

THE 1992 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

CASE CONCERNING THE MEDIA GULF WAR

IN THE INTERNATIONAL COURT OF JUSTICE

State of Atlantis,

Applicant

versus

State of Bergenia,

Respondent

MEMORIAL FOR THE APPLICANT

January 1992

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JURISDICTION

The states of Atlantis and Bergenia submit this dispute to the International Court of Justice pursuant to Article 36, paragraph 1 of the Statute of the International Court of Justice.

STATEMENT OF FACTS

The State of Bergenia has engaged in serious acts of repression against the Ethlantians, an ethnic group who inhabits the Bergenian territory of Province. Independent international groups have confirmed a pattern of human rights violations against the Bergenians. (C. 3). For example, Bergenia legally mandates that Ethlantians live in areas segregated from the rest of the populace, and that Ethlantians must submit to a "special legal process" for merely disrupting government activities. (C. 1-2). Ethlantians have also been relocated to ghetto communities, lacking basic services. (C. 4). When Ethlantians attempt to challenge these practices, they receive unequal treatment under Bergenian laws because they are subject to a special legal process if they protest against the government. (C. 2). After riot police killed several Ethlantian demonstrators, the Ethlantians became so outraged that they have demanded recognition of their right to self-determination and political independence. (C. 2).

The Bergenian atrocities have not subsided since the Ethlantians demanded recognition of their fundamental human rights. Indeed, the atrocities may have grown worse. The State of Atlantis has produced evidence that Ethlantians are being tortured to compel them to confess to crimes they have not committed. (C. 4). Atlantis has also produced evidence that Bergenia is executing Ethlantians without a trial. (C. 4).

Atlantis has attempted to resolve the Ethlantian problem through informal appeals, (C. 2), and through a formal diplomatic request on 1 January, 1990. (C.

2,3). Atlantis has also sought the assistance of the U.N. Human Rights Commission. (C. 4). None of those peaceful attempts to resolve the problem have been effective. (C. 4).

Relations between Atlantis and Bergenia have also worsened due to Bergenia's oil export policies. Both Bergenia and Atlantis are members of the Organization of Oil-Producing States (OPS), which is a regional multiparty organization that coordinates oil production and pricing among its members. (C. 1). The OPS agreement does not specify that the OPS directives are legally binding. (C. 1). Atlantis has complained that Bergenia is attempting to destroy the OPS by exporting double the amount of oil permitted by OPS directives. (C. 2). Bergenia's noncompliance has contributed to a 17% decrease in the price of oil, causing considerable harm to Atlantis. (C. 2). Seventy-five percent of Atlantis' Gross National Product comes from the production and sale of oil. (C. 2).

As the situation continued to deteriorate in Province, Atlantis sent its troops to its southern border to prepare for possible hostilities against Bergenia. (C. 2). Bergenia also stationed military troops along the border, and then sent a great number of security police to control Province. Bergenia's increasingly threatening posture seemed to be directed against Atlantis. Bergenia was then allocating 23% of its Gross National Product on military expenditures, purchasing missiles, aircraft and conventional weapons. (C. 3).

After issuing numerous unanswered requests that Bergenia adhere to OPS directives, Atlantis felt compelled to close an oil pipeline that had been built across Atlantis and Bergenia. (C. 1). The two countries had signed the Pipeline Treaty on 10 July 1978, which had provided for the construction of the pipeline. (C. 1). The pipeline was especially built in such a way that either party could control the flow of oil. (C. 1).

Instead of addressing the crucial oil production and Ethlantian problems,

Bergenia responded by engaging in a full-scale mobilization of its troops. (C. 3). It formed a military Coalition with the states of Carola, Devon, Victoria and Bergenia, ostensibly as a measure of self-defense. (C. 3). Bergenia assumed military command and full responsibility for all actions and conduct that would be taken in the course of hostilities with Atlantis. (C. 4).

Because all other means had failed, Atlantis militarily intervened in Province on 10 August 1990, and notified the UN Security Council of its action. (C. 4). Atlantis quickly overran Province, and restored police and public services to prevent disruption of civilian life. (C. 4). For ease of transportation and communication, the facilities in Province were linked with those in Atlantis, and the border barriers were removed. (C. 5).

