

## Dispute Settlement

### Quick Reference Rules of Law

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## Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)

State (P) v. State (D)

I.C.J., 2006 I.C.J. 126.

**NATURE OF CASE:** Proceeding in the International Court of Justice.

**FACT SUMMARY:** The Democratic Republic of the Congo (P) brought an application against Rwanda (D), and Rwanda (D) challenged the jurisdiction of the International Court of Justice.

### RULE OF LAW

Where one party to a treaty excludes dispute settlement obligations under the treaty before becoming a party, and fails to take formal acts to bring about withdrawal of the reservation, the International Court of Justice lacks jurisdiction based on that treaty.

**FACTS:** The Democratic Republic of the Congo (DRC) (P) brought an application against Rwanda (D). DRC (P) tried to base the jurisdiction of the International Court of Justice on nine treaties with dispute settlement clauses that provided for such jurisdiction. Rwanda (D) was not party to two of the treaties, and with respect to the other seven, Rwanda (D) excluded dispute settlement obligations. Rwanda (D) challenged the jurisdiction of the International Court of Justice on the nature of its obligations. The excerpt omits discussion of some of the treaties. The treaties involved were Genocide Convention, Article IX; Convention on Racial Discrimination, Article 22; Convention on Discrimination against Women, Article 29; World Health Organization Constitution, Article 75; Unesco Convention, Article XIV; Montreal Convention, Article 14; Vienna Convention, Article 66; Convention Against Torture; and Convention on Privileges and Immunities of the Specialized Agencies. Rwanda (D) was not party to the last two.

**ISSUE:** Where one party to a treaty excludes dispute settlement obligations under the treaty before becoming a party, and fails to take formal acts to bring about withdrawal of the reservation, does the International Court of Justice lack jurisdiction based on that treaty?

**HOLDING AND DECISION:** [Judge not stated in casebook excerpt.] Yes. Where one party to a treaty excludes dispute settlement obligations under the treaty before becoming a party, and fails to take formal acts to bring about withdrawal of the reservation, the International Court of Justice lacks jurisdiction based on that treaty. First, Rwanda (D) may have committed itself at the time of a 1993 peace agreement to withdrawing all reservations to human rights treaties, and the Rwanda (D) minister of justice effectuated the withdrawal, but Rwanda (D) never

took formal acts to bring about withdrawal of the reservation. A decision to withdraw a reservation within a state's domestic legal order is not the same as implementation of that decision by the national authorities within the international legal order, which can only occur by notification to the other state parties to the treaty in question through the Secretary-General of the United Nations.

Second, the existence of a dispute that implicates peremptory norms of general international law is not an exception to the principle that jurisdiction always depends on the consent of parties. The DRC (P) may have made numerous protests against Rwanda's (D) actions at the bilateral and multilateral levels, and therefore satisfied preconditions to the seisin of the I.C.J. in the compromissory clauses within some of the treaties, including the Convention on Discrimination against Women, but whatever the dispute, there was no evidence that the DRC (P) sought negotiations with respect to interpretation or application of the Convention. The DRC (P) also failed to show that it initiated arbitration proceedings with Rwanda (D) under the Convention on Discrimination against Women. The treaty cannot therefore form the basis of jurisdiction.

### ANALYSIS

The Court's analysis of all treaties involved was similar to that included in the casebook excerpt. The main principle here is that where a state has apparently not granted consent to the jurisdiction of the I.C.J., the I.C.J. will not advance the case past the preliminary matter of jurisdiction, whatever atrocities have in fact been committed by the non-consenting state. Additionally, where, as here, there is evidence of non-consent, reversal of the position requires an overt act by the state, in order to convince the Court that, after all, consent to the I.C.J.'s jurisdiction was granted.

### Quicknotes

**JURISDICTION** The authority of a court to hear and declare judgment in respect to a particular matter.

**TREATY** An agreement between two or more nations for the benefit of the general public.

## Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)

State (P) v. State (D)

I.C.J., 1984 I.C.J. 392.

**NATURE OF CASE:** Proceeding in the International Court of Justice.

**FACT SUMMARY:** Nicaragua (P) filed suit in 1984 against the United States (D) claiming it was responsible for illegal military and paramilitary activities in and against Nicaragua. The United States (D) challenged the jurisdiction of the International Court of Justice to hear the case, as well as the admissibility of Nicaragua's (P) application to the I.C.J.

### RULE OF LAW

- (1) The International Court of Justice has jurisdiction to hear a dispute between two states if each accepted the Court's jurisdiction.
- (2) The application by a state to the International Court of Justice is admissible where no grounds exist to exclude it.

**FACTS:** Nicaragua (P) filed suit in 1984 against the United States (D), claiming it was responsible for illegal military and paramilitary activities in and against Nicaragua (P). The United States (D) challenged the jurisdiction of the International Court of Justice to hear the case. Though the United States (D) deposited a declaration accepting the compulsory jurisdiction of the Court in 1946, it attempted to qualify that declaration in a 1984 notification referring to the declaration of 1946 and stating in part that the declaration "shall not apply to disputes with any Central American State. . . ." The United States (D) also argued that Nicaragua (P) had failed to deposit a similar declaration to the I.C.J., and that the I.C.J. lacked jurisdiction on that ground as well. Nicaragua (P) argued that it could rely on the 1946 declaration made by the United States (D) because it was a "state accepting the same obligation" as the United States (D) when it filed charges in the I.C.J. against the United States (D). Nicaragua (P) also pointed to its intent to submit to the compulsory jurisdiction of the I.C.J. through a valid declaration it made in 1929 with I.C.J.'s predecessor, the Permanent Court of International Justice, even though Nicaragua (D) failed to formally deposit it with that court. Finally, the United States (D) also challenged the admissibility of Nicaragua's (P) application to the I.C.J.

### ISSUE:

- (1) Does the International Court of Justice have jurisdiction to hear a dispute between two states if each accepted the Court's jurisdiction?

- (2) Is the application by a state to the International Court of Justice admissible where no grounds exist to exclude it?

**HOLDING AND DECISION:** [Judge not stated in casebook excerpt.]

- (1) Yes. The International Court of Justice has jurisdiction to hear a dispute between two states if each accepted the Court's jurisdiction. Nicaragua's (P) declaration of 1929 is valid even though it was not deposited with the Permanent Court, because it had potential effect that would last for many years. Because it was made unconditionally and was valid for an unlimited period, it retained its potential effect when Nicaragua (P) became a party to the Statute of the I.C.J. The drafters of the current Statute wanted to maintain the greatest possible continuity between it and the Permanent Court. Nicaragua (P) may be deemed to have given its consent to the transfer of its declaration to the I.C.J. when it accepted the Statute.

In addition, the conduct of Nicaragua (P) and the United States (D) suggest that both intended to be bound by the compulsory jurisdiction of the I.C.J., and the conduct of the United States (D) constitutes recognition of the validity of the declaration of Nicaragua (P) of 1929. Because the Nicaraguan declaration of 1929 is valid, Nicaragua (P) was a "state accepting the same obligation" as the United States (D) at the date of filing of the charges with the I.C.J., and therefore could rely on the United States' (D) declaration of 1946.

The 1984 notification by the United States (D) does not prohibit jurisdiction in this case, because the United States (D) appended by its own choice a six months' notice clause to its declaration, and it was not free to disregard it with respect to Nicaragua (P). The obligation of the United States (D) to submit to the jurisdiction of the I.C.J. in this case cannot be overridden by the 1984 notification.

The "multilateral treaty reservation" that was appended to the United States' (D) declaration of 1946, which limited the I.C.J.'s compulsory jurisdiction, also does not prohibit jurisdiction in this case. Through the declaration, the United States (D) accepted jurisdiction except with respect to "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the

*Continued on next page.*

Court, or (2) the United States of America specially agrees to jurisdiction." Nicaragua's (P) application in this case relies on four multilateral treaties, and the United States (D) argued that the I.C.J. could exercise jurisdiction only if all treaty parties affected by a decision were also parties to the case. But the effect on other states is not a jurisdictional problem, and the United States' (D) objection to jurisdiction on the basis of the multilateral treaty reservation is unfounded.

- (2) Yes. The application by a state to the International Court of Justice is admissible where no grounds exist to exclude it. The United States (D) challenged the admissibility of Nicaragua's (P) application on five separate grounds. The first—that Nicaragua (P) failed to bring forth necessary parties—fails because there is no "indispensable parties" rule. The second and third—that Nicaragua (P) is asking the Court to consider the existence of a threat to peace, which is the exclusive province of the Security Council—fails because the I.C.J. can exercise jurisdiction concurrent with that of the Security Council. Both proceedings can be pursued *pari passu*. The fourth—that the I.C.J. is unable to deal with situations involving ongoing armed conflict—is not a show-stopper because any judgment on the merits is limited to the evidence submitted and proven by the litigants. The fifth—that the case is incompatible with the Contadora process, to which Nicaragua (P) is a party—fails because there is nothing compelling the I.C.J. to decline to consider one aspect of a dispute just because the dispute has other aspects. The fact that negotiations are being conducted subject to the Contadora process does not pose any legal obstacle to the exercise by the Court of its judicial function.

### ▶ ANALYSIS

The questions of jurisdiction and admissibility are very complicated, but are based primarily on the principle that the I.C.J. has only as much power as that agreed to by the parties. A primary focus of the case was on the declarations—the 1946 declaration of the United States, and the 1929 declaration of Nicaragua—and what each declaration indicated about the respective parties' intent as it relates to the I.C.J.'s jurisdiction.



### Quicknotes

**JURISDICTION** The authority of a court to hear and declare judgment in respect to a particular matter.

**STATUTE** A law enacted pursuant to the legislature's power and consistent with specified procedure so that it regulates a particular activity.



## Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)

State (P) v. State (D)

I.C.J., 2008 I.C.J. 140.

**NATURE OF CASE:** Order on request for the indication of provisional measures.

**FACT SUMMARY:** Georgia (P) filed proceedings against the Russian Federation (D), claiming that Russia (D) engaged in ethnic cleansing in Georgia (P), in violation of the Convention on Elimination of Racial Discrimination (CERD).

### RULE OF LAW

Under certain circumstances, the International Court of Justice may assess facts and order provisional measures to protect rights under international treaties without deciding the merits of a dispute.

**FACTS:** Georgia (P) filed proceedings against the Russian Federation (D), claiming violation of the Convention on Elimination of Racial Discrimination (CERD). Georgia (P) alleged that Russia (D) was engaging in ethnic cleansing in the South Ossetia and Abkhazia regions of Georgia (P). Georgia (P) asked the International Court of Justice to decide whether the circumstances required provision measures to protect rights under CERD, not to decide the merits of Georgia's (P) argument that Russia (D) breached CERD.

**ISSUE:** Under certain circumstances, may the International Court of Justice assess facts and order provisional measures to protect rights under international treaties without deciding the merits of a dispute?

**HOLDING AND DECISION:** [Judge not stated in casebook excerpt.] Yes. Under certain circumstances, the International Court of Justice may assess facts and order provisional measures to protect rights under international treaties without deciding the merits of a dispute. The evidence shows that the Georgian population in the affected areas remains vulnerable, and there is an imminent risk that the rights of the population and of Georgia (P) under CERD may suffer irreparable prejudice without intervention. In addition, the I.C.J. has the power, under its Statute, to indicate measures to protect those rights, even if they are not exactly as requested, without prejudging the question of the jurisdiction of the I.C.J. to deal with the merits of the case. Therefore, both parties shall refrain from any act of racial discrimination against persons, groups of persons, or institutions, abstain from supporting racial discrimination, and do all in their power to prevent such discrimination.

### ▶ ANALYSIS

The ruling of the I.C.J. went beyond what Georgia (P) asked for, which was to stop Russia (D) from engaging in racial discrimination and ethnic cleansing, by applying it to both parties. That is the way in which the I.C.J. used its statutory authority to indicate measures that were not exactly as requested. The protective measures are similar to the common law preliminary injunction.



### Quicknotes

**BREACH** The violation of an obligation imposed pursuant to contract or law, by acting or failing to act.

**INJUNCTION** A court order requiring a person to do, or prohibiting that person from doing, a specific act.



## Legality of the Threat or Use of Nuclear Weapons

[Parties not identified.]

I.C.J., Advisory Opinion, 1996 I.C.J. 226.

**NATURE OF CASE:** Advisory opinion.

**FACT SUMMARY:** The General Assembly and World Health Organization requested advisory opinions from the International Court of Justice regarding the legality of nuclear weapons.

### RULE OF LAW

The International Court of Justice may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

**FACTS:** [Facts not stated in casebook excerpt.]

**ISSUE:** May the International Court of Justice give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request?

**HOLDING AND DECISION:** [Judge not stated in casebook excerpt.] Yes. The International Court of Justice may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. Only compelling reasons are justified for a refusal to grant such an advisory opinion. The Charter of the United Nations authorizes the General Assembly to make such a request; however, the Court lacks the jurisdiction to grant such an opinion to the World Health Organization.

### ANALYSIS

The Court also rejected arguments that it should refrain from rendering an advisory opinion on the basis that such a reply might negatively affect disarmament negotiations, and that the Court would be exceeding its authority and acting in a law-making capacity. The Court rejected the latter argument on the basis that it simply states the existing law and does not legislate, even if it sometimes must specify the scope and application of such law.



### Quicknotes

**ADVISORY OPINION** A decision rendered at the request of an interested party as to how the court would rule should the particular issue arise.



## Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

United Nations (P) v. Israel (D)

I.C.J., Advisory Opinion, 2004 I.C.J. 136.

**NATURE OF CASE:** Advisory opinion by International Court Justice.

**FACT SUMMARY:** Israel (D) constructed a wall in occupied Palestinian territory and the United Nations (P) objected.

### RULE OF LAW

The construction of a wall by Israel, the occupying power, in the occupied Palestinian territory, violates international law, including the Fourth Geneva Convention of 1949, the Hague Convention, and relevant Security Council and General Assembly resolutions.

**FACTS:** Israel (D) constructed a wall in occupied Palestinian territory. The wall and its route impaired the freedom of the Palestinian population. The U.N. General Assembly (P) demanded that it stop and reverse the construction of the wall. The I.C.J. was asked to provide an advisory opinion on the matter.

**ISSUE:** Does the construction of a wall by Israel (D), the occupying power, in the occupied Palestinian territory, violate international law, including the Fourth Geneva Convention of 1949, the Hague Convention, and relevant Security Council and General Assembly resolutions?

**HOLDING AND DECISION:** [Judge not stated in casebook excerpt.] Yes. The construction of a wall by Israel (D), the occupying power, in the occupied Palestinian territory, violates international law, including the Fourth Geneva Convention of 1949, the Hague Convention, and relevant Security Council and General Assembly resolutions. The wall and the Israeli occupation impede the liberty of movement of the inhabitants of the occupied territory, with the exception of Israeli citizens, as guaranteed under Article 12 of the International Covenant on Civil and Political Rights. It also impedes access to work, health facilities, education, and an adequate standard of living under the International Covenant on Economic, Social, and Cultural Rights and the United Nations Convention on the Rights of the Child. Finally, the wall changed the demography of the territory, because of the departure of some Palestinians, which violates Article 49 of the Fourth Geneva Convention. Construction of the wall also breaches Israel's (D) obligations under the Fourth Geneva Convention and the Hague Convention because the route chosen for the wall infringes the rights of Palestinians in the occupied territory, which cannot be justified by military exigencies or the requirement of national security. The legal

consequence of Israel's (D) actions in the matter is that all states are under an obligation not to recognize the illegal situation resulting from the construction of the wall, and all the states party to the Fourth Geneva Convention are under an obligation to ensure compliance by Israel (D) with international humanitarian law. Finally, both Israel (D) and Palestine are under an obligation to observe the rules of international humanitarian law. Illegal action and unilateral decisions have been taken on all sides, and implementation of the relevant Security Council resolutions is the only way to end the hostile situation.

**SEPARATE OPINION:** (Higgins, J.) The International Court of Justice looked at only a part of a much larger conflict between the two states, and should have considered the bigger picture and spelled out what is required of both parties. Of paramount importance is the protection of civilians. In addition, the real impediment to Palestine's ability to exercise its rights as a self-determined people is not the wall, but Israel's (D) refusal to withdraw from Arab occupied territory and for Palestine to provide conditions to allow Israel (D) to feel secure in doing so. Further, while the wall seems to have resulted in a lessening of attacks on Israeli civilians, the necessity and proportionality for the route selected, balanced against the hardships for Palestinians, have not been explained.

**DISSENT:** (Buergethal, J.) The construction of the wall raises important issues of humanitarian law, but the Court should have declined to issue an advisory opinion because the Court failed to address Israel's (D) arguments that it was willing to provide compensation and services for Palestinian residents, and that the wall was intended to be a temporary structure. The Court's conclusions are not convincing, because it failed to demonstrate adequately why it was not convinced that military exigencies and concern for security required Israel (D) to erect the wall along the chosen route.

### ANALYSIS

Judge Buergethal, the only dissenter in the matter, is a U.S. citizen. In addition, the United States was one of eight votes against asking the I.C.J. for an advisory opinion. Ninety members voted in favor of the opinion, and 74 members abstained.



### Quicknotes

**GENEVA CONVENTION** International agreement that governs the conduct of warring nations.

**HAGUE SERVICE CONVENTION** Multilateral treaty governing service of process in foreign jurisdictions.



## United States—Final Anti-Dumping Measures on Stainless Steel from Mexico

State (D) v. State (P)

World Trade Organization, Appellate Body, 47 I.L.M. 475 (2008).

**NATURE OF CASE:** Appeal to Appellate Body of the World Trade Organization (WTO).

**FACT SUMMARY:** Mexico (P) complained that the United States (D) violated Article VI of GATT 1994 and the Anti-Dumping Agreement by using incorrect methodology for calculation of margins of dumping. The panel that convened for the complaint did not follow the Appellate Body's prior holdings, and instead relied on panel reports that the Appellate Body had reversed.



### RULE OF LAW

In ruling on a dispute brought before a WTO panel, the panel must follow previously adopted Appellate Body reports addressing the same issues.

**FACTS:** Mexico (P) complained that the United States (D) violated Article VI of GATT 1994 and the Anti-Dumping Agreement by using incorrect methodology for calculation of margins of dumping. The Appellate Body of the WTO had addressed similar complaints filed against the United States (D) by the European Community and Japan, but the panel that convened for Mexico's (P) complaint did not follow the Appellate Body's prior holdings, and instead relied on panel reports that the Appellate Body had reversed.

**ISSUE:** In ruling on a dispute brought before a WTO panel, must the panel follow previously adopted Appellate Body reports addressing the same issues?

**HOLDING AND DECISION:** [Judge not identified.] Yes. In ruling on a dispute brought before a WTO panel, the panel must follow previously adopted Appellate Body reports addressing the same issues. While Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties, subsequent panels are not free to disregard the legal interpretations and reasoning contained in previous Appellate Body reports that have been adopted. The Appellate Body functions to provide consistency and stability in interpretation of rights and obligations under covered agreements, and the panel's failure to follow previously adopted Appellate Body reports undermines the development of a coherent and predictable body of jurisprudence. The panel's erroneous legal interpretation is corrected, and its findings and conclusions that have been appealed are reversed. Whether the panel failed to discharge its duties under Article 11 of the Dispute Settlement Understanding is not ruled upon.

### ANALYSIS

"Dumping" is the act of a manufacturer in one country exporting a product to another country at a price that is either below the price it charges in its home market or is below its cost of production. "Free market" advocates view "dumping" as beneficial for consumers and believe that actions to prevent it would have negative consequences. The use of "zeroing" in the context of calculating anti-dumping duties in domestic trade remedy proceedings has been one of the most contentious issues in World Trade Organization dispute settlement, and that in part explains the panel's deviation from prior rulings by the Appellate Body in this case.



### Quicknotes

**INTERPRETATION** The determination of the meaning of a statute.

**REMEDY** Compensation for violation of a right or for injuries sustained.

