.[586] The ICJ also found that Uganda had not presented credible evidence to prove that the DRC was involved, either directly or indirectly, in certain attacks against Uganda.[587] The ICJ observed that the Ugandan High Command document did not assert that the DRC had perpetrated any attacks against Uganda—it largely focused on preventative justifications for Ugandan military operations.[588] The ICJ thus concluded that Uganda's actions were not justifiable on the basis of self-defense.[589]

The ICJ rejected Uganda's claim that the Lusaka Ceasefire Agreement constituted "acceptance by all parties of Uganda's justification for sending additional troops into the DRC between mid-September 1998 and mid-July 1999."[590] The ICJ also held that the Lusaka Ceasefire Agreement did not constitute acceptance for the presence of Ugandan

[580] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 71 (Dec. 19).
[581] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 64–68 (Dec. 19).
[582] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 70 (Dec. 19).
[583] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 110–11 (Dec. 19).
[584] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 118 (Dec. 19).
[585] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 119 (Dec. 19).
[586] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 121–28 (Dec. 19).
[587] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 129–41 (Dec. 19).
[588] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 143 (Dec. 19).
[589] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 147 (Dec. 19).
[590] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 97 (Dec. 19).

troops during the withdrawal periods the agreement established.[591] On that basis, neither the Kampala Disengagement Plan, the Harare Disengagement Plan, nor the Luanda Agreement—all of which modified the Lusaka Ceasefire Agreement—granted consent for the presence of Ugandan troops in the DRC's territory.[592] The ICJ also acknowledged that many of the UPDF's operations exceeded the scope of common border security, which was the basis for the DRC's consent to the presence of UPDF forces in the DRC prior to the Victoria Falls Summit.[593]

The ICJ concluded that Uganda's actions in the DRC violated the prohibition of the use or threat of force under article 2(4) of the UN Charter, calling the actions "grave violations."[594] The ICJ rejected the DRC's assertion that Uganda had created or controlled the MLC so as to impute its conduct to Uganda, noting that the DRC had provided largely uncredible evidence to support its assertion.[595] The ICJ did find, however, that Uganda's support of the MLC and the ALC violated the principle of non-intervention and the prohibition of the use or threat of force.[596]

The ICJ concluded that Uganda was any occupying power in Ituri on the basis of the appointment of a governor to administer the region.[597] Because Uganda was an occupying power, international law required imputed responsibility to Uganda "for any acts [or omissions] of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account."[598]

The ICJ rejected Uganda's procedural challenge to the DRC's allegations of Uganda's actions in Kisangani during 2000, finding that Rwanda did not have to be a party to the case in order for the ICJ to make a finding on the legality of Uganda's conduct.[599] Relying on various international reports that exhibited consistency in the presentation of facts and corroboration by other credible sources,[600] the ICJ then concluded that

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[591] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 99 (Dec. 19).
[592] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 101–04 (Dec. 19).
[593] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 111 (Dec. 19).
[594] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 153 (Dec. 19).
[595] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 158–60 (Dec. 19).
[596] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 161, 163 (Dec. 19).
[597] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 177–78 (Dec. 19).
[598] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 179–80 (Dec. 19).
[599] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 204 (Dec. 19).
[600] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 206–10 (Dec. 19).

> UPDF troops committed acts of killing and torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.[601]

While the ICJ rejected the DRC's assertion that Uganda had created a deliberate policy of terror on the basis of insufficient evidence, it did find that the UPDF's actions were legally attributable to Uganda.[602] As a result, the ICJ held that Uganda had violated international human rights law and international humanitarian law under customary international law and various binding international legal instruments.[603]

The ICJ found that it did not have credible evidence to prove that Uganda had a policy of exploiting the DRC's natural resources nor that the Ugandan military intervention was designed to exploit the DRC's resources.[604] Nevertheless, the ICJ did conclude that high-ranking Ugandan military officials and soldiers had exploited the DRC's resources and that Uganda had not taken measures to prevent such exploitation.[605] The ICJ rejected, however, the DRC's assertion that the principle of sovereignty over natural resources extended to the specific situation of looting, pillage, and exploitation of resources by an intervening military.[606] The ICJ held that "Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC's natural resources."[607] But, as the ICJ had already found that Uganda did not control rebel groups in the DRC, Uganda was not liable for their actions.[608] Finally, the ICJ concluded that Uganda had violated its duties as an occupying power.[609]

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[601] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 211 (Dec. 19).
[602] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 212–14 (Dec. 19).
[603] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 219–20 (Dec. 19).
[604] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 242 (Dec. 19).
[605] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 242 (Dec. 19).
[606] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 224 (Dec. 19).
[607] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 246 (Dec. 19).
[608] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 247 (Dec. 19).
[609] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 249 (Dec. 19).

The DRC had requested that, as a consequence of Uganda's violations of international law, the ICJ should require Uganda to cease its internationally wrongful acts, to provide specific guarantees and assurances of non-repetition, to pay reparations for its violations, which would be determined at a later proceeding failing agreement on the nature of the reparations by the DRC and Uganda.[610] The ICJ noted that the DRC had not presented any evidence that Uganda had continued to violate international law after June 2, 2003, so the ICJ did not have to order Uganda to cease any internationally wrongful acts.[611] The ICJ found that Uganda had already provided sufficient guarantees and assurances of non-repetition by assuming obligations concordant with non-repetition under the Tripartite Agreement on Regional Security in the Great Lakes, which was signed on October 26, 2004 by the DRC, Rwanda, and Uganda.[612] Finally, the ICJ ordered that Uganda pay reparations for its violations of international law, which would be determined by the ICJ failing agreement between the DRC and Uganda.[613] The ICJ also found that, based on its findings of violations following the ICJ's issuance of provisional measures, that Uganda had violated the ICJ's provisional measures.[614]