Upon receiving a petition by Bergenia, the Security Council passed Resolution 910 (1990). (C. 5). The preamble of Resolution 910 affirms "the inherent right of individual or collective self-defense in response to the armed attack by Atlantis." (C. 5). The Resolution states that:

The Security Council:

1. Condemns the Atlantis invasion of Bergenia;
 2. Demands that Atlantis withdraw immediately and unconditionally all of its forces to the positions which they occupied before 10 August 1990.
- (C. 5).

Because Bergenia still had not remedied its oil export policies or its treatment of Ethlantians, Atlantis chose to remain in Province. The Security Council followed up with Resolution 928 (1990), in which it authorizes, under Chapter VII of the UN Charter:

...Member States, unless Atlantis on or before 15 October 1990 fully implements the Resolution, to use all necessary means to uphold and implement Resolution 910 and to restore international

peace and security in the area..... (C. 5). Both resolutions passed unanimously. Bergenia also claimed its right of self-defense under Article 51 of the Charter and under customary international law. (C. 6).

By 15 October 1990, neither Bergenia nor the Security Council had made any efforts to peacefully resolve the conflict. (C. 6).

On 16 October 1990, Coalition forces launched an armed attack on Atlantis, and targeted several civilian structures and facilities in Atlantis. (C. 6). Five hundred civilians, 400 of whom were workers and 100 of whom were nearby residents, were killed, and many were injured, when the Coalition attacked the Alpha power station. (C. 6). The Coalition also attacked bridges crossing the Beta River. (C. 6). The Coalition gained little military advantage from these actions, for the power stations supplied power to a mostly civilian area, and the bridges provided a transport route for civilian food and supplies. (C. 6). Civilians were also hurt by the Coalition's attack on the Delta Sanitation Plant. (C. 7). Because the plant served both a civilian and military population, both communities were faced with cholera outbreaks. (C. 7).

Coalition Members Victoria and Devon treated Atlantisan combatants inhumanely. Victoria employed flame-throwers and riot control agents against Atlantisan troops entrenched in the Epsilon Caves. (C. 7). Atlantisan troops exited the caves with their hands uplifted, proclaiming their right to surrender. (C. 7). They were blinded by riot control agents, unarmed, and on open ground. The Victorian lieutenant ordered his troops to fire, and many Atlantisans were killed. (C. 7).

The Devonese marched 800 Atlantisan prisoners of war (POWs) to Devon's Fort Mu prison camp, in which 100 of the POWs died along the way. (C. 8). The Devonese did not have the resources to take care of the POWs because the war had

limited their abilities to obtain or transport food. While interned, the POWs were quartered in make-shift housing and were not fed enough. (C. 8). The Devonese forced Atlantisan officers and enlisted personnel to work long hours doing arduous tasks to repair and rebuild roads and military installations. (C. 9).

Bergenia committed atrocities against members of the Ethlantian Liberation Front (ELF), by summarily executing 30 of them in Zeta, a village controlled by the ELF. (C.7). Bergenia also caused severe environmental damage by spilling oil from Atlantis' Theta Refinery Complex. (C. 7). Bergenia claims that the action was to prevent Atlantis from landing on the Devonese coast, but the oil slick ended up travelling along the coast, and polluted Devonese desalination plants. (C. 7-8). As a result of the spill, fresh water supplies were damaged and plant life was destroyed. (C. 8).

Atlantis' use of force and choice of targets was considerably more discriminate. Atlantis used ballistic missiles to attack a missile-launcher, which Bergenia had strategically located merely 660 feet from the Gamma Hospital. (C. 6). Since the missiles had limited targeting accuracy, they caused damage to the surrounding area. (C. 7). Faced with attacks from Coalition forces, Atlantis resorted to igniting the Iotan oil fields to obscure the area. (C. 8). An unintended result was that the fumes harmed the surrounding crops and populace. (C. 8).

Bergenia also damaged the environment by lighting the Kappa oil fields on fire. (C. 8). The resulting smoke made discrimination of military targets extremely difficult. Atlantis attacked the "general targeting area" with intent to damage only military targets, but Bergenia's ignition of the Kappa oil fields made it impossible to completely avoid civilian deaths. (C. 8).

On 30 December 1990, Atlantis and Bergenia signed a provisional cease-fire

agreement. (C. 9). The Security Council passed Resolution 930 (1990), requiring all states to maintain peace and security in the region, and to resolve their claims against one another. (C. 9). Consequently, Atlantis and Bergenia have submitted a Compromis to the International Court of Justice. (C. 9).

QUESTIONS PRESENTED

I. Do the principles of humanitarian intervention justify intervention in a State that engages in murder, torture, and racial discrimination against a portion of its own population when that intervention is limited in scope and used only after other remedies have failed?

II. Does a State have the right of self-defense under customary international law and the U.N. Charter to launch a limited anticipatory strike against another State that has massed armed forces along the border of the defending State, has engaged in a massive arms buildup, and has engaged in atrocities directed at people of the same ethnic group as the population of the defending State?

III. Has a State violated international law when it launches an armed attack pursuant to a Security Council Resolution when the resolution contains no references to, or characteristics of, an article 42 armed action?

IV. Has a State violated international law when it expressly takes responsibility for all actions taken by an armed coalition that bombs civilian power stations and civilian bridges, executes enemy forces who are attempting to surrender, forces captured enemy officers to perform physical labor, summarily executes civilians who oppose the coalition, uses riot control agents against

enemy forces, and causes intentional spillage of oil that destroys surrounding foliage and civilian water supplies?

V. Has a State complied with international law when it justifiably occupies a foreign territory and it maintains public order and safety by managing police and public services, when it attacks only military targets with a valid military objective, and executes spies and mercenaries only after a proper trial?

VI. Has a State violated international law when it is a member of an organization that regulates the oil production of its members, and the State makes misrepresentations concerning its oil exports to the detriment of other members who rely on the State's misrepresentations?

VII. Is a State justified in terminating a bilateral oil pipeline treaty when the other party makes misrepresentations concerning fundamental circumstances surrounding the treaty, and the party that makes the misrepresentations also uses proceeds from the sale of oil to amass weapons that will likely be used against the State that terminates the treaty?

SUMMARY OF PLEADINGS

I.

Atlantis' intervention in Province is fully justified under the principles of humanitarian intervention and self-defense. Humanitarian intervention is a valid principle of international law, as demonstrated by ample state practice and state expressions of opinio juris. Various States have employed dozens of such interventions. This Court has recognized that international human rights law creates erga omnes obligations that permit all States to seek remedies against an

offending State. Under appropriate circumstances, humanitarian intervention is an appropriate remedy when other remedies have failed.

The U.N. Charter has not eliminated the right of humanitarian intervention. The text of article 2(4) prohibits only those interventions that are directed at the territorial integrity and political independence of another State. When properly employed, humanitarian intervention does not fall within the article 2(4) prohibition because such an action is directed only at the protection of innocent victims. This interpretation is particularly appropriate in light of the U.N. Charter's express purpose of protecting fundamental human rights and the United Nation's inability to collectively enforce human rights law. The Nicaragua case also indicates that interventions are illegal under customary international law only when they bear on matters in which each State may exercise its right of sovereignty. The killing and torture of innocent victims are not matters within the political sovereignty of any State.

Bergenia's murder and torture of innocent Ethlantians was a sufficiently severe violation of human rights law to give Atlantis a right to intervene in Province. The U.N. Charter, the 1948 Universal Declaration of Human Rights, numerous United Nations declarations, and norms of jus cogens all prohibit murder, torture, and acts of racial discrimination. Bergenia violated all of those norms in its treatment of the Ethlantians. Atlantis was fully justified in protecting the lives of innocent people.

Atlantis' intervention in Province was also sufficiently limited in scope. Atlantis occupied Province with a minimum of casualties, and it did not exceed the territorial boundaries of the area where the atrocities occurred. Atlantis made no demand on Bergenia that interfered with Bergenia's political, economic, or social structure. Atlantis demanded only that Bergenia cease its atrocities. Before intervening in Province, Atlantis attempted to resolve the dispute through

diplomatic channels and by a futile appeal to the U.N. Human Rights Commission. In short, Atlantis satisfied all of the procedural and substantive requirements of a proper humanitarian intervention.

Atlantis' action was also a valid exercise of its right of self-defense. Both customary international law and accurate interpretations of the U.N. Charter recognize the right of anticipatory self-defense. Atlantis had good reason to fear Bergenia's massive arms buildup, Bergenia's mobilization of forces along Atlantis' borders, and the numerical superiority of the Coalition forces. These actions, combined with Bergenia's persecution of people of the same ethnic group as the population of Atlantis, sent Atlantis a clear message of impending hostilities. Atlantis responded with a limited intervention to avoid a lethal first strike from Coalition forces.

II.

Bergenia's armed aggression against Atlantis violated international law. Security Council Resolution 928 (1990) permitted only peaceful measures against Atlantis because the resolution was compatible only with an article 41 action, which does not permit the use of armed force. The Security Council did not expressly invoke article 42 as the basis for the resolution, and only article 42 permits the use of armed force to enforce a resolution. The Council also did not require troops and materials from Member States, nor did it set up a centralized command structure. Finally, the Council and parties had not yet exhausted peaceful options as required by article 41. Bergenia violated the U.N. Charter by militarily enforcing Resolution 928 without article 42 authorization from the Security Council.

Bergenia's armed attack against Atlantis was not a valid exercise of its right of self-defense. After Atlantis occupied Province, Bergenian troops faced no immediate threat of armed attack, and the Security Council was attempting to

peacefully resolve the conflict. Bergenia also lacked a right of self-defense under customary international law because its own atrocities against the Ethlantians created the conflict.

Bergenia violated numerous treaties and norms of customary international law throughout the armed conflict. Coalition members violated Geneva Protocol I by bombing a civilian power station and civilian bridges. Coalition members also violated the Hague Convention, Geneva Convention, and Protocol I by murdering Atlantisans who were attempting to surrender at the Epsilon Caves, by improperly housing and caring for POWs, and by executing civilian members of the Ethlantian Liberation Front without first conducting a trial. Additionally, Coalition forces violated customary norms, evidenced by state practice and the Gas Protocol, that prohibit the use of riot control agents during warfare. Bergenia assumed full authority for the Coalition's conduct of the war, and violations by its Coalition partners must be imputed to Bergenia. Bergenia also violated Protocol I by intentionally spilling oil from an Atlantisan refinery, causing severe harm to the environment and to civilians who lost their water supply.

III.

Atlantis complied with international law before and during the armed conflict. During its occupation of Province, Atlantis took all necessary actions to ensure public order and safety in Atlantis by managing police and public services. Atlantis attacked only military targets, and Bergenian civilians were injured only because Bergenia placed military targets within civilian areas. Bergenia's use of civilian populations to shield military targets itself violated Protocol I. Atlantis executed hostile spies and mercenaries only after according them proper trials, as required by the Hague Convention. Finally, Atlantis' ignition of several oil fields was an act of military necessity, while Bergenia's destruction of the environment through oil spills was an impermissible belligerent

reprisal.

IV.

Atlantis' closure of the Atlantis-Bergenia Pipeline was a permissible response to Bergenia's illegal oil export practices, as well as to Bergenia's atrocities against the Ethlantians and its armed threat against Atlantis. Bergenia violated international law by failing to follow directives from the Organization of Oil-Producing States (OPS). Bergenia joined the OPS and complied with its directives, or concealed its noncompliance, for a period of years. Other OPS members relied on Bergenia's implied representation that it would act in good faith with regard to OPS directives. Those members voluntarily reduced their oil exports, while Bergenia changed its course of conduct and began violating the directives. Atlantis has been severely harmed by Bergenia's misrepresentation, because Atlantis has agreed not to increase its own oil exports even though Bergenia's conduct has contributed to a drastic reduction in world oil prices. Bergenia should therefore be estopped from denying the binding effect of OPS directives. Bergenia's intentional conduct has been so detrimental that it also constitutes an act of economic aggression against Atlantis.

Atlantis' closure of the Pipeline is justified by principles of treaty interpretation, economic reprisal, and self-defense. Customary international law, as codified by the Vienna Convention on the Law of Treaties, permits a State to terminate a treaty if a fundamental change in circumstances has occurred. Bergenia's change in conduct regarding the OPS directives constitutes a fundamental change in circumstances. Atlantis would not have permitted Bergenia to install a pipeline within Atlantis' borders had it known that the pipeline would later be used to assist Bergenia in violating OPS directives. Bergenia's noncompliance also changed Atlantis' duty under the treaty by obligating Atlantis to assist Bergenia in breaching duties owed to all OPS members. This radical

change in circumstances terminates Atlantis' duties under the treaty.

Atlantis' closure of the Pipeline was also a permissible economic reprisal for Bergenia's failure to follow OPS directives and for Bergenia's atrocities against the Ethlantians. The closure was a limited and proportionate response to those violations, enacted only after other attempts to remedy the violations had failed.

Atlantis' closure of the Pipeline was also a legitimate act of self-defense. Atlantis was under no duty to permit Bergenian oil to flow over its territory when the proceeds from that oil were being used to amass weapons that would later be used against Atlantis. The continued performance of the Pipeline Treaty would have threatened Atlantis' security and independence, and Atlantis was fully justified in refusing to provide Bergenia with the means to attack Atlantis.

PLEADINGS AND AUTHORITIES

I. ATLANTIS' ACTIONS TO PROTECT ITSELF AND THE ETHLANTIANS ARE CONSISTENT WITH INTERNATIONAL LAW

The principles of humanitarian intervention and self-defense fully justify the actions that Atlantis has taken in Province. Atlantis intervened in Province to protect innocent people from murder, torture, and other severe human rights violations, an action consistent with customary international law and the U.N. Charter. Atlantis also entered Province to forestall a Bergenian attack on Atlantis, an action consistent with customary international law and article 51 of the U.N. Charter. Those principles also justify Atlantis' continued presence in Province and its response to the Coalition armed attack on Atlantis and Province.

A. The Principle of Humanitarian Intervention Justifies Atlantis' Actions in Province

Humanitarian intervention is "the justifiable use of force for the purpose of protecting the inhabitants of another State from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice."¹ Although article 2(4) of the U.N. Charter generally prohibits the use of force, Atlantis' intervention is permissible if humanitarian intervention is a valid principle of international law, if the Bergenian mistreatment of Ethlantians warranted intervention, and if the intervention in Province was appropriately limited in scope.²

1. Humanitarian Intervention is a Valid Principle of Customary International Law

Formation of customary international law requires both state practice and

¹ Ellery C. Stowell, International Law 348 (1931).

² See, e.g., Jean-Pierre L. Fonteyne, The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter, 4 Cal. W. Int'l L.J. 203, 262-65 (1974).

opinio juris.³ The frequency of past humanitarian interventions, and the justifications that States have given for those actions, suggests that the doctrine meets both requirements for establishing a customary norm. The principle of humanitarian intervention has existed for six hundred years, and scholars cite dozens of interventions that were primarily motivated by humanitarian concerns.⁴ Examples include the numerous European interventions into the Turkish/Moslem Ottoman Empire in the 19th century, the multinational rescue mission in Congo (Stanleyville) in 1964, and the Tanzanian intervention in Uganda in 1979.⁵

The abundance of state practice and opinio juris concerning humanitarian intervention led Hersch Lauterpacht to conclude that there is

a substantial body of opinion and practice in support of the view . . . that when a State renders itself guilty of cruelties against and persecutions of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible.⁶

The International Law Association states that "the doctrine of humanitarian intervention appears to have been so clearly established that only its limits and not its existence is subject to debate."⁷ The International Law Commission has also supported the right of States to enforce rules of customary international law

³ North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

⁴ Michael J. Bazylar, Reexamining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia, 23 Stan. J. Int'l L. 547, 573, 582-87 (1987).

⁵ Id.; see also Fonteyne, supra note 2, at 204.

⁶ 1 L. Oppenheim, International Law 312 (8th ed. H. Lauterpacht 1955).

⁷ Int'l L. Ass'n, The International Protection of Human Rights by General International Law, Interim Report of the Sub-Committee, International Commission on Human Rights 11 (1970); see e.g., South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.) Second Phase, 1966 I.C.J. 6, 323, 373-74, 441 (July 18) (Jessup, J., dissenting); Derek W. Bowett, Self-Defense in International Law 95 (1958).

that have "been created or established for the protection of human rights and fundamental freedoms."⁸

This Court has recognized the right of States to seek remedies against another State that violates the human rights of its own citizens. In the Barcelona Traction case,⁹ this Court described "principles and rules concerning the basic rights of the human person" as obligations erga omnes, giving "all States a legal interest in their protection."¹⁰ Under proper circumstances, humanitarian intervention is a permissible remedy when other remedies have failed.

The failure of States to intervene in specific circumstances does not undermine the validity of humanitarian intervention under customary international law. The community of nations may have benefitted from intervention in some situations, such as the Nazi extermination of six million Jews in the 1930's and 1940's. However, States more often fail to intervene due to political, economic, or strategic considerations, and not due to a perception that legal norms prohibit such interventions. Similarly, even if the doctrine has been used less frequently in recent times, this does not mean that the principle of humanitarian intervention has been replaced by a contrary customary norm.¹¹

a. The U.N. Charter Has Not Eliminated the Right of Humanitarian Intervention

The U.N. Charter has neither expanded nor eliminated the right of humanitarian intervention. Rather, the principle remains unchanged in light of

⁸ Int'l L. Comm'n, Draft Articles on State Responsibility, Report of the International Law Commission on the Work of its Thirty-Seventh Session, U.N. GAOR, 40th Sess., Supp. No. 10, at 25, U.N. Doc. A/40/10 (1985).

⁹ Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Second Phase 1970 I.C.J. 3 (Feb. 5).

¹⁰ Id., Reporters' Note 2, at 32.

¹¹ Fonteyne, supra note 2, at 234.

the text of the U.N. Charter, the major purposes of the Charter, and the inability of the United Nations to adequately enforce norms of human rights.

1) The Text of Article 2(4) Has Not Eliminated The Right of Humanitarian Intervention

Article 2(4) of the U.N. Charter prohibits the use of force "against the territorial integrity or political independence of any state."¹² Inclusion of the terms "territorial integrity" and "political independence" in article 2(4) would be surplusage if the U.N. Members intended to eliminate all uses of force except self-defense.¹³ Those terms therefore qualify the general prohibition against the use of force. When properly limited in scope and duration, humanitarian intervention does not fall within the article 2(4) prohibition because the doctrine permits the use of force only in defense of innocent victims. Such intervention is not directed at the territorial or political sovereignty of the offending State.

2) Humanitarian intervention is consistent with the U.N. Charter's purpose of protecting fundamental human rights

The U.N. Charter reaffirms "faith in fundamental human rights, [and] in the dignity and worth of the human person."¹⁴ Indeed, article 56 requires U.N. Members "to take joint and separate action" to implement the purposes of article 55, which include "universal respect for, and observance of, human rights and fundamental freedoms for all."¹⁵ The Charter therefore contemplates a need to balance conflicting goals of conflict-minimalization under article 2(4) and protection of human rights under articles 55 and 56. The pursuit of human freedom

¹² U.N. Charter art. 2, para. 4.

¹³ See, e.g., Oscar Schachter, The Right of States to Use Armed Force, 82 Mich. L. Rev. 1620, 1625 (1984).

¹⁴ U.N. Charter, Preamble, paras. 1-2; art. 1, paras. 1, 3.

¹⁵ Id. art. 55(c); see also arts. 62(2), 68, 76(c).

and dignity sometimes carries a price. Avoidance of conflict cannot be the only principle guiding the conduct of States.

3) The U.N. Charter has not replaced humanitarian intervention in the area of human rights law enforcement

As early as 1948, Judge Phillip Jessup was concerned that the U.N. collective action scheme could not replace humanitarian intervention because of the United Nation's inability to respond quickly enough to preserve human life.¹⁶ The right of permanent members of the Security Council to veto resolutions has also thwarted collective action efforts in past cases, such as the British and French veto during the 1956 Suez crisis, and the Soviet Union's veto during the Soviet invasion of Afghanistan.¹⁷ Until the 1990 Iraqi invasion of Kuwait, the Security Council was never able to take military action except when a permanent member was absent from the proceedings.¹⁸ The action against Iraq was "most notable as a momentous exception to the general pattern of U.N. practice."¹⁹

b. The Nicaragua Case Has Not Invalidated the Principle of Humanitarian Intervention

In the Nicaragua case,²⁰ this Court ruled that the United States violated customary norms concerning the use of force, the principle of non-intervention, and the principle of State sovereignty by engaging in certain acts that supported opposition forces within Nicaragua. The Court stressed, however, that

[a] prohibited intervention must . . . be one bearing on matters in which each State is permitted, by the principle of State

¹⁶ See, e.g., Phillip C. Jessup, A Modern Law of Nations 170-71 (1948).

¹⁷ Anthony C. Arend, International Law and the Recourse to Force: A Shift in Paradigms, 27 Stan. J. Int'l L. 1, 7 (1990).

¹⁸ Id.

¹⁹ Id. at 9-10.

²⁰ Military and Paramilitary Activities In and Against Nicaragua (Nic. v. U.S.), 1986 I.C.J. 14 (Judgment on Merits of June 27).

sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices²¹

Severe human rights violations, such as the killing and torture of innocent victims, are not political, economic, social, or cultural choices available to States under the principle of sovereignty.²² Thus, intervention to secure basic human rights is not a "prohibited intervention" within this Court's definition of the term. The Nicaragua case does not prohibit limited intervention that is narrowly tailored to protect fundamental human rights.

2. The Murder and Torture of Many Ethlantians Was a Sufficiently Severe Violation of Human Rights to Justify Atlantis' Intervention In Province

Treaty law, customary law, and norms of jus cogens prohibit a State from violating the fundamental human rights of its citizens. The U.N. Charter affirms this principle,²³ and Bergenia is a party to the Charter. The 1948 Universal Declaration of Human Rights provides that all people have the right to life and liberty,²⁴ freedom from torture and inhumane treatment,²⁵ and equal rights under municipal law regardless of race.²⁶ The United Nations adopted the Declaration by unanimous vote, and most participants at the time felt that it expressed "more forcefully rules that already were recognized by customary international law."²⁷

²¹ Id. at 108.

²² See infra pp. 6-7.

²³ U.N. Charter, Preamble, paras. 1-2; art. 1, para. 1, 3; art. 55(c).

²⁴ Universal Declaration of Human Rights, art. 3, G.A. Res. 217 A, U.N. Doc. A/810, at 71 (1948).

²⁵ Id. art. 6.

²⁶ Id. arts. 6-10.

²⁷ Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather than States, 32 Am. U. L. Rev. 1, 15 (1982).

Even if not a codification, subsequent state practice has made the Declaration binding concerning gross violations. For example, "[s]everal of the governments that were skeptical about the value of the Declaration did not hesitate to invoke it against other countries."²⁸ A host of international declarations and covenants have also reiterated and expanded the principles of the Declaration.²⁹ This Court has recognized that many of the principles are so fundamental that they are considered jus cogens.³⁰

Bergenia's atrocities against the Ethlantians were severe violations of international human rights law. Atlantis produced evidence that Bergenia murdered Ethlantians without benefit of a public hearing. (C. 4). Bergenia tortured Ethlantians to force them to confess to crimes they had not committed. (C. 4). Bergenia also enforced laws of ethnic discrimination against the Ethlantians, and forced the Ethlantians to live in ghettos lacking all public services. (C. 2,4). Those acts were grossly inconsistent with the U.N. Charter, numerous U.N. declarations and conventions, and fundamental norms of jus cogens.

²⁸ Id. at 16.

²⁹ See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967); Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/CN.4/1984/72, Annex (1984); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [1950 European Convention on Human Rights]; American Convention on Human Rights, July 18, 1978, OEA/Ser.K/XVI/1.1 Doc. 65, Rev. 1, Corr. 1, OAS Treaty Series, No. 36 (1970); African Charter on Human and Peoples' Rights, Oct. 21, 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (1982).

³⁰ Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 56, 57 (January 26) (apartheid and racial discrimination are violations of the fundamental law of humanity); See also Theodor Meron, Human Rights Law Making in the United Nations 187, 189 (1986); Restatement (Revised) of the Foreign Relations Law of the United States, Section 703 reporters' note 3 (1986).

3. Atlantis' Intervention In Province Was Sufficiently Limited in Scope and Humanitarian in Nature, and It Occurred Only After Other Remedies Had Failed

The principle of humanitarian intervention properly requires an overriding humanitarian motive on the part of the intervening state, no unnecessary force or duration of the operation, and reasonable attempts to exhaust peaceful means of settlement.³¹ Atlantis fully complied with those requirements. Its intervention was carefully limited to the territory of Province and was accomplished with minimum casualties. Demanding only that Bergenia cease its human rights violations, Atlantis did not seek to interfere with Bergenia's political or economic structure. Atlantis also made reasonable attempts to exhaust peaceful remedies. Prior to the intervention, Atlantis attempted to resolve this dispute through diplomatic channels, and through a futile appeal to the U.N. Human Rights Commission. (C. 2-4). Atlantis also informed the U.N. Security Council of its actions shortly after the intervention. (C. 4).

B. The Principle of Anticipatory Self-Defense Justifies Atlantis' Defense of Itself and the Ethlantians

International law is not a suicide pact.³² Customary international law recognizes a right of anticipatory self-defense when a State is in imminