INTERNATIONAL COURT OF JUSTICE

INTRODUCTION

History of the Court

The creation of the International Court of Justice may be traced back to a process of development of the methods for pacific settlement of international disputes. Efforts towards arbitration culminated in the instauration in 1899 of the Permanent Court of Arbitration, whose faults—such as the fact that it, not being a standing court, could not establish jurisprudence—were crucial to the proposal of a new system (MCNAIR, 1953).

In 1920 a committee of jurists, indicated by the Council of the League of Nations, began the drafting of a Statute for a Permanent Court of International Justice (hereinafter, PCIJ), which began to function in 1922. The PCIJ, considered the substantial predecessor of the International Court of Justice due to the similarity between both Statutes, discontinued its activities during the Second World War.

Following the end of the conflict in 1945, a conference held in San Francisco decided for the creation of a new court, which would be linked to the United Nations and better represent the new international order. Providing continuance to the PCIJ in the form of the similar Statute and continued jurisprudence, the International Court of Justice (hereinafter, ICJ) was thus created in 1945. After the formal dissolution of the PCIJ in April 1946, the ICJ held its first public sitting on the 18th of that same month, receiving its first case one year later, the famous Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania), which helped underline the modern concept of state responsibility.

Organization of the Court

The ICJ is composed of 15 judges appointed by the United Nations General Assembly and the Security Council in independent and simultaneous votings. Article 2 of the Statute of the Court establishes that “the Court shall be composed of a body of independent judges, elected regardless of their nationality” (IC, 1945, Art.2) and taking into consideration their individual qualification and competence. It is, however, a rule that the Court may not include more than one national of the same state, as well as that the ICJ must be the representation of the main forms of civilization and the principal legal systems of the world (IC, 1945). Elected judges do not represent their countries of origin, but rather their personal views on international law. Furthermore, Article 31 of the Statute
provides that a party to a case before the ICJ is entitled to a national judge on the Court, and, if no such judge has been elected, a judge *ad hoc* may be appointed (IC, 1945).

**Jurisdiction of the Court**

The Court may exercise jurisdiction either by entertaining the legal disputes between States submitted to the ICJ by them (contentious cases) or by being requested to issue advisory opinion on legal matters by United Nations organs (advisory proceedings).

Jurisdiction in contentious cases is established on the basis of the consent of the States party to the dispute. Consent to the exercise of jurisdiction over a dispute whose existence is recognized by both parties may be given by them *ad hoc*; that is, through a special agreement—the *compromis*.

There is, however, no requirement of form to the expression of consent, since it may arise *post hoc* from application of the principle of *forum prorogatorium*. After the initiation of the proceedings, a party may express their *post hoc* consent. That is, in the case of unilateral application by the plaintiff, consent may be held to exist based on the other party’s participating in the proceedings or addressing a communication to the Court (IC, 1945).

Consent may also be given *ante hoc*, that is, through clauses contained in treaties signed by the parties which grant jurisdiction before the appearance of a dispute.\(^1\)

Another manner of expressing consent is through an optional clause (IC, 1945). The State may, by issuing an unilateral declaration, accept the compulsory *ipsa facto* jurisdiction of the Court, in relation to any other State who accepts the same obligation, in all legal disputes which concern either the interpretation of a treaty, a question of international law, the existence of a breach of an international obligation or the nature or extent of the reparation due.

In regards to the exercise of advisory jurisdiction by the Court, it consists in the issuing of an advisory opinion on a legal question at the request of organs authorized by the Charter of the United Nations, such as the General Assembly and the Security Council (IC, 1945). An advisory opinion serves mainly to the purpose of contributing to the settlement of disputes by political organs and supplying them with guidance regarding points of law.

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\(^1\) Statute of the Court, Article 36(1) establishes that “all matters specially provided for (...) in treaties and conventions in force” are subject to the jurisdiction of the ICJ (IC, 1945, Art.36, §1).
1. INTRODUCTION

On January 25, 2000, a complaint was filed in Senegal against the former President of Chad, Mr. Hissène Habré, by seven citizens and a legal person who considered themselves victims of crimes under international humanitarian law. He, who has been living in exile in Dakar since 1990, occupied the post of Chadian President from June 7, 1982, to December 1, 1990, and, therefore, had ceased to occupy the position by the time the complaints were filed. On February 3, 2000, Mr. Habré was indicted for complicity in “crimes against humanity, acts of torture and barbarity” and placed under house arrest.

The complaints and the indictment were, however, dismissed by the Dakar Court of Appeal on July 4, 2000, on the grounds that “crimes against humanity” did not constitute part of Senegalese criminal law, as well as that the torture in question had been committed abroad by an alien. Senegalese courts, according to the Senegalese Criminal Procedure, may not exercise extraterritorial jurisdiction.

A Belgian national of Chadian origin and Chadian nationals filed, from November 30, 2000, to December 11, 2001, a series of criminal complaints in Belgian courts against Mr. Habré for crimes under international humanitarian law. Belgian courts intend to exercise jurisdiction on the basis of passive nationality.

On September 19, 2005, the investigating judge responsible for the case issued an international arrest warrant against Mr. Habré. The Dakar Court of Appeal, however, decided that it lacked jurisdiction to issue an opinion on the request for extradition since it concerns acts committed by a Head of State in the exercise of his functions. In 2002, however, the Immunity of Head of State was lifted from Mr. Habré by the Congolese Minister of Justice. On February 20, 2007, Senegal amends its Penal Code and Code of Criminal Procedure to include the offences of genocide, war crimes and crimes against humanity, as well as to enable the exercise of universal jurisdiction by Senegalese courts.

After that, Senegal referred the matter to the African Union (2005). Belgium criticized this action as a way to delay criminal procedures towards Mr. Habré. On May 8, 2007, and December 2, 2008, Belgium issued Notes Verbales drawing attention to the fact that a dispute existed between both countries in regards to the trial of Mr. Habré, but
reiterating its willingness to cooperate with Senegal pursuant to the rules international judicial cooperation. Senegal has failed to provide a response to either of the Notes.

2. STATEMENT OF THE ISSUE

On view of the previously mentioned events, on February 16, 2009, the Kingdom of Belgium issued the application and request for provisional measures against the Republic of Senegal, instituting proceedings before the ICJ on the grounds, firstly, that:

Under conventional international law, Senegal’s failure to prosecute Mr. H. Habré, if he is not extradited to Belgium to answer for the acts of torture that are alleged against him, violates the Convention against Torture of 1984, in particular Article 5, paragraph 2, Article 7, paragraph 1, Article 8, paragraph 2, and Article 9, paragraph 1 (ICJ, 2009a, p. 13, §11).

And, secondly, that:

Under customary international law, Senegal’s failure to prosecute Mr. H. Habré, or to extradite him to Belgium to answer for the crimes against humanity which are alleged against him, violates the general obligation to punish crimes under international humanitarian law which is to be found in numerous texts of secondary law (institutional acts of international organizations) and treaty law (ICJ, 2009a, p. 13, §12).

By means of the Application, Belgium requested the Court to declare that:

the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice; failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts (ICJ, 2009a, p. 15, §16).

2.1. Belgium’s allegations

Belgium bases its claim both in alleged violations committed by Senegal to Conventional International Law as well as to Customary International Law.

2.1.1. As to Senegal’s violations to the 1984 Convention against torture

In its Application, Applicant contends that Senegal violated “the Convention against Torture of 1984, in particular Article 5, paragraph 2, Article 7, paragraph 1, Article 8, paragraph 2, and Article 9, paragraph 1” (ICJ, 2009a, p. 13, §11).

Article 5, paragraph 2 of the aforementioned Convention reads as follows:

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases
where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article (UNGA, 1984, p. 198, Art. 5, §2).

This article is precisely the rule that obliges a given state to prosecute in a matter in which it chooses not to extradite the individual in question.

The second article invoked by Belgium is Article 7, paragraph 1:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution (UNGA, 1984, p. 198, Art. 7, §1).

Also, Article 8, paragraph 2:

If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State (UNGA, 1984, p. 198, Art. 8, §2).

And the last article of the abovementioned convention is Article 9, paragraph 1:

States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings (UNGA, 1984, p. 198, Art. 9, §1).

One can observe that all articles of the UN Convention Against Torture invoked by Belgium have on their content obligations of a state to: (1) Declare its territorial jurisdiction over cases covered by the Convention; (2) Either extradite or deliver the person under its jurisdiction to the competent authorities to judge him/her; (3) In cases of extradition, utilize the Convention as a legal basis in the event of the inexistence of a bilateral treaty governing these practices among the states involved; (4) Fully cooperate in conducting investigations to produce evidence and other necessary means to conduct the trialing of those who have violated the Convention (UNGA, 1984).

According to Belgium, since Mr. Habré is accused of crimes of torture and since Senegal is a signatory to this Convention, the Respondent would be obliged by its provisions to either prosecute him or extradite him. By not performing either of these duties that are allegedly applicable to the present case, Belgium asserts that Senegal would be in breach of Treaty norms.
2.1.2. As to Senegal’s violations of Costumary International Law

According to Belgium, Senegal would be in breach of Customary International Law as well (ICJ, 2009a). Hence, the country claims that the failure to either prosecute or extradite one that is accused of crimes against humanity under international humanitarian law is a violation of it (ICJ, 2009a). In the Applicant’s view, the acts committed by Mr. Habré (that would include serious human rights abuses against political opponents and ethnic groups within Chad) are crimes against humanity (ICJ, 2009a).

Belgium invokes the art. 7 of the Statute of the International Criminal Court (hereinafter ICC), which provides among the violations that constitute crimes against humanity are torture and persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law(...), crimes of which Mr. Habré is currently accused (IC, 1998, p. 5, Art. 7). The Applicant then quotes the Furundzija Case, in which the ICC mentioned that the ICC Statute as well as other legal instruments have enshrined these crimes as prohibited by Custom.

The obligation to prosecute these crimes would also be of a customary nature. For that effect, Belgium brings before this Court several instruments in which that duty is present. For the abovementioned reasons, according to Belgium, an obligation to prosecute and extradite as set forth in custom is also being breached by the Respondent.

2.1.3. Request for provisional measures

According to Belgium, the Request for Provisional Measures was undertaken in view of the pronouncements made by current Senegalese President, Mr. Abdoulaye Wade. These pronouncements would indicate that the Senegalese duties to prosecute and extradite Mr. Habré are threatened. In interviews and other occasions quoted in the Applicant’s Request for Provisional Measures, Mr. Wade would have mentioned that the trial would take a very long time, and that he could not assure, during the lengthy process, that Mr. Habré’s would continue within Senegal.

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2 “Resolutions of the General Assembly of the United Nations (see, for example, resolution 3074 (XXVIII), para. 1), the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission in 1996 (Article 9), and in numerous calls by the international community to combat impunity (see, for example, the preamble of the Statute of the ICC, 4th–6th consideranda, the Constitutive Act of the African Union, Article 4 (c), and various Security Council resolutions - For example, S/Res. 1318, 7 September 2000, VI; S/Res. 1325, 31 October 2000, para. 11; S/Res. 1820, 19 June 2008, para. 4. )”. Belgium v. Senegal. Application Instituting Proceedings. Available at http://www.icj-cij.org/docket/files/144/15054.pdf
Belgium alleges that these statements made by Mr. Wade would entitle Belgium to request provisional measures due to the provisions of Article 41\(^3\) of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court\(^4\). And in its Request, Belgium solicited the Court to indicate, pending decision on the merits:

(...) provisional measures requiring Senegal to take all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied (ICJ, 2009c, §15).

2.2. Senegal’s Allegations

During Public Hearings, Senegal contends that no situation of urgency or risk of irreparable harm, that are the requirements for the granting of Provisional Measures, are met in the present case (ICJ, 2009b). Au contraire, Senegal affirms that it wishes to proceed with trialing Mr. Habré in its own Courts, and that the Applicant focuses on Extradition rather than on the duty to prosecute.

According to the Respondent, the African Union’s decision on the matter gave full support to Senegalese authorities to continue with trial procedures, and also called upon the international community to provide funds and cooperate to bring Mr. Habré to justice (AAU, 2006). It was the Senegalese Chambre d’Accusation’s decision, notified to Belgium upon request in 2005, that the trial would be held inside Senegal, envisaged that it considered Mr. Habré’s prosecution a “basic act of criminal procedure which put an end to the judicial phase of the extradition proceedings” (ICJ, 2009b, p. 6).

Also, Senegal affirms that the affirmations made by Mr. Wade were simply in the sense that the funds needed for Mr. Habré’s trial were not coming through, therefore frustrating Senegalese attempts of the trial (ICJ, 2009b).

It also challenges the Court’s jurisdiction regarding the case, as, according to Senegal, there is no dispute regarding the application or content of the 1984 Convention Against Torture (ICJ, 2009b).

2.3. Decision of the Court concerning Provisional Measures

After the establishment of oral proceedings, during which Senegal offered formal assurance of its intention not to permit Mr. Habré to leave Senegalese territory before a final decision is given in the present case, the Court reasoned that the indication of

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\(^3\) Article 41 of the Statute of the ICJ affirms the Court’s right to guarantee the rights of the parties, pending a final decision on the merits (IC, 1945).

\(^4\) These articles refer to the procedure that has to be taken for Provisional Measures to be submitted, and that their purpose is to guarantee the rights of the parties related to matters of urgency, not jeopardizing the judgment on the merits of the case.
provisional measures is justified solely on the grounds of urgency, *periculum in mora* (ICJ, 2009c). Given the guarantee presented by Senegal, the Court concluded that, in the present case, there was no apparent risk of irreparable prejudice to the rights alleged by Belgium as to justify the granting of provisional measures; The Court, by thirteen votes to one, found that that there was no need for the indication of provisional measures (ICJ, 2009c; 2009d).

2.4. Legal Thesis involved in the merits

2.4.1. Types of jurisdiction:

Jurisdiction is the “general legal competence of States” to decide in judicial, legislative and administrative matters. (BROWNLIE, 2008) Being the power to control properties and the conduct of persons in harmony with municipal law, it constitutes is an important feature of the State’s sovereignty. (O’KEEFE, 2004)

In International Criminal Law, jurisdiction possesses two main perspectives: (a) prescriptive jurisdiction, which is a State's power to determine the applicable law inside its territory; and (b) executive jurisdiction, which is the authority to enforce its law, by applying executive measures, detaining and punishing those who have committed acts considered felonies under its criminal law. (O’KEEFE, 2004)

For the most part, jurisdiction is limited by the Principles of Non-Interference and Equality between States. (DONOVAN, ROBERTS, 2005) Thus, the general presumption is that jurisdiction is territorial. However, the evolution of international law has resulted in the recognition of the existence of jurisdictional principles other than the territorial. (BROWNLIE, 2008) In current international law, even though there is not a unanimously accepted division, five main jurisdictional principles have been identified.

2.4.1.1. The territorial principle

The territorial principle is the classic standard which prescribes that the courts of the location where the crime was physically committed are entitled to exercise jurisdiction. This is the most widely acknowledged jurisdictional type. In fact, according to the American Justice, it constitutes an almost universal rule that “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done” (USA, 1909, Art. 5; JANIS & NOYES, 2006).

2.4.1.2. The active nationality principle

Traditionally accompanying the territorial principle, (JANIS; NOYES, 2006) this principle has provided an alternative basis for the establishment of jurisdiction—that of the defendant’s nationality. The active nationality principle allows the inducement of
jurisdiction over extraterritorial acts, since, supported by this principle, a State can prosecute its own nationals anywhere in the world. Because the joint application of territorial and active nationality may lead to problems such as parallel jurisdictions and double jeopardy, this principle is often limited by States to serious felonies (BROWNLIE, 2008).

2.4.1.3. The passive nationality principle

The passive nationality is another principle which is nowadays generally accepted as a basis for the establishment of jurisdiction, being reflected in the legislation of various countries (O’KEEFE, 2004). This principle provides States with the possibility to protect their nationals who were victims of offences committed abroad. (JANIS; NOYES, 2006) Thus, aliens may be tried for a crime committed against a national, although the act was performed out of the victim’s country.

2.4.1.4. The protective or security principle

Under this principle, a State may exercise jurisdiction over acts committed abroad by foreigners, when that act is considered harmful to its security or national interests. However, in order to establish jurisdiction on this basis, a risk to a concrete interest must be demonstrated (BROWNLIE, 2008) and the offence at hand must be considered a threat to some fundamental national interest (O’KEEFE, 2004).

2.4.1.5. The universal jurisdiction principle

The controversial universal jurisdiction principle, applicable only when absent any other possible nexus between the adjudging State and the case, consists in prescriptive jurisdiction over an offence committed abroad by persons, who, at the time of commission, are non-resident aliens, where that offence is not considered neither a threat to the fundamental interest of the prescribing state nor to give rise to effects within its territory (O’KEEFE, 2004).

The crimes which may give rise to universal jurisdiction must be themselves deemed to possess a “universal” character—that is, they must be classified as violations of jus cogens, which are norms in the highest hierarchical position (PPUJ, 2001). Mary Robinson, United Nations High Commissioner for Human Rights, further clarified the matter:

The principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim. Human rights abuses widely
considered to be subject to universal jurisdiction include genocide, crimes against humanity, war crimes and torture (JANIS, NOYES, 2006).

In the *Ex parte* Pinochet case, Lord Millet considered that there were two cumulative criteria to be fulfilled for the exercise of universal jurisdiction: (a) That the crime is contrary to a peremptory norm of International Law; and (b) that it is so serious and in such a scale that they can be regarded as an attack on the international legal order (UK, 1999).

### 2.4.2. Jurisdictional immunities of former heads of state

Perhaps one of International Law’s most important canons is the principle of sovereign equality of states, and the fact that, as equally sovereign, they shall remain independent (PCIJ, 1927). Also fundamental is the principle of non-intervention in other states’ internal affairs (BROWNLE, 2006). Those are the foundation of several other rules governing international relations, such as the principle of immunity of states from jurisdiction exercised by other states and precisely jurisdictional immunity of certain state officials. In fact, it is said that these very immunities are not granted in the name of a specific person, but in reason of the country which they represent (WICKREMASINGHE, 2010).

Due to the fact that Heads of State are the main representatives of a nation, and their link to that state’s personality is so strong, they are granted absolute immunity from jurisdiction exercised by other states in relation to them (criminal and civil) (CASSESE, 2005, WICKREMASINGHE, 2010). This is precisely because they are to carry out their functions in an independent manner, and this rule, a principle named ne impediatur officium, impedes other states from possible interference in their private life so as to jeopardize the performance of their functions (CASSESE, 2006). This sort of immunity is called *ratione personae* (personal immunity), and is enjoyed by Heads of State in power regarding all aspects of their lives—either related to their functions or not (ICJ, 2002a).

As it is the rule in international law, however, Former Heads of State do not enjoy full immunities as empowered Heads of State. As mentioned before, immunity derives precisely from their official capacity and the principle of sovereign equality of states (ICJ, 2002a), and it is natural that, after having left office, Former Heads of State only enjoy limited immunity—namely, immunity *ratione materiae*—in reason of acts that shall both have been (1) performed in official capacity and (2) carried out while in office: for those, they may not be prosecuted by other states (WICKREMASINGHE, 2010).

It is also important to stress is that the immunity defense utilized by state officials, either former or in power, is considered not to apply to International Courts and Tribunals.
Understanding beyond solutions. UFRGSMUN: beyond modelling.

(CASSESE, 2008), and, specifically with regards to the International Criminal Court, the immunity plea is specifically prohibited, which permits that individuals, although high rank officials within a state, may be prosecuted for serious breaches of international law individually (IC, 1998, p. 16, Art. 27, §2). That would be precisely because, in International Tribunals, the judiciary system would be impartial, something that cannot be guaranteed in a national tribunal, that arguably may be used to intervene in another state’s independence. (CASSESE, 2008) However, this permission exists and it is a way to avoid impunity from gross human rights violations, a tendency of the international community, (CASSESE, 2008) it is almost unanimous that these officials will still challenge jurisdiction through an immunity plea when trialed by International Tribunals.

2.4.3. Possibility of waiving immunity?

As immunity enjoyed by Former Heads of State lies on a former official capacity, and derives from the sovereignty of the State to which they performed their duties, it is several commentator’s opinion that they can be waived both by the Head of State himself as well as by the State to whose sovereignty the immunity was attached to (WICKREMASINGHE, 2010; BIANCHI, 1999). This was also the one of the two options listed by the Court in the Arrest Warrant case for possibly for a former or current Head of State to be judged by courts (GAETA, 2003).

In a 2002 letter to the judge in Belgium investigating the alleged offences committed by Mr. Habré, the Minister of Justice of Chad expressly waived the immunity from its former president, the first time such an event ever occurred (GAETA, 2003).

2.4.4. War crimes and crimes against humanity: juridical nature (jus cogens?)

Some scholars, such as Roberto Ago, during the drafting of the International Law Commission Articles on State Responsibility, have attempted to codify into this future treaty the notion of International Crimes, which would entail state’s responsibility for offenses that would go beyond the ones generated by mere wrongful acts. In 1969, the

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5 See, for instance, the judgment of Slobodan Milošević, former president of Serbia, before the International Criminal Tribunal of the Former Yugoslavia (ICTY, 2005). For an also comprehensive view of a plea of immunity in International Tribunals by a former Head of State being rejected, see Prosecutor v. Charles Ghankay Taylor decision on immunity from jurisdiction (SC-SC, 2004).

6 For evidence of that, simply examine the dockets of the current international criminal tribunals such as the Security Council’s ad hoc tribunals—Former Yugoslavia and Rwanda—, the special tribunals—Sierra Leone—and the International Criminal Court’s.

7 On the development of the ILC Draft Articles on State Responsibility, the difficulty of States to accept “international crimes” committed by them generated such controversy that made impossible
Vienna Convention on the Law of Treaties, in its article 53, states recognize that “peremptory norms” (jus cogens norms), shall work as to derogate treaty norms contrary to it (CASSESE, 2006).

However there has been much academic discussion on the matter since the 1960s (see, for instance, AGO, 1971, ARECHAGA, 1978, WEIL, 1983, SHELTON, 2010), International Court’s pronunciation on it has mostly been obiter dicta⁸, and most of its work on the matter has been through Dissenting or Separate Opinions.⁹ Many authors repel the notion of jus cogens as fundamentally contrary to the formation of international law, based on the will of sovereign equal states, and say that, mostly, it is a slippery slope to start ranking norms in accordance with their importance (WEIL, 1983). Nonetheless, courts such as the Inter-American Court of Human Rights have been less cautious and have recognized the existence of norms of jus cogens in several occasions since the 2003 Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants (IACHR, 2003; SHELTON, 2010).

As for the notion of war crimes being fundamentally contrary to International Law as to configure jus cogens prohibitions, this is read as the International Court of Justice’s Advisory Opinion on the Threat or Use of Nuclear Weapons of 1996 (ICJ, 1996). This analogy can be made regarding crimes against humanity as well, as their prohibition is observed in numerous treaties, such as the ones establishing the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda (CASSESE, 2006; SHELTON, 2010). Although not mentioning the expression “jus cogens”, Judges Rosalyn Higgins, Thomas Buergenthal and Pieter Kooijmans in their joint separate opinion to the Arrest Warrant case affirmed that both war crimes and crimes against humanity are “heinous in nature” (ICJ, 2002b, §46). Nonetheless, they did not acknowledge that the gravity of said crimes would amount to the lifting the application of the norm that prohibits prosecution of a Minister of Foreign Affairs in power, agreeing, hence, with that final reasoning of the majority of the Court itself.

for the original Article 19 of the 1993 proposal to come into being. The final draft as submitted today contains no mention of “crimes” committed by states, but the interesting development of the meetings until its withdrawal, in 1998, can be seen in http://untreaty.un.org/ilc/guide/9_6.htm.

⁸ In both the Nicaragua Case (1986) and in the Nuclear Weapons Advisory Opinion (1996), the Court expressly utilized, although obiter dicta, the expression jus cogens (ICJ, 1986; 1996). In another famous case, the Barcelona Traction Light and Power Co., it has recognized, also obiter dicta, the erga omnes nature of certain international law norms, such as certain human rights, prohibition of slavery and prohibition of torture (ICJ, 1970).

⁹ Opinions that develop this concept are, for instance, Judge Antonio Augusto Cançado Trindade’s Separate Opinion on the Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion), the Dissent of Judge Tanaka in the South West Africa Case, and others (ICJ, 1966; 2010).
2.4.5. UN convention against torture—treaty obligation to prosecute or extradite?

The prohibition to utilize torture has been an evolving norm derived precisely from the dignity of the human person, to which all are entitled and has a non-derogable nature. It is crystallized in a number of treaties, one of the most important ones being the International Covenant on Civil and Political Rights of 1966 Article 7, that reads: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (…)” (UNGA, 1966, Art. 7).

In 1984, a Convention now widely ratified was produced by the United Nations, namely the 1984 UN Convention Against Torture (hereinafter, CAT). The CAT has a specific definition of torture in its article 1 with important factors that should be taken into account:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is **intentionally inflicted** on a person for such purposes as obtaining from him or a third person **information or a confession**, punishing him for an act he or a third person has committed or is suspected of having committed, **or intimidating or coercing** him or a third person, or for any reason based on **discrimination** of any kind, when such pain or suffering is inflicted by or at the **instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity**. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions (UNGA, 1984, p. 197, Art. 1, §1, emphases added).

As stressed, the specific elements for the configuration of torture are that it is 1) inflicted **intentionally**, 2) in order to obtain **information, confession, to punish or to intimidate**, 3) with the **consent or acquiescence of a public official or other in official capacity**.

As for the present case, the fundamental issue regarding CAT is that it is one of the conventions that impose upon the High-Contracting Parties a special duty so as to prevent impunity from a crime considered so heinous in nature, which is present in its Art. 5, paragraph 2, Art. 7, paragraph 1, Art. 8, paragraph 2 and Art. 9, paragraph 1. They read as follows.

This obligation contained in the abovementioned articles is to either prosecute the alleged offender or to extradite him to a place that is willing to exercise jurisdiction over the alleged breach to the CAT (UNGA, 1984). This specific and innovative instrument is designed so that suspects of having committed torture are brought to justice (UNHRC, 2007). Some authors designate such obligation as a sort of universal jurisdiction imposed by treaty, (CASSESE, 2002) as one accused of torture, in spite of no territory or nationality.

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10 The CAT was the first convention to establish a treaty obligation to prosecute and extradite. This obligation was later on embedded in other specific conventions.
link, has to be either prosecuted or extradited by the State that has this person in its territory.

This obligation, known as obligation aut dedere aut judicare (to either extradite or trial), was recognized by the Committee Against Torture precisely in a case against Senegal brought by individuals allegedly tortured under Mr. Habré’s rule in Chad. This case, Guengueng et al. v. Senegal was brought before the Committee responsible for evaluating the compliance of signatories to the Convention after the dismissal of the complainants’ case in Senegalese Courts against Mr. Habré (CAT, 2006). Senegal alleged having no jurisdiction over the case. The CAT Committee’s reasoning was in the sense that Senegal could not invoke its internal law in order not to trial a claim made under CAT (BATES, 2007).

In the present case the jurisdiction invoked by Belgium to prosecute Mr. Habré would be the one derived of passive nationality, and so its claim to prosecute Mr. Habré would be less inchoate and less controversial than one exercised by a less traditional link, although the latter may be expressly permitted through the Convention.

2.4.6. Existence of a customary right to prosecute and extradite?

According to Belgium, not only would Senegal be in breach of the aforementioned provisions under CAT to either prosecute or extradite Mr. Habré, but to a norm of customary character in that same sense. In its Application, the Kingdom of Belgium contends that there is a coexistent norm of a customary character to oblige states to either prosecute or extradite those accused of crimes against humanity, which would include torture, along with the provision set forth in CAT (ICJ, 2009a).

In order to make its case of the existence of an obligation to prosecute or extradite for grave breaches of humanitarian and human rights law, Belgium founds its claims in documents of secondary nature (reports, resolutions) and widespread treaties. The Application reads as follows:

The obligation to prosecute the perpetrators of such crimes is indicated in the resolutions of the General Assembly of the United

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11 Which means that the victims being of Belgium nationality would entitle Belgium to exercise jurisdiction over said offences to CAT, not indeed an application of universal jurisdiction, differently from cases such as the one present in the Arrest Warrant case against former Minister of Congo, Abdulaye Yerodia.

12 According to the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment, although there is a provision for treaty-based universal jurisdiction under CAT, states have been cautious in exercising such right (UNHRC, 2007).

13 For more on the coexistence of customary and treaty norms, see the International Court of Justice’s reasoning in Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA) (ICJ, 1986). According to the Court, although there may be a preexistent norm of a customary character prior to a norm codified in treaty, they both coexist, binding all states at hand in spite of them being signatories of said convention (ICJ, 1986).
Nations (see, for example, resolution 3074 (XXVIII), para. 1), the Draft Code of Crimes against the peace and Security of Mankind adopted by the International Law Commission in 1996 (Art. 9), and in numerous calls by the international community to combat impunity (see, for example, the preamble of the Statute of the ICC, 4th-6th consideranda, the Constitutive Act of the African Union, Article 4 (c), and various Security Council resolutions) (ICJ, 2009a, p. 13).14

As for the burden of proof demanded by the Court in order to establish the existence of a norm of customary character, it will depend upon the Kingdom of Belgium—that claims the existence of a customary norm being breached by Senegal—to prove that both opinio juris exists and that state practice is general enough so as to configure a customary obligation capable of being breached.15

2.4.7. Omission on the part of Senegal?

The International Law Commission Articles on State Responsibility for International Wrongful Acts (hereinafter ILC Draft Articles on State Responsibility) provides that:

There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State (ILC, 2001, p. 34).

International Court of Justice’s perhaps most famous acknowledgment of breach of obligation by omission in the 1980 Diplomatic and Consular Staff in Teheran, and it came to the conclusion that a state government’s inaction, in that case Iran’s, would entail its international responsibility.16 Another great example of that is the Court’s responsibility attribution of Albania in the Corfu Channel case for knowing (or needing to know) of the placing of mines in the Channel that damaged UK vessels.

In order to attribute responsibility, the formulae utilized by the ICJ—and often cited in its jurisprudence—is that of (1) a damage caused to a state (2) by an act or omission (3) attributable to a first state by a causal nexus. A faute, or an intent to cause harm, is in general not necessary in order for International Responsibility to be engaged (BROWNLIE, 2006).

2.5. Legal Precedents
2.5.1. Ex-parte Pinochet case

In the Ex-Parte Pinochet case, the former Head of State of Chile—in office until his resignation in 1990—had been visiting the United Kingdom for medical treatment in 1998.

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16 See also the Commentary to the Article 2 provided in the ILC (2001).
when Spain issued a request for his extradition in order to face charges for torture in the Spanish courts. The Divisional Court, considering that he enjoyed immunity from prosecution as a former head of state, invalidated the provisional warrant for the applicant's arrest issued in response to the extradition request. When this decision was appealed to the House of Lords, it held, by six votes to one, that the appeal should be allowed, permitting the extradition (UK, 2000).

The House of Lords concluded that, due to the *jus cogens* nature of the international crime of torture, recognized in the *Furundzija* case (ICTY, 1998), the establishment of universal jurisdiction is justified, as it was provided for in the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (UK, 2000). Said convention also required all member states to outlaw torture (UNGA, 1984). Thus, the argument that Senator Pinochet was entitled to immunity *ratione materiae* because the organization of state torture should be considered as part of his official functions as head of state was rejected by the judicial organ. It was reasoned that “if the implementation of a torture regime is a public function giving rise to immunity *ratione materiae*, this produces bizarre results” (UK, 2000), such as a former head of state escaping liability for the crime of torture—a crime whose description states that must be committed “by or with the acquiescence of a public official or other person acting in an official capacity” (UNGA, 1984, Art. 1, §1)—, while those who carried out his orders being liable. For the aforementioned reasons, the House of Lords considered that Senator Pinochet, when allegedly organizing and authorizing torture, was not acting in any capacity which might give rise to immunity *ratione materiae*, since: (a) such actions are contrary to international law; (b) Chile, as a signatory of the Torture Convention, had agreed to outlaw such conduct; and (c) Chile had agreed that all other member states were to have jurisdiction over official torture (UK, 2000).

2.5.2. Arrest Warrant case

In the Arrest Warrant case, the Democratic Republic of the Congo filed, on 17 October 2000, an application against the Kingdom of Belgium, requesting the Court to annul an arrest warrant issued by a Belgian judge against the Congo’s Minister of Foreign Affairs—Mr. Abdulaye Yerodia Ndombasi—under the motif of alleged serious violations of international humanitarian law. The alleged crimes were committed by means of speeches made by Mr. Ndombasi that incited racial hatred. The accused was not in Belgium territory at the time of the issuing of the warrant and was in office as the Congolese
Understanding beyond solutions. UFRGSMUN: beyond modelling.

Minister for Foreign Affairs. No Belgian national was a victim of the alleged offences, nor was there any link between Belgium and the accused.

The Congo contended that Belgium’s conduct violated both “the principle that a State may not exercise its authority on the territory of another State” and “the principle of sovereign equality among all Members of the United Nations” (ICJ, 2002a, §1). The Applicant argued also that Belgium’s non-recognition of the immunity of a Minister in office constituted an infringement to the rule of customary international law concerning the inviolability and immunity from criminal process of incumbent foreign ministers (ICJ, 2002a, §10).

The Court upheld the Congo’s immunity claim, by 13 votes to 3, having, however, decided not to analyze the matter of Belgium’s universal jurisdiction (ICJ, 2002a, Art. 3). The Court acknowledged as firmly established in international customary law the immunities from jurisdiction in other States enjoyed by Ministers for Foreign Affairs, as well as other holders of high-ranking office in a State (ICJ, 2002a, §51). Such immunities, however, were held to exist in order to “ensure the effective performance of their functions on behalf of their respective State”, rather than to their “personal benefit” (ICJ, 2002a, §53). In relation to Ministers of Foreign Affairs, the Court reasoned that their functions are of such nature that, throughout the duration of his office, he ought to, when abroad, enjoy full immunity from criminal prosecution, since if a Minister of Foreign Affairs is arrested, he is consequently prevented of exercising the functions of his office (ICJ, 2002a, §54–55).

Finally, the Court, through its analysis of state practice, has failed to recognized the existence under customary international law of any exception to the immunity from criminal jurisdictional and inviolability enjoyed by Ministers of Foreign Affairs in the case of alleged war crimes or crimes against humanity (ICJ, 2002a, §58).

3. SUBMISSIONS

The Kingdom of Belgium requests this Court to adjudge and declare that:

a) the Court has jurisdiction to entertain the dispute between the Kingdom of Belgium and the Republic of Senegal regarding Senegal’s compliance with its obligation to prosecute Mr. H. Habré or to extradite him to Belgium for the purposes of criminal proceedings;

b) the Republic of Senegal has the obligation of bringing criminal proceedings against Mr. Habré for acts including crimes of torture and crimes against
humanity which he allegedly engaged in either as perpetrator, co-perpetrator or accomplice;

c) should the prosecution of Mr. Habré fail, the Republic of Senegal is obliged to extradite him to the Kingdom of Belgium so that he can answer for these crimes before the Belgian courts.
TOPIC B: Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)

Luíza Leão Soares Pereira, Mariana Camargo Contessa and Mariana Bom

1. INTRODUCTION

The Former Yugoslav Republic of Macedonia (hereinafter FYROM) became independent from the former Yugoslav Federation on September 8, 1991, as the result of a voting of its citizens. A new constitution was adopted on November 17, 1991.

On December 19, 1991, FYROM adopted a declaration in order to seek wider international recognition as a sovereign and independent State. The Hellenic Republic (hereinafter, Greece), however, has refused to recognize FYROM under the name referred to in its new Constitution, since Greece considered that the new denomination implied territorial aspirations.

During the years of 1992 and 1993, FYROM had its independent statehood recognized by a number of States, not including Greece. On April 8, 1993, it became a member of the United Nations. Nonetheless, according to the Security Council Resolution 817, due to the dispute concerning the denomination of the Applicant, it was to be referred to by the United Nations as “the Former Yugoslav Republic of Macedonia” until the settlement of the difference.

On September 13, 1995, the FYROM and Greece signed an agreement—the Interim Accord—which provided for the establishment of diplomatic relations between them. Following the adoption of the Interim Accord, FYROM was granted membership of a number of international and regional organizations, such as the Council of Europe and the World Trade Organization. These memberships were requested by FYROM under the new denomination stated in its constitution, on the understanding that it would be referred to as state in the UNSC Resolution 817 (UNSC, 1993).

In 1995, FYROM also became a member to NATO’s Partnership for Peace under the designation of “the former Yugoslav Republic of Macedonia”. However, it could not proceed to gain full NATO membership, since on April 3, 2008, Greece, as a member of NATO, acted against it (and approval of NATO membership requires the consent of all existing members).
2. STATEMENT OF THE ISSUE

In light of the aforementioned events, on November 17, 2008, FYROM filed an application against the Hellenic Republic before the International Court of Justice on the grounds that “the Respondent’s actions to prevent the Applicant from proceeding to be invited to join NATO, in clear violation of its obligations under the Interim Accord.” (ICJ, 2008, p. 14, Art.20).

By the Application, FYROM requested the Court:

to adjudge and declare that the Respondent, through its State organs and agents, has violated its obligations under Article 11, paragraph 1, of the Interim Accord; to order that the Respondent immediately take all necessary steps to comply with its obligations under Article 11, paragraph 1, of the Interim Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant’s membership of the North Atlantic Treaty Organization and/or of any other “international, multilateral and regional organizations and institution” of which the Respondent is a member, in circumstances where the Applicant is to be referred to in such organizations or institutions by the designation provided for in paragraph 2 of United Nations Security Council resolution 817 (1993) (ICJ, 2008, p. 16, Art. 23).

2.1. Macedonia’s allegations
2.1.1. Jurisdiction of the International Court of Justice

According to the Macedonian Application, the International Court of Justice has jurisdiction to address the present case under Article 36(1) of the Court’s statute and under Article 21, paragraph 2, of the Interim Accord of 1995\(^1\), all in accordance with Article 40(1) of the Statute of the Court and Article 38 of the Rules of the Court.

Thus, the Applicant contends that the present case concerns only the dispute that has arisen between the two States “concerning the interpretation or implementation of this Interim Accord” (ICJ, 2008, p. 36, Art.21, §2), not involving the existing divergence about the Applicant’s name, as referred to in Article 5(1) of the 1995 Interim Accord, which was expressly excluded from Article 21(1).

2.1.2. As to the Greek violation of the Interim Accord

The Applicant claims that the Interim Accord is still in force and that it was signed with the scope to help the establishment of diplomatic relations between the Parties, and to

\(^1\) “Any difference or dispute that arises between the Parties concerning the interpretation or implementation of this Interim Accord may be submitted by either of them to the International Court of Justice, except for the difference referred to in Article 5, paragraph 1.” (UN, 1995, p. 10, Art.21, §2).
support their future cooperation, notwithstanding the continuing difference concerning the Applicant’s name. This purpose should be considered in the interpretation of the agreement, as it is provided by the Vienna Convention on the Law of Treaties of 1969 (VC, 1969). Moreover, the Applicant requests the observance to the *pacta sunt servanda* principle.

In this context, Article 11(1) would had established towards Greece a firm and unconditional general obligation to not object the Applicant’s membership in organizations or institutions of which the Respondent is a member. For this reason, FYROM stressed in its memorial that the mentioned Article comprises a broad objective, for (I) it is applicable to *all* international, multinational and regional organizations, and (II) “The obligation encompasses any implicit or explicit act or expression of disapproval or opposition in word or deed to the Applicant’s application to or membership of an organization or institution” (ICJ, 2009, p. 81).

The only exception to this norm would be engaged solely when the Applicant’s is to be referred differently than “the former Yugoslav Republic of Macedonia”. In this matter, the Applicant argues that its actions were consistent with this rule, since this would be just a “(…) provisional descriptive designation referring to the State’s previous status in order for it to be identifiable within the UN, pending resolution of the dispute over its name” (ICJ, 2009, p. 111).

In conclusion, this denomination, which was agreed in paragraph 2 of the UNSC Resolution 817 (UNSC, 1993), did not require the Applicant to call itself in this manner, and, so, the Applicant remained using its constitutional name in its official documents. However, when seeking to join NATO, the Applicant agreed to be recalled by the provisional name of “The Former Yugoslav Republic of Macedonia”.

2.2. Greece’s allegations

2.2.1. As to the International Court of Justice absence of jurisdiction

2.2.1.1. As to the attempt to adjudicate the “name issue” before the Court

The Respondent argues that, although the Article 21(1) of the Interim Accord establishes that any dispute or controversy concerning the interpretation of the agreement between the Parties could be resolved before the International Court of Justice, the mentioned Article also provides a clear exception when the issue concern Article 5 (1), which prescribes:

> The Parties agree to continue negotiations under the auspices of the Secretary-General of the United Nations pursuant to Security Council resolution 845 (1993) with a view to reaching agreement on the difference described in that resolution and in Security Council resolution 817 (1993) (UN, 1995, p. 5, Art.5, §1).
The divergence described in this Resolution is the State’s name quarrel, which, in the Security Council’s words, should be resolved in order to maintain peace in the region (UNSC, 1993, 3rd considerandum).

In this subject, the Respondent defends that the Applicant aims to hold before the International Court of Justice a case concerning the “name issue”, which was expressly excluded by the Interim Accord in the exception provided by article 21(1).

2.2.1.2. As to the exclusion of the present dispute by Article 22 of the Interim Accord

Article 22 of the Interim Accord ascertains the following:

This Interim Accord is not directed against any other State or entity and it does not infringe on the rights and duties resulting from bilateral and multilateral agreements already in force that the Parties have concluded with other States or international organizations (UN, 1995, p. 10, Art. 22).

Therefore, the Respondent argues that this Article prescribes an important exception to both the jurisdiction and merits of the case, for it concedes that Greece has prior rights and obligations to bilateral and multilateral agreements signed before the Interim Accord. As a result, the obligations acknowledged before the Interim Accord are super-ordinate in relation to obligations provided by the Accord itself.

In the present case, Greece recognized its obligations towards NATO before the Interim Accord, and, by expressed disposition of this Accord, Article 11(1) cannot derogate such obligations, since an international organization as NATO requires the compliance of the States Parties to its international legal responsibilities concerning its rights and duties in the membership process towards the other members and to the organization itself.

2.2.1.3. As to the International Court of Justice absence of jurisdiction to determine membership to NATO

The Respondent also asserts that the Application is de facto directed against NATO, an international organization that is not submitted to the Court’s jurisdiction. In Greece’s point of view, the refusal to invite the Applicant to join the organization is not attributable to itself, but to a collective decision taken unanimously by the Heads of State and Government of the NATO members.

Moreover, Greece recalls that there is no doubt that international organizations have distinct personalities from its members, being widely known that NATO is an international organization with a proper legal personality. The decision to admit a new Party taken at the summit, as it was the case with the Bucharest declaration, is made by the North Atlantic
Council (NAC), its supreme body, and it is implemented by NAC’s subordinate committees. It concludes, at last, that the Respondent had no individual role play in the decision of April 3, 2008, and that it cannot be held responsible for a decision taken by the organization, mentioning the “veil effect”, which prevents a State to be held responsible for a decision taken in a deliberate process of an international organization.

2.2.2. As to the consistence of the Greek conduct to the Interim Accord

According to the counter-memorial, the scope of the Interim Accord is to provide a protective framework, by establishing a provisional name to the Applicant, while a final agreement is not settled (ICJ, 2010a). In this context, a breach to this objective would frustrate the very goal of the Interim Accord.

Accordingly, the obligation prescribed by Article 11(1) of the agreement is only to not object the membership of the Applicant to international, multinational or regional organizations or institutions and not to grant the success of the admission; mainly, if it is considered that NATO is an organization with complex access process. On the other hand, if the Applicant refuses to be referred as “the former Yugoslav Republic of Macedonia”, then the obligation prescribed ceases to produce effects. As a conditional right, the Respondent understands that it has a margin of appreciation to determine whether this condition remains.

Furthermore, the Respondent points out that Article 11(1) must be read in accordance with Article 22 of the Interim Accord. As it was sustained before, due to the mentioned Article, prior international obligations and rights accepted by the Respondent were not precluded by the advent of the Interim Accord. In this sense, Greece would be entitled to point out deficiencies in the Applicant’s conduct, which could lead it to an ineligible status to receive an invitation to accede the alliance, as it is its right as a member of NATO. Also, since NATO is a consensus organization, Greece could not be held responsible for the organization’s decisions.

2.2.3. As to the Applicant’s violation to the Interim Accord

In addition to the allegation that Greece’s actions were consistent with the Interim Accord, the Respondent contends that it was the Applicant which reiterated manifestations of intentional violation of the Interim Accord and that such actions would provide ample justification to take measures that, otherwise, could be inconsistent to the Interim Accord. In this matter, the Respondent evokes the Applicant’s affirmation that it had never stopped using its Constitutional name in its official documents and, then, concludes that Article
11(1) imposes to the Applicant an obligation to use, at the international level, the provisional name, in accordance with the UNSC resolution 817. So, the Respondent claims that, even if the Court understands that the Respondent did object the Applicant’s invitation to join NATO, it would be a lawful application of the exception provided by paragraph 1 of Article 11.

For this reason, the Hellenic Republic argues that the Interim Accord is synallagmatic, requiring a *quid pro quo* exchange of rights and obligations, so that this rights and duties are interdependent, especially when concerning the Article 11(1) provision (ICJ, 2010a). And, in this framework, its actions would then be protected by the *exceptio inadimpleri contractus* principle, which is not limited only to material breaches, and allows the party to an agreement not to perform its conventional duties if the other party refuses to comply with the obligations agreed.

In the present case, the Respondent affirms that the conditions to apply the mentioned principle are met, because of the Applicant’s constant material violations to the provisions of the Interim Accord, in view that there was no observance to Articles 5 (obligation to act in good faith so that the negotiations about the “name issue” can reach a final conclusion), 6 (prohibition of interference in Internal Affairs), 7(1) (prohibition of hostile activities and propaganda), 7(2) (prohibition to use “Vergina Sun” symbol by the Applicant), 7(3) (prohibition of appropriation of Greeks historical and cultural symbols), and, finally, 11 (obligation to be referred to as “the former Yugoslav Republic of Macedonia” in the International level) (UN, 1995).

At last, Greece concludes that even if there was a disobedience to Article 11(1) by the Respondent, the wrongfulness of such conduct was precluded by the Applicant’s continuous violations the Interim Accord.

2.3. Order of 12 March 2010

In the order of March 12, 2010, the International Court of Justice, under the request of the Applicant, authorized the Former Yugoslav Republic of Macedonia to submit a reply to the Greek counter-memorial, as well as submission of a rejoinder by Greece.

2.4. Reply to the counter-memorial

The reply presented by the Applicant reaffirms that the only reason why the Respondent objected the invitation of the Applicant to accede to NATO was the divergence in relation to the Applicant’s name, even though the Applicant was referred to in NATO by its provisional name (ICJ, 2010b). Moreover, it is stressed that NATO’s
consensus-based decision-making procedure does not exempt the Respondent from its obligations towards the Applicant (ICJ, 2010b).

Subsequently, the jurisdiction of the Court is defended under the arguments that (I) the solution of the present case does not require the Court to address the merits of the “name question”, (II) article 22 does not refer to jurisdiction issues and, in any case, Greece did not explained which right or duty before NATO obliged the objection to the invitation of the Applicant, and (III) the Court is not been asked to address NATO’s conduct, but the Respondent’s (ICJ, 2010b).

In relation to the merits of the case, the Applicant informs that, before April 3, 2008, Greece had never demonstrated its concern that the Applicant’s conduct would not be consistent with the provisions of the Interim Accord (ICJ, 2010b). In addition, the Applicant refuses to accept the exceptio inadimpleri contractus principle as a justification to the Greek’s disregard to Article 11(1), for (I) it is a new and not widely accepted doctrine, and (II) the only possible exception to comply with the Interim Accord obligations would be the prescriptions of Article 60 of 1969 Vienna Convention, since the exceptio inadimpleri contractus principle would not integrate the doctrine about State responsibility (ICJ, 2010b). Moreover, Article 11(1) would only provide with a unilateral obligation of Greece, leaving the exceptio inadimpleri contractus argument baseless (ICJ, 2010b).

2.5. Greece’s rejoinder

The rejoinder presented by the Respondent, alongside with again rejecting the Court’s jurisdiction over the matter, restates that the Interim Accord is a synallagmatic agreement (ICJ, 2010c). The Respondent also reiterates that it has never objected the membership of the Applicant, but that it does not have the obligation to guarantee the success of the admission of the Applicant to the NATO, under Article 11(1), as well that the decision to not invite the Applicant to join the organization is attributable solely to NATO (ICJ, 2010c).

Greece also repeats that the Applicant is in violation of Article 5(1) of the Interim Accord, because it would be trying to solve the question of its name unilaterally by adjudicating the matter, contravening the mentioned agreement (ICJ, 2010c). Additionally, the rejoinder remembers that the Applicant disrespected Articles 6(2) and 7 (1)(2)(3) of the Interim Accord (ICJ, 2010c).

As a final point, it is mentioned that the exceptio inadimpleri contractus principle does not require any prior notification to be used and it is applicable to the present matter insofar and as long as the Applicant does not comply with its own obligations under the
Interim Accord with the due reciprocity towards the Greek commitment (ICJ, 2010c). Lastly, Greece states that remains committed to the Interim Accord and that still aspires the normalization of the relationship between the parties, which demands a final solution to the named dispute (ICJ, 2010c).

2.6. Legal thesis involved in the merits

2.6.1. Competence to adjudge a case of political nature

The article 36(2) of the statute of the International Court of Justice establishes that:

The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation (IC, 1945, Art. 36, §2, emphasis added).

Due to this provision, it is understood that the Court is competent “to hear and determine legal questions, but not political questions” (FITZMAURICE, 1986), that is, the Court should not refer to political issues, since there are other organs competent to deal with this subject, such as the Security Council (SCHRÖDER, 1995): This was precisely one of the United States’ defense thesis in the Nicaragua case (ICJ, 1984a). Nevertheless, in that same case, the Court refused such argument and stressed that “[t]he [Security] Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events” (ICJ, 1984b, p. 435, §95). As a result, the Court established that there must be more than mere political implications to obstruct its competence to adjudge a case, but a real political nature (ICJ, 1984b, p. 435, §96).

The referred position was repeatedly reiterated by the Court in many cases, such as the Nuclear Weapons case, when it stressed that: “[t]he fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a ‘legal question’” (ICJ, 1996, p. 234, §13), and in the Certain Expenses of UN case, which established that the interpretation of treaty provision is an essentially judicial task (ICJ, 1962, p. 155). On the subject, Sir Gerald Fitzmaurice, former judge of the International Court of Justice, recalls us of the fact that, irrespective of the reasons for which the interpretation was requested, the problem of treaty interpretation is indeed a legal question (FITZMAURICE, 1986).

2 About this matter, see also ICJ (1973).
Finally, it is the position adopted by Judge Cançado Trindade that the review of the obligations imposed by international law towards States, as well as the legality of its conduct is, in essence, a judicial matter (ICJ, 2010d). Moreover, he also argues that, even if it is understood that this is not the case under analysis, the distinction between “political” and “legal” issues should be overruled, for there is “[n]o questions which, by their ‘intrinsic nature’, may be termed as essentially ‘legal’ or ‘political’; such qualifications pertain rather to the means of resolution of the questions at issue” (ICJ, 2010d, p. 5).

2.6.2. Obligations of the parties regarding the treaty

The interim accord was signed in New York on September 13, 1995, between Greece, referred as “the party of the first part”, and FYROM, referred as the “party of the second part” (UN, 1993). This treaty aimed to establish good diplomatic relations between both States and to regulate their interaction with each other. So as to recall the parties’ allegations regarding the treaty, see above, under the parties allegations.

2.6.3. Treaty Law

Treaties are legal instruments able to regulate the relationship between two or more subjects of International Law. In fact, they are one of the most important normative instruments of International Law, being expressly prescribed as a source of law by the Court’s Statute in article 38, paragraph 1 (STEIN, 1995). The Vienna Convention of 1969 on the Law of Treaties (hereinafter VCLT) sets the follow definition in its article 2(1)(a):

“[t]reaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (VC, 1969, p. 9, Art. 21, §1, (a)).

2.6.3.1. The pacta sunt servanda principle

One of the most important standards of International Law concerning the chapter of Treaty Law is the pacta sunt servanda principle. It is widely accepted as a general principle of law, stipulating that every treaty is binding upon the parties that have signed it and, therefore, shall be complied with (FITZMAURICE, 2006). To be exact, this rule asserts

3 The Vienna Convention on the Law of Treaties was elaborated by the International Law Commission and was opened for signatures on April 23, 1969. More than just a treaty, the VCLT carries within its provisions some customary rules that are applicable even to those who are not direct subjects to it, such as international organizations. For more information, see Fitzmaurice (2006).
precisely the “[d]uty of all states to carry out their treaty obligations in good faith” (DUNOFF, RATNER & WIPPMAN, 2006), as well as a presumption of continuance of the treaties’ validity and normative force if they were not expressly terminated (BROWNLIE, 2008, p. 620). Indeed, the Court, when rendering its judgment to the Gabčíkovo-Nagymaros case, recognized this principle, and emphasized that:

[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way (...) what is required in the present case by the rule pacta sunt servanda, as reflected in article 26 of the Vienna Convention of 1969 on the Law of treaties is that the Parties find an agreed solution within the cooperative context of the Treaty (ICJ, 1997, p. 78, §141–142).

In this same case, the Court also affirmed that the wrongful conduct of one (or even both) parties did not derogate the application of such principle, since it “[d]id not bring the Treaty to an end nor justify its termination” (ICJ, 1997, p. 68, §114). The Court, moreover, stressed that:

[t]he Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule pacta sunt servanda if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal noncompliance (ICJ, 1997, p. 68, §114).

As already mentioned above, the VCLT also expressly prescribes this principle in its article 26: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” (VC, 1969, p. 11, Art. 26).

2.6.3.2. Treaty interpretation

There are many schools defending different ways to interpret a treaty, each one pursuing a different hermeneutic purpose (RIS, 1991). The main theories about such difficult task are explained in the subsequent sections.

2.6.3.2.1. The intent school

The first one to be mentioned is the Intent School, which defends that the first duty of any interpreter is to define the aim of the parties when negotiating a treaty, in a way that the treaty could be applied as the parties actually intended it to be. In such task, the interpreter could rely on supplementary sources, for example, the travaux préparatoires of the accord, even when the text seems to be unambiguous (RIS, 1991). The mentioned

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4 The travaux préparatoires consists in the written record of the treaty’s negotiation process, such as memoranda, minutes of conferences and drafts (RIS, 1991).
resource is, nevertheless, criticized by scholars, such as Sir Gerald Fitzmaurice, since (I) the words and expressions adopted by the text were chosen exactly to give voice to the parties’ intentions, so there would be no need to study the *travaux préparatoires*; and (II) many parties to the treaty can join the agreement later, not participating on the elaboration of its preliminary drafts (FITZMAURICE, 1986). Moreover, it is also appointed by the critics that any treaty is structured in order to give voice to the parties’ intentions and, hence, it would be only logical to presume that such aim would be already demonstrated by the text of the treaty. In response to that, this theory recollects the possibility that the parties, even when using the same terminology, in good faith, may have wished-for another meaning to the text, perhaps due to idiomatic difficulties during the negotiations. In such cases the most adequate way to interpret would be to restore the parties’ truly aspirations (SCHAFFER, 1976).

2.6.3.2.2. The textualist school

In the opposite site, there is the *Textualist School* which supports that the best way to analyze the meaning of a treaty is by establishing the words naturally and ordinarily significance. As a result, the priority of such thesis is to interpret the actual meaning of the text, disregarding the initial intention of the parties. In this context, the *travaux préparatoires* can be consulted, but only in order to clarify and confirm the use of the words chosen by the parties (RIS, 1991, p.114–115), since the words choice is, in fact, the actual intention of the parties. In effect, this hermeneutic school aims to be more scientific than the first mentioned (SCHAFFER, 1976). This form of interpretation was preferred by the International Court of Justice in relation to the precedent school in several occasions, albeit it has not completely overlooked the relevance of the parties’ intentions in certain opportunities (FITZMAURICE, 1986, p. 338 and 343; BROWNLIE, 2008, p. 631), but this approach was only accepted when the textualist method led to an unreasonable result (RIS, 1991, p.130).

2.6.3.2.3. The teleological school

The doctrine that emphasizes the purpose of the treaty in the interpretation process is the *Teleological School*. The theory tries to determine which was the scope of the agreement and, consequently, considers the historical background of the treaty of great importance, as well as the context in which such accord was developed (RIS, 1991). Then, once the main goal of the treaty is identified, the text is interpreted the in manner that will guarantee the realization of such object (SCHAFFER, 1976). According to Sir Gerald Fitzmaurice, this
approach is “[m]ore especially connected with the general multilateral convention of the
‘normative’, and, particularly, of the sociological or humanitarian type”, because it would be
the most adequate hermeneutic method to use when analyzing international organizations’
charters in general (FITZMAURICE, 1986, p. 204). Indeed, the ICJ has adopted these
principles when dealing with advisory opinions concerning powers of United Nations’
organs, developing the theory of implied powers5 (BROWNLIE, 2008). Sir Gerald
Fitzmaurice, however, appoints the main flaw of the school by saying that this method:

[v]irtually denies altogether the direct relevance of intentions as such:
whatever the intentions of the parties or some of them may have
been, the convention as framed has certain object or purpose, and
the task of the tribunal is to ascertain and establish this object or purpose,
and then to interpret the treaty so as to give effect to it

A more recent version of the mentioned doctrine also understands that the object of
a convention can be very dynamic. Accordingly, the interpretation should not only focus in
the agreements’ scope when it was developed, but in the present goal that has appeared
through the passage of time. This new approach, nonetheless, has not been admitted by the
Court as interpretative process, since it implies a quasi-legislative function
(FITZMAURICE, 1986). Other Courts, however, such as the European Court of Human
Rights has admitted an “evolutionary” hermeneutic method when applying the European

2.6.3.2.4. The Vienna Convention on the Law of Treaties approach

The International Law Commission, when formulating the VCLT, adopted as major
inspiration to the interpretation’s clause the work of Sir Gerald Fitzmaurice, special
rapporteur for the Commission, who had organized the major principles about this theme
based on the International Court of Justice jurisprudence. Therefore, were admitted as
primary principles of treaty interpretation: (I) the principle of textuality, that provides that
the treaty must be interpreted in accordance to the words and texts that are expressly
established in its articles; (II) the principle of the natural and ordinary meaning, which
defends that the words and terms of the agreement must be understood in its most
common and natural sense; and (III) principle of integration, that supports that, while
interpreting, the treaty provisions must be considered as a whole and, consequently,
chapters or articles cannot be interpreted out of context (FITZMAURICE, 2006). These
hermeneutic standards were prescribed in the article 31 of the convention, as follows:

5 See ICJ’s Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations (ICJ,
1949).
General rule of interpretation: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

The Commission admitted the following subsidiary principles as well: (I) the principle of effectiveness, which determines that the interpretation must be focused in the apparent purpose or object of the agreement; (II) the principle of subsequent practice, according to which the correct interpretation of a treaty can be inferred from the parties' subsequent conduct; and, lastly, (III) the principle of contemporaneity, that establishes that the terms of the treaty shall be understood in the light of the current linguistic usage, but also considering the original meaning of the words (SCHAFFER, 1976, p. 137–138).

As result, the final text of the article concerning treaty supplementary sources of interpretation was:

Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

In conclusion, the Convention's dispositions about interpretation upheld the most modern views about the subject, giving space to textual, intention and teleological approaches (CASSESE, 2005, p. 179). Nevertheless, it must be said that, in relation to Article’s 31 first item, mentioned above, Malgosia Fitzmaurice (2006) recollects that this clause is, in fact, an international customary law already recognized as such by many judgments of the International Court of Justice. Furthermore, this first provision reflects a good faith requirement to the interpretation which is the very essence of the pacta sunt servanda principle (FITZMAURICE, 2006, p. 199).
On the other hand, regarding the hermeneutic process in accordance to the treaty’s “object and purpose”, it is important to note that this clause is undirected connected to the principle of effectiveness. Thus, if there are two possible interpretations and one of these does not enable the treaty to produce appropriate effects, this interpretation should be disregarded. It is believed that each provision was stipulated in order to achieve some goal or result, because it would be unproductive to add meaningless clauses in a treaty (FITZMAURICE, 2006). Nevertheless, the ICJ, most of the times, has subordinated this principle to the failures of the textual approach, given that “[t]his may involve a judicial implementation of purposes in a fashion not contemplated in fact by the parties” (BROWNlie, 2008, p. 635–636).

2.6.3.2.5. Material Breach of a Treaty

It is admitted that one of the parties is entitled to terminate or to suspend the application of an agreement if the other one has perpetrated a material breach (BROWNlie, 2008, p. 622). The VCLT itself prescribes that:

Termination or suspension of the operation of a treaty as a consequence of its breach: 1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. 2. A material breach of a multilateral treaty by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State; or (ii) as between all the parties; (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State; (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty. 3. A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty. 4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach. 5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties (VC, 1969, p 20–21, Art. 60, §1–5, emphasis in the original).

Nevertheless, the definition of what truly is a material breach remains vague. In the Gabčíkovo-Nagymaros case, mentioned above, for example, the ICJ did not recognize that the
reciprocal noncompliance provides grounds for the termination of a treaty (ICJ, 1997). In this sense, although a violation can allow the adoption of countermeasures by the other party, it does not mean *ipso facto* that it constitutes a material breach and that it permits the termination of the treaty.

2.6.4. Reparation over Treaty’s breach
2.6.4.1. State Responsibility

Initially, it must be noticed that the matter of existence of rights or obligations, as well as the presence of material breach that consents the termination or suspension of the treaty, is a matter of treaty law. For this reason, the state responsibility theory does not have legitimacy to determine the content or to interpret the state’s obligations, but only acts after these obligations prescribed by primary rules are defined and a breach by a State is identified, regulating, then, its consequences (UNGA, 2003; FITZMAURICE, 2006; CRAWFORD; OLLESON, 2006, p. 457).

The international responsibility of a State requires the existence of an act or omission that is attributable to a State under international law and that constitutes, at the same time, a breach of its international obligations. There is not, however, even in the present day, a biding international legal instrument about this subject. The main source about this theme is the non-binding “Draft Articles on Responsibility of States for Internationally wrongful acts”, which was developed by the International Law Commission and approved by the United Nations General Assembly in 2001. The Draft Articles contemplate the State Responsibility in a comprehensive way, and even if not a biding instrument, it can be taken in account because of its soft law character, and due to the fact that many of its provisions are indeed merely codification of custom (BROWNIE, 2008).

2.6.4.2. Reparation

Once the State responsibility is engaged, the responsible State must provide reparation to the injured one, as it was stated by the Permanent Court of International Justice in the 1928 Chorzów Factory case:

 [...] it is a principle of international law, and even a general conception of law, that any breach of an engagement involves and obliga-tion to make reparation. [...] reparation is the indispensable

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Dinah Shelton defines *soft law* as “[a]ny international instrument other than treaty containing principles, norms, standards, or other statements of expected behaviour.” (SHELTON, 2010. p.180). Regarding this matter, Alan Boyle (2006) points out that, albeit ‘soft law’ norms are not biding *per se*, they are frequently evidence of existing law, *opinio iuris* or a costumary international law under formation. The wide acceptance of any ‘soft law’ instrument may legitimate certain conducts or even make the adoption of contrary positions harder to sustain (BOYLE, 2006,p.142).
complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself (PCIJ, 1928, p. 29).

Accordingly, reparation can be categorized in three distinct and not mutually excluding forms: compensation, satisfaction and restitution:

Article 35 Restitution: A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) Is not materially impossible; (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. Article 36 Compensation: 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established. Article 37 Satisfaction: 1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State (UNGA, 2001, Art.35–37, emphases in the original).

3. SUBMISSION

The Yugoslav Republic of Macedonia asks the Court to:

a) declare that the Respondent, through its State organs and agents, has violated its obligations under Article 11, paragraph 1, of the Interim Accord;

b) order the Respondent to take all necessary steps to comply with its obligations under Article 11, paragraph 1, of the Interim Accord, and to cease and desist from objecting in any way, whether directly or indirectly, to the Applicant’s membership of the North Atlantic Treaty Organization and/or of any other “international, multilateral and regional organizations and institutions” of which the Respondent is a member.
REFERENCES

TOPIC A:

Books and articles


Documents


— **Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons.** ICJ Reports, 1996.


— **Application instituting proceedings on Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal) filed in the Registry of the Court on 19 February 2009a.** General List Number 144. Available at <http://www.icj-cij.org/docket/files/144/15054.pdf> Last retrieved on: October 1, 2011.


TOPIC B:

Books and articles


Documents


___ Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons. ICJ Reports, 1996.