The ICJ rejected Uganda's first counter-claim in its entirety.[615] The ICJ analyzed Uganda's first counter-claim under the DRC's proposed time-period framework, despite Uganda's objections.[616] The ICJ rejected the DRC's assertion that Uganda had waived its right to assert violations of international law during Mobuto's rule of Zaire,[617] but concluded that Uganda had failed to prove that Zaire authorities had provided political or military support for specific attacks against Ugandan territory or that Zaire had violated a duty by failing to act against anti-Uganda groups.[618] With respect to the second period, the ICJ found that Uganda had failed to prove that the DRC had provided actual support to anti-Uganda rebel groups.[619] Finally, the ICJ concluded that the DRC was acting in self-defense throughout the third period.[620]

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[610] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 252 (Dec. 19).
[611] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 254 (Dec. 19).
[612] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 257 (Dec. 19).
[613] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 259 (Dec. 19).
[614] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 264 (Dec. 19).
[615] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 305 (Dec. 19).
[616] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 291 (Dec. 19).
[617] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 293–94 (Dec. 19).
[618] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 298, 301 (Dec. 19).
[619] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 303 (Dec. 19).
[620] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 304 (Dec. 19).

The ICJ rejected the DRC's procedural challenges to Uganda's second counter-claim.[621] The ICJ also found that Uganda did not have to exhaust local remedies for its claim to be considered.[622] The ICJ found, however, that Uganda did not demonstrate that the individuals at the Ndjili International Airport were Ugandan nationals, and so the ICJ found that claim inadmissible.[623] The ICJ did find that Uganda had satisfactorily shown there were attacks on the Ugandan embassy in Kinshasa and that its diplomats had mistreated at the Ndjili International Airport.[624] Finally, the ICJ determined that while the seizure of Ugandan property was unlawful, there was insufficient evidence to conclude that the DRC had expropriated that property in violation of the international law of expropriations.[625] Nevertheless, the DRC had violated the 1961 Vienna Convention on Diplomatic Relations in seizing Uganda's property.[626] The ICJ thus found that the DRC owed reparations to Uganda for those violations.[627]

V. Analysis

a. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*

The United States was clearly the more powerful state in *Nicaragua*. In 1988, the United States had a GDP of 5.253 trillion USD.[628] Of that GDP, 5.58% was devoted to military expenditures.[629] In the same year, Nicaragua's GDP was 2.631 billion USD.[630] From the available data, Nicaragua devoted 4.002% of its GDP to military expenditures in 1991, an all-time high.[631]

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[621] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 326–27 (Dec. 19).
[622] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 330–31 (Dec. 19).
[623] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 333 (Dec. 19).
[624] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 334 (Dec. 19).
[625] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, paras. 341–42 (Dec. 19).
[626] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 343 (Dec. 19).
[627] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, para. 345(13) (Dec. 19).
[628] *United States: GDP (Current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US&view=chart (last visited Apr. 24, 2017).
[629] *United States: Military Expenditure (% of GDP)*, WORLD BANK, http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS?locations=US&view=chart (last visited Apr. 24, 2017).
[630] *Nicaragua: GDP (Current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=NI&view=chart (last visited Apr. 24, 2017).
[631] *Nicaragua: Military Expenditure (% of GDP)*, WORLD BANK, http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS?locations=NI&view=chart (last visited Apr. 24, 2017).

The United States's actions following the *Nicaragua* judgment suggest that the ICJ and international law generally are subject to the interests of powerful states.[632] Because the United States refused to participate in the proceedings on the merits, it appears that it effectively closed any avenue for compliance with a judgment on the merits. Shortly after its communication to the ICJ that it would not participate in the proceedings on the merits, the United States issued a press release:

> On January 18 of [1985] we announced that the United States would no longer participate in the proceedings instituted against it by Nicaragua in the International Court of Justice. Neither the rule of law nor the search for peace in Central America would have been served by further United States participation. The objectives of the ICJ to which we subscribe -- the peaceful adjudication of international disputes -- were being subverted by the effort of Nicaragua and its Cuban and Soviet sponsors to use the Court as a political weapon. Indeed, the Court itself has never seen fit to accept jurisdiction over any other political conflict involving open hostilities.
>
> This action does not signify any diminution of our traditional commitment to international law and to the International Court of Justice in performing its proper functions. U.S. acceptance of the World Court's jurisdiction under Article 36(1) of its Statute remains strong. We are committed to the proposition that the jurisdiction of the Court comprises all cases which the parties refer to it and all matters that are appropriate for the Court to handle pursuant to the United Nations Charter or treaties and conventions in force. We will continue to make use of the court to resolve disputes whenever appropriate and will encourage others to do likewise.[633]

This statement reveals two important motivators behind the U.S. decision to not comply with the ICJ's judgments in *Nicaragua*. First, the statement persists in claiming that the United States was fully committed to the ICJ—when it agreed with the outcome. Second, the statement reveals a piece of the context during which *Nicaragua* was decided: The Cold War. Given these components, it is not surprising that the United States continued funding the contras despite the ICJ judgment in *Nicaragua*.

While Nicaragua attempted to persuade the Security Council to enforce the ICJ's judgment, the United States continued to accuse Nicaragua and the ruling as being complicit in a propaganda war against the United States.[634] Finally, the DRC, Ghana,

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[632] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 2 (Philippe Sands et al. eds., 2004) ("A climax was reached in the context of the Nicaragua case, where the open refusal of the United States to respect the judgment, its veto of Security Council action under Article 94(2) of the Charter, and the subsequent General Assembly resolutions urging compliance bear witness that the success of the Court should not be taken for granted.").

[633] George Schultz, Sec'y of State of the U.S., United States: Department of State Letter and Statement Concerning Termination of Acceptance of I.C.J. Compulsory Jurisdiction, to Dr. Javier Perez de Cuellar, Sec'y Gen. of the United Nations (Oct. 7, 1985), http://www.jstor.org/stable/pdf/20692919.pdf.

[634] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 199–200 (Philippe Sands et al. eds., 2004).

Madagascar, Trinidad and Tobago, and the United Arab Emirates presented a draft resolution to the Security Council calling for full compliance with the *Nicaragua* judgment.[635] The United States defeated the draft resolution with its veto—it was the only state to vote against the draft resolution.[636] In explaining the veto, Vernon Walters, the U.S. representative, stated:

> The United States has been compelled to vote against the present draft resolution for the simple reason that that draft resolution could not, and would not, contribute to the achievement of a peaceful and just settlement of the situation in Central America within the framework of international law and the Charter of the United Nations. That question, and not the 27 June decision of the International Court of Justice, is the real issue before this Council. . . . In the view of the United States, the Court has asserted jurisdiction and competence over Nicaragua's claims without any proper basis. Moreover, the Court failed to give any meaningful significance to the multilateral treaty reservation or the very substantial evidence of Nicaraguan misbehaviour. Many of the principles asserted by the Court to constitute customary international law have no basis in authority or reason. . . . For the moment we would merely ask whether those members of the Council that have voted in favour of the present draft really believe it would have bolstered the Court as a judicial institution. . . . In a word, the United States has voted against this draft resolution because it would have painted an inaccurate picture of the true situation in Central America, because it would not have contributed to a comprehensive and peaceful settlement of the problems in the regions, and because it would in fact have done a disservice to the international law and institutions that it purports to uphold.[637]

A later attempt to pass another Security Council resolution calling for full compliance similarly failed as a result of the U.S. veto.[638] Nevertheless, the General Assembly adopted a resolution calling for full compliance with the *Nicaragua* judgment on November 3, 1986.[639]

The failed attempt to pass two Security Council resolutions and the successful attempt to pass a General Assembly resolution allowed Nicaragua to politically leverage

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[635] S.C. Draft Res. 18250, para. 2 (July 31, 1986).
[636] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 201 (Philippe Sands et al. eds., 2004).
[637] Statement of Vernon Walters, U.S. Rep. to the Sec. Council, U.N. SCOR, 40th Sess., 2704th mtg. at 57–61, S/PV.2704 (July 31, 1986), https://documents-dds-ny.un.org/doc/UNDOC/PRO/N86/608/44/PDF/N8660844.pdf?OpenElement.
[638] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 202 (Philippe Sands et al. eds., 2004).
[639] G.A. Res. 41/31 (Nov. 3, 1986).

other powerful states to condemn the United States's actions.[640] While the international pressure in and of itself did not cause the United States to cease its activities, the United States nevertheless felt the need to explain its veto on the Security Council resolutions. More significantly, the United States explained that its actions were still fully compliant with its own interpretation of international law. Rather than deny the power of international law to require the United States to comply with the *Nicaragua* judgment, the United States argued that its actions were fully consistent with international law. If the United States felt that international law lacked power, it likely would not have expressed itself in that manner.

That the United States not only ignored the ICJ judgment but actively disobeyed it does not signify that *Nicaragua* is a failure for the purposes of this study. In spite of the disobedience, U.S. domestic developments eventually led to de facto compliance with the terms of the ICJ judgment. The shift from active disobedience to de facto compliance began with events surrounding the Iran-Contra affair. The Iran-Contra affair began when *Al-Shiraa*, a Lebanese newspaper, revealed that the United States was conducting an arms-for-hostages deal with Iran and diverting proceeds to the contras in an article published in November 1986.[641] This revelation led to U.S. Attorney-General Edwin Meese to reveal the program to the American public on November 25, 1986.[642] Within a week, Reagan issued an executive order to form a "President's Special Review Board" to review activities of the National Security Council.[643] The President's Special Review Board, commonly known as the Tower Commission, issued its report on February 26, 1987.[644] For the purposes of this report, the relevant finding was that U.S. executive agents had continued to fund Nicaraguan contras in spite of specific legislation that prohibited such funding.[645] It should be noted that the Iran-Contra affair began just under five months after the ICJ issued the *Nicaragua* judgment.

The Iran-Contra affair sparked a domestic crisis within the United States. The media prolifically covered the Iran-Contra affair. Within the first four weeks of the scandal, *The New York Times* ran front-page stories covering the Iran-Contra affair on approximately 20% of its available front-page space.[646] During the same period, CBS News devoted 25.4% of its total broadcast time to the Iran-Contra affair.[647] On October 1, 1986, Reagan's Presidential Job Approval rating was 64% approving, 28% disapproving,

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[640] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 202–04 (Philippe Sands et al. eds., 2004).

[641] Central Intelligence Agency, *How the Iran-Contra Story Leaked*, 33 STUD. INTELLIGENCE 11, 11 (1989), https://www.cia.gov/library/readingroom/docs/DOC_0000621341.pdf.

[642] *Iran-Contra Investigation*, C-SPAN (Nov. 25, 1986), https://www.c-span.org/video/?150820-1/irancontra-investigation.

[643] Exec. Order No. 12,575, 51 Fed. Reg. 43,718 (Dec. 1, 1986).

[644] PRESIDENT'S SPECIAL REVIEW BOARD, REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD (1987), https://archive.org/details/TowerCommission.

[645] PRESIDENT'S SPECIAL REVIEW BOARD, REPORT OF THE PRESIDENT'S SPECIAL REVIEW BOARD III-19–III-24 (1987), https://archive.org/details/TowerCommission.

[646] Richard A. Brody & Catherine R. Shapiro, *Policy Failure and Public Support: The Iran-Contra Affair and Public Assessment of President Reagan*, 11 POL. BEHAV. 353, 361 (1989).

[647] Richard A. Brody & Catherine R. Shapiro, *Policy Failure and Public Support: The Iran-Contra Affair and Public Assessment of President Reagan*, 11 POL. BEHAV. 353, 361 (1989).

and 7% unsure.[648] By December 4, 1986, the approval rating had fallen to 47% approving, 43% disapproving, and 8% unsure.[649] On February 27, 1987, the day after the Tower Commission issued its report, the approval rating stood at 40% approving, 52% disapproving, and 7% unsure.[650] Following the Iran-Contra affair and the Tower Commission report, U.S. executive agents ceased sponsoring the contras.[651]

The international situation changed following the Iran-Contra affair. George H. W. Bush, Reagan's Vice-President, became President in 1989.[652] His Republican-nomination campaign was formed and influenced in the period following the Iran-Contra affair.[653] Additionally, Nicaragua underwent a regime change following a Sandinista defeat in Nicaraguan politics.[654] Violeta Chamorro, a U.S.-backed candidate, became President in 1990, and the United States announced a 500 million USD aid package would be given to Nicaragua.[655] On September 12, 1991, Nicaragua informed the ICJ that it renounced all right of action in the proceedings and wished to discontinue them.[656]

By 1991, the United States was fully compliant with the ICJ's *Nicaragua* judgment. It had ceased funding and conducting military and paramilitary operations in Nicaragua and the parties had agreed to the form of the reparations. The causal trigger for compliance with the substantive provisions of the judgment was the U.S. domestic situation. Before proceeding with the analysis, it is important to recall Hathaway's integrated theory of international law. Per that theory, the effective enforcement of international law occurs at the domestic level regardless of whether the state has agreed to be bound to international instruments. What was critical in this case was that the support of the contras violated not only international law, but domestic law. The furor created by the Iran-Contra affair was a specific domestic reaction related to foreign affairs. As a result of the violation of domestic law, the public generated domestic pressure that forced the United States to comply with the ICJ's international judgment. Such a reaction is the essence of Hathaway's theory.

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[648] *Job Approval: Ronald Reagan*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/data/popularity.php?pres=40 (last visited May 3, 2017).

[649] *Job Approval: Ronald Reagan*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/data/popularity.php?pres=40 (last visited May 3, 2017).

[650] *Job Approval: Ronald Reagan*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/data/popularity.php?pres=40 (last visited May 3, 2017).

[651] Robert Pear, *'The Buck Stops Here': Has Admiral's Testimony Been Clearing the Picture or Intentionally Obscuring It?*, N.Y. TIMES (July 19, 1987), http://www.nytimes.com/1987/07/19/weekinreview/the-buck-stops-here.html?pagewanted=all.

[652] *George H. W. Bush*, WHITE HOUSE, https://www.whitehouse.gov/1600/presidents/georgehwbush (last visited May 3, 2017).

[653] Robert Ajemian, *Where is the Real George Bush?: The Vice President Must Now Step Out from Reagan's Shadow*, TIME (Jan. 26, 1987), http://content.time.com/time/subscriber/article/0,33009,963342-1,00.html.

[654] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 205 (Philippe Sands et al. eds., 2004).

[655] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 206 (Philippe Sands et al. eds., 2004).

[656] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 206 (Philippe Sands et al. eds., 2004).

International pressures do not appear to have had any effect in coercing U.S. compliance with the ICJ judgment. When the United States notified the ICJ that it would not continue in the proceedings, there was no decline in Reagan's Presidential Job Approval rating—in fact, it increased from 61% approving to 63% approving in that timeframe.[657] Similarly, there was no decline in the approval rating in the period immediately following the ICJ judgment. While international pressures occurred at the same time as the revelation of the Iran-Contra affair, they should not be considered to have influenced the United States's decision for two reasons. First, international pressure for compliance existed at all times, but it was not until the Iran-Contra affair began that change began to occur. Second, domestic approval ratings do not appear to have been susceptible to international disapproval.

Another interesting component of *Nicaragua* is that the United States did not invoke the Connally Amendment to the ICJ's jurisdiction, discussed above.[658] Constanze Schulte speculated that the failure to invoke the Connally Amendment may have been the implausibility of asserting that military or paramilitary actions in a foreign state were purely domestic matters.[659] The failure to invoke the Connally Amendment was particularly notable because the ICJ had upheld such a reservation to its jurisdiction in the 1957 *Certain Norwegian Loans* case.[660] It is possible that the United States did not believe that the ICJ would respect the invocation of the Connally Amendment, given the overall climate during *Nicaragua*. Developing states were beginning to emerge and assert their rights more aggressively in the international arena. Notably, the *Certain Norwegian Loans* case involved two European powers instead of a conflict between a developed and a developing state like in *Nicaragua*. In any case, it is significant that the United States failed to argue the Connally Amendment as a bar to ICJ jurisdiction when the entire participation in *Nicaragua* was based on procedural challenges.

Additionally, the ICJ noted, as it had previously done in the *Corfu Channel* case, that "[i]ntervention is perhaps still less admissible in the particular form it would take here; for from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself."[661] While there is no doubt that powerful states, particularly the United States, have continued to intervene in the domestic affairs of other states, these interventions could possibly be justified by an emerging "responsibility to protect," commonly referred to as "R2P."[662] Indeed, U.S. interventions post-*Nicaragua* have largely been on the stated basis of humanitarian concerns. There remains, of course, the argument that any intervention on the basis of R2P

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[657] *Job Approval: Ronald Reagan*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/data/popularity.php?pres=40 (last visited May 3, 2017).

[658] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 188 (Philippe Sands et al. eds., 2004).

[659] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 188 (Philippe Sands et al. eds., 2004).

[660] Certain Norwegian Loans (Fr. v. Nor.), Judgment, 1957 I.C.J. 9 (July 6).

[661] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 202 (June 27).

[662] *See, e.g.*, Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFF., Nov./Dec. 2002.

is nugatory and serves to mask geopolitical interests.[663] Nevertheless, the humanitarian concerns underlying the intervention seem to differentiate post-*Nicaragua* U.S. interventions from the *Nicaragua* intervention itself. Moreover, some scholars have argued that the presence of geopolitical interventions alongside humanitarian concerns do not vitiate the humanitarian justification for intervention.[664] A modern-day comparison that highlights the distinction and significance of interventions with or without humanitarian concerns is the Russian seizure of Crimea on nationalistic (though allegedly humanitarian) grounds and the nascent U.S. intervention in Syria on humanitarian grounds arising from the Syrian government's use of sarin gas against civilians.[665]

It should be noted, however, that intervention on the basis of R2P appears to contradict an explicit finding in *Nicaragua*:

> [The Court] has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention. . . . In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition.[666]

The ICJ rejected that an exception to the customary law principle of non-intervention is a request of an opposition movement in another state.[667] Nonetheless, that finding was premised on U.S. interventions based on "the domestic policies of [the country being intervened in], its ideology, the level of its armaments, or the direction of its foreign policy."[668] Speaking in dicta, the ICJ noted that any assertion of humanitarian intervention did not comply with the United States's assertion of collective self-defense.[669] While the

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[663] *See generally*, *e.g.*, Catherine Lu, *Humanitarian Intervention: Moral Ambition and Political Constraints*, 62 INT'L J. 942 (2007).

[664] *See generally* PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 452–510 (2008).

[665] *Compare* Sarah de Geest, *Russian Intervention in Ukraine: R2P Limits and Reclaiming the Concept and Narrative*, HUMAN SEC. CTR. (Apr. 11, 2015), http://www.hscentre.org/russia-and-eurasia/russian-intervention-ukraine-r2p-limits-reclaiming-concept-narrative/, *with Donald Trump's Foreign Policy: On a Whim and a Prayer*, ECONOMIST, Apr. 15–21, 2017, at 21–22 (noting approval of Trump's decision to strike Syria on the basis of using chemical weapons against civilians).

[666] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 206–07 (June 27).

[667] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 246 (June 27). In fact, the ICJ called this type of intervention "ideological intervention." *Id.* para. 266.

[668] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 207 (June 27).

[669] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 268 (June 27).

ICJ came close to rejecting the concept of humanitarian intervention, it couched its language on the specific means by which the United States actually employed in Nicaragua to state that "the use of force could not be the appropriate method to monitor or ensure [respect for human rights in Nicaragua]."[670]

It would be an error to extend that holding as a rejection of R2P, especially considering the Cold-War context of U.S. interventions and the prevalence of the domino theory among U.S. foreign affairs experts. Intervention on the basis of R2P is thus distinct from the ICJ's holding in *Nicaragua*, and conducting R2P-style interventions is not tantamount to non-compliance with *Nicaragua*. It thus appears that the United States has sought to avoid repeating actions similar to its actions in *Nicaragua*—such behavior appears to indicate implicit compliance with the substantive terms of the *Nicaragua* decision.

b. *The Territorial Dispute*

Libya was clearly the more powerful state in *The Territorial Dispute*. Libya's GDP in 1994 was 28.608 billion USD.[671] From the available data, Libya spent 4.078% of its GDP on its military.[672] In 1994, Chad's GDP was 1.18 billion USD.[673] Its percentage of GDP spent on military expenditures was 1.878%.[674]

Compliance with the ICJ's judgment in *The Territorial Dispute* began almost immediately:

> Within weeks of the ICJ's decision, Libya and Chad agreed to abide by it; in April 1994, they reached an agreement on the practicalities of the Libyan withdrawal, removal of mines, and demarcation of the border. They called for the United Nations to send a team of monitors to observe the withdrawal. In May, the UN Security Council established the United Nations Aouzou Strip Observer Group for this purpose. The team consisted of 15 military and civilian observes and cost the United Nations just over $67,000. On May 30, in accordance with the withdrawal schedule previously agreed upon, Libya completed its withdrawal, and the United Nations certified the result. Both governments consider the matter of the Strip's territorial sovereignty closed.[675]

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[670] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, para. 268 (June 27).

[671] *Libya: GDP (current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=LY&view=chart (last visited Apr. 24, 2017).

[672] *Libya: Military Expenditure (% of GDP)*, WORLD BANK, http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS?locations=LY (last visited Apr. 24, 2017).

[673] *Chad: GDP (current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=TD&view=chart (last visited Apr. 24, 2017).

[674] *Chad: Military Expenditure (% of GDP)*, WORLD BANK, http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS?locations=TD (last visited Apr. 24, 2017).

[675] JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 13 (2015).

Immediate compliance, however, may have overshadowed an elaborate background of motivations underlying Libya's decision to comply. Libya was anxious to retain OAU approval, and thus its behavior was modified when the UN and France condemned Libya's behavior in conjunction with OAU disapproval.[676] Libya had also achieved "pariah status" following its refusal to hand over two of its nationals involved in a 1988 plane bombing over Lockerbie, Scotland and the resulting UN sanctions.[677] But at the time of *The Territorial Dispute*, Libya had already won two cases before the ICJ, making it one of the most active developing states in using the ICJ forum.[678] Libya likely felt confident in its ability to use the ICJ to reinforce its interests.

The arguments that Libya presented to the ICJ were based on a non-Western interpretation to international law.[679] In particular, Libya's claim as successor to the Senoussi Order and its conception of dual sovereignty reflected Islamic political thought and interpretations.[680] These arguments demonstrated the emergence of developing states from non-Western backgrounds onto the international law plane. As several scholars asserted, "[t]he independence of these new states vastly changed the legal landscape, as they came to have a significant role in the development of international norms. Their perspectives, molded by centuries of colonial domination, exerted a major influence on the process of law making and its outcomes."[681]

The ICJ in its judgment, however, did not address Libya's claims based on non-traditional interpretations of international law. It approached the issue as a matter of treaty interpretation and was careful to base its conclusions on the results of that interpretive lens. Ultimately "[t]he judgment unequivocally endorsed the practices of the colonial past and reinforced colonial continuities by supporting the sanctity of European-created borders."[682] Nevertheless, Michelle L. Burgis concluded that the very fact Libya argued its case on the basis of Islamic political thought and practice supports the notion that international law may be influenced by non-Western states.[683]

There were thus at least two powerful motivators informing Libya's decision of whether to comply with *The Territorial Dispute* judgment. On the one hand, Libya desired

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[676] MICHELLE L. BURGIS, BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTES 120 (2009).

[677] MICHELLE L. BURGIS, BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTES 121 (2009).

[678] MICHELLE L. BURGIS, BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTES 121–22 (2009).

[679] For greater elaboration on the influences undergirding Libya's arguments, see generally MICHELLE L. BURGIS, BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTES 131–44 (2009).

[680] MICHELLE L. BURGIS, BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTES 133 (2009).

[681] JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 15 (2015).

[682] MICHELLE L. BURGIS, BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTES 122 (2009).

[683] MICHELLE L. BURGIS, BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTES 133 (2009).

international acceptance by the UN and the OAU, which would occur if Libya complied with the ICJ judgment. On the other hand, the ICJ had refused to address Libya's anti-colonial arguments regarding the acceptance of borders drawn by European powers. This rejection potentially entailed a rejection of non-Western, developing states' anti-colonial narrative in relating to the international system. It should also be recalled that Libya had the support of the Soviet Union. Had it chosen to reject the ICJ judgment, Libya would likely still have the support of a powerful international actor. Moreover, given the sanctions and condemnation that it was already under, Libya was likely to have suffered relatively little by loss of prestige or the imposition of additional international sanctions. Moreover, many relevant actors suspected that Libya would not comply with the ICJ judgment.[684] *The Territorial Dispute* judgment constituted a "total victory" for Chad.[685] Libya thus had powerful incentives directing it toward noncompliance with the judgment.

Libya's decision to comply with *The Territorial Dispute* judgment is therefore highly significant. Not only did it choose to comply with a decision that overlooked the anti-colonial narrative driving Libya, it did so even when it would have still received international support from the Soviet Union. Libya's choice thus reflects an acceptance of international law over the option of noncompliance, which would have benefitted Libya more. Ultimately, the "dispute was settled efficiently and rapidly in accordance with the ICJ judgment, demonstrating the greater importance of positive factors in this case, including the desire of both parties for a judicial settlement, the conclusion of a special agreement for that purposes, and the financial support available during the proceedings."[686]

c. *Armed Activities on the Territory of the Congo*

It was not quite as apparent whether Uganda or the DRC was more powerful. Uganda's GDP in 2005 was 9.014 billion USD.[687] It spent 2.404% of that GDP on military expenditures.[688] The DRC's GDP in 2005 was 11.964 billion USD.[689] It spent 1.381% of that GDP on military expenditures.[690] Quantitatively, Uganda spent 216.7 million USD on its military while the DRC expended 165.2 million USD on its military. Thus it appears that Uganda was quantitatively more powerful than the DRC. Additionally, the DRC's relative instability must be considered, as well as its inability to control its eastern territory.

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[684] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 232 (Philippe Sands et al. eds., 2004).
[685] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 234 (Philippe Sands et al. eds., 2004).
[686] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 234 (Philippe Sands et al. eds., 2004).
[687] *Uganda: GDP (Current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CD&view=chart (last visited Apr. 24, 2017).
[688] *Uganda: Military Expenditure (% of GDP)*, WORLD BANK, http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS?locations=UG (last visited Apr. 24, 2017).
[689] *Congo, Dem. Rep.: GDP (Current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=CD&view=chart (last visited Apr. 24, 2017).
[690] *Congo, Dem. Rep.: Military Expenditure (% of GDP)*, WORLD BANK, http://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS?locations=CD (last visited Apr. 24, 2017).

It may be hard to imagine that any success has emerged from the seemingly perpetually-troubled DRC. As one author put it:

> To describe the Congo as a site of perpetual violence marked by recurring full-scale armed conflict and lost opportunities is to risk repeating—with no excuse—the trajectory paved by Conrad with the phrase 'heart of darkness', and thus to consolidate identities and histories that serve to perpetuate dominant images and structural prejudices. Nevertheless it is difficult to speak of the Congo without reference to its violent history, not least because the carnage and gratuitous sexual violence which has become synonymous with the country continues unrelentingly to dominate the lives of its people to this day.[691]

Indeed, violence and instability has continued in the DRC to the present. In 2006, the DRC held its first democratic elections which resulted in violence in Kinshasa.[692] The 2011 elections were rife with accusations of fraud.[693] Joseph Kabila, the son of Laurent-Désiré Kabila, prevailed in both elections.[694] Ethnic violence persists throughout the eastern DRC.[695]

It should be recalled, however, that Uganda withdrew its military forces from the DRC after the DRC had initiated the *Armed Activities* litigation, but prior to the ICJ's judgment. The withdrawal of Ugandan forces led the ICJ to find the DRC's cessation claims were inapplicable. It is difficult to argue that the withdrawal had nothing to do with the litigation before the ICJ. In fact, Uganda continuously referred to the security challenges it faced throughout the proceeding. While military realities may have compelled the Luanda Agreement, by which Uganda agreed to withdraw its forces that were not permitted to stay in the DRC, it is significant that military realities were expressed via an international legal document. Had military realities been sufficient, in and of themselves, to compel Uganda to withdraw its forces, then the Luanda Agreement would have been superfluous. If it is assumed that states vigilantly pursue their own interests, then it would have been to no states' benefit to expend resources on an international treaty that accomplished nothing beyond what military realities accomplished.

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[691] Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 147 (Elizabeth Wilmshurst ed., 2012).
[692] Séverine Autesserre, *What the Uproar over Congo's Elections Misses: The Local Roots of the Country's Problems*, FOREIGN AFF. (Mar. 1, 2017), https://www.foreignaffairs.com/articles/democratic-republic-congo/2017-03-01/what-uproar-over-congos-elections-misses.
[693] Séverine Autesserre, *What the Uproar over Congo's Elections Misses: The Local Roots of the Country's Problems*, FOREIGN AFF. (Mar. 1, 2017), https://www.foreignaffairs.com/articles/democratic-republic-congo/2017-03-01/what-uproar-over-congos-elections-misses.
[694] Séverine Autesserre, *What the Uproar over Congo's Elections Misses: The Local Roots of the Country's Problems*, FOREIGN AFF. (Mar. 1, 2017), https://www.foreignaffairs.com/articles/democratic-republic-congo/2017-03-01/what-uproar-over-congos-elections-misses.
[695] *See generally* Louise Arimatsu, *The Democratic Republic of the Congo 1993–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 146, 185–88 (Elizabeth Wilmshurst ed., 2012).

Along with finding that Uganda had ceased violations of international law at the time of the *Armed Activities* judgment, the ICJ concluded that the Luanda Agreement entailed adequate assurances and guarantees of non-repetition. The remedies that the DRC requested against Uganda were thus already satisfied by the time the ICJ issued its judgment, barring the request for reparations which is ostensibly continuing. The DRC and Uganda both failed to agree to the exact nature of the reparations, so that aspect of the case is still before the ICJ.[696] Nevertheless, the fact that the case is continuing is significant. Without respect for international law's power, neither Uganda nor the DRC would likely expend the resources necessary to continue the litigation. Additionally, *Armed Activities* is unique from *Nicaragua* and *The Territorial Dispute* in that both parties to the dispute received a judgment in their favor. This distinction has some explanatory power. Because both states are pursuing the litigation, that pursuit demonstrates that both states have considered that international law, as decided by the ICJ, has the ability to effectuate their interests against the other.

d. Case Comparison

The three cases each represent compliance against state interests to varying degrees. *The Territorial Dispute* is the clearest. Libya acted directly against its interests by complying with the ICJ judgment immediately after its ruling. *Armed Activities* represents a medium level of compliance. While Uganda did not respect the ICJ's provisional measures, it had already ceased violating international law by the time the ICJ issued its judgment. Finally, *Nicaragua* represents the weakest form of compliance. While initially the United States actively disobeyed the ICJ's ruling, the United States was forced into compliance by its own domestic politics following the Iran-Contra affair and Nicaragua's democratic regime change. Furthermore, Nicaragua and the United States agreed to discontinue the proceedings on the matter of reparations owed to Nicaragua after the United States provided 500 million USD in aid.

All three cases involved armed conflict. While it was more apparent in *Nicaragua* and *Armed Activities*, the underlying events leading to *The Territorial Dispute* were very violent and involved state-state armed conflict. Each case also involved challenges to state sovereignty. These cases were chosen precisely because they involved armed conflict and challenges to state sovereignty. The underlying rationale for the choice was that states would be more likely to disregard an unfavorable ICJ ruling in these types of situations. Where the military and sovereignty are challenged, a state has more incentive to pursue its self-interests at the expense of international law. But these cases demonstrated that states are willing to comply with ICJ judgments at the expense of their immediate self-interests even in matters of vital concern to the states.

But why are states willing to comply with unfavorable ICJ rulings when noncompliance would directly pursue self-interests in important matters? A possible explanation is that international law has the power to legitimize and delegitimize a state's

[696] Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Order of 6 December 2016 (Dec. 6), http://www.icj-cij.org/docket/files/116/19296.pdf.

actions. An example of this occurred in the events surrounding *Nicaragua*. The United States's refusal to comply with the ICJ judgment unleashed a flurry of activity condemning the action by states uninvolved in the dispute. The United States twice had to use its veto in the Security Council in order to defeat draft resolutions calling for full compliance with the ICJ judgment. In spite of U.S. efforts, the General Assembly passed a resolution calling for compliance. Failure to adhere to an ICJ ruling thus carries high international transaction costs. In this case, the United States is the exception that proves the rule. Few states have the resources and political largesse to withstand such excoriation and pressure from other states. It is hard to imagine that Libya or Uganda would have been able to fare as well as the United States in resisting concerted international pressure to comply with an ICJ judgment.

International law's power to legitimize or delegitimize a state's actions should not be idly considered, if only for one reason: States care about whether other states and their own domestic audiences perceive their actions as complying with international law. For example, the United States was extremely careful to declare that its actions, though noncompliant with the *Nicaragua* judgment, were compliant with international law as a whole.[697] By itself, that is a remarkable, if not laughable, claim. The United States was distinctly departing from international law by refusing to recognize the ICJ's holding regarding its own jurisdiction. Yet it still expended resources arguing that its actions complied with international law as a whole. The assertion that international law is "pure talk" to mask a state's pursuit of its self-interests cannot explain the United States's actions in *Nicaragua*. The departure from international law in favor of the United States's self-interests was clear. "Pure talk" could not mask it. But the United States still engaged in dialogue with the international community about the *Nicaragua* decision in the language of international law—the realist understanding of international law fails to explain this case.

A key point to observe is that, in these cases, compliance with international law has not suffered where international law confronts essential state interests, such as sovereignty or matters involving armed conflict. This point is somewhat counterintuitive. An outside observer, knowing that international law has weak enforcement measures, might assume that states would be more willing to comply with international law in matters of lesser concern but more likely to violate international law in matters involving vital state interests. In both *The Territorial Dispute* and *Armed Activities*, such an assumption proves false. Libya withdrew troops from the Aouzou strip and Uganda had already withdrawn its troops by the time of the ICJ judgment. While the United States in *Nicaragua* pursued its own self-interests, it seems to be the exception that proves the rule. It is key to note that the United States was in full compliance with the ICJ judgment within five years. While other

[697] The United States is, by no means, the only state to argue that its actions are compliant with international law. During the invasion of Crimea, Russian President Vladimir Putin claimed that the annexation of Crimea complied with international law. *See* Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, N.Y. TIMES (Mar. 18, 2014), https://www.nytimes.com/2014/03/19/world/europe/ukraine.html ("Certainly the sanctions imposed on Russia ahead of Tuesday's steps did nothing to dissuade Mr. Putin, as he rushed to make a claim to Crimea that he argued conformed to international law and precedent.").

factors may have strongly influenced the United States to change its position with respect to the substantive terms of the *Nicaragua* judgment, the integrated theory of international law provides a reasonable basis to conclude that domestic pressures caused the United States to fully comply. In each of the three cases, therefore, the states complied with ICJ judgments, whether expressly or de facto, in spite of the judgments being disfavorable and involving vital state interests.

VI. Conclusion

Intervening factors may have motivated the states in *Nicaragua*, *The Territorial Dispute*, and *Armed Activities* to act as they did, but the power of international law itself was undoubtedly causal to a degree. While it may not have been strong enough to influence compliance in and of itself, except perhaps in *The Territorial Dispute*, it is nonetheless obvious that it was a factor in each states' decision about whether to comply with the ICJ judgment. Moreover, intervening variables in this analysis are part and parcel to the power of international law as enforcement is often provided for by political means.

The UN Charter itself acknowledges that the Security Council may enforce decisions of the ICJ when a party fails to comply with an ICJ judgment.[698] While the Security Council has never enforced an ICJ judgment under the provision,[699] that provision indicates that ICJ decisions were intended to be enforced, failing automatic compliance, by UN organs and other actors.[700] Indeed, as have I argued before, other states can use their power to effectively coerce states to comply with international law standards.[701] Further, Constanze Schulte argues that a focus on enforcement mechanisms does not fully grasp the power of international law to influence state behavior.[702]

In spite of weak enforcement mechanisms, the ICJ has a general pattern of compliance.[703] This pattern is likely the result of the impartiality of the ICJ and its production of well-reasoned and thorough opinions. To increase compliance, the ICJ should continue to ensure that it remains impartial and that it issues decisions based on established principles of international law. Failure to do so would delegitimize the ICJ as an institution. The ICJ should also ensure that its judgments receive as much publicity as possible. Increased publicity should grant domestic audiences the ability to hold their governments accountable to international law via domestic pressure. The ICJ currently has a respectable website through which it publishes press releases regarding its proceedings

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[698] U.N. Charter art. 94(2).

[699] *In Hindsight: The Security Council and the International Court of Justice*, SEC. COUNCIL REPORT (Dec. 28, 2016), http://www.securitycouncilreport.org/monthly-forecast/2017-01/in_hindsight_the_security_council_and_the_international_court_of_justice.php.

[700] *See generally* CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 36–80 (Philippe Sands et al. eds., 2004).

[701] *See generally* Christopher R. Marshall, *Swaziland, the AGOA, and Convention 87: A Case Study for the Trade Preference Program Enforcement Model*, 52 TEX. INT'L L.J. 163 (2017).

[702] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 37 (Philippe Sands et al. eds., 2004).

[703] CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 271–75 (Philippe Sands et al. eds., 2004).

in six languages: French, English, Arabic, Chinese, Spanish, and Russian.[704] Cases are readily available, as are the ICJ's orders and the parties' filings. The ICJ could provide more translations of the documents it maintains. For instance, the DRC's filings in *Armed Activities* are only available in French.

The purpose of this report was to demonstrate that international law has the power to modify a state's behavior even when it conflicts with its immediate interests. Only in *Nicaragua* did a state refuse to immediately modify its behavior, and the result was near universal condemnation and eventual de facto compliance. The three cases demonstrate that international law's power varies depending on the situation. In *The Territorial Dispute*, international law's power was at its highest. It was dealing with non-Western states on an issue that, while connected to armed conflict, did not address violations of international humanitarian law. In *Armed Activities*, international law's power was middling. While Uganda ceased violating international law prior to the judgment, it had disobeyed the ICJ's provisional measures. Likely, the relative scale of the violence and the involvement of regional and international bodies influenced, in part, Uganda's behavior. But the fact that both the DRC and Uganda have continued to pursue the ICJ litigation with respect to reparations indicates that both consider international law has the power to enforce reparations against the other or themselves. Finally, *Nicaragua* represents the nadir of international law's power. The United States's active disobedience was perhaps one of the greatest challenges to the ICJ's relevance. Nevertheless, *Nicaragua* is notable now because it is an outlier. And it must not be forgotten that, in the immortal words of Louis Henkin, "*almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*."[705]

[704] *See generally International Court of Justice*, INT'L COURT OF JUSTICE, http://www.icj-cij.org/ (last visited May 3, 2017).
[705] LOUISE HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (1968).

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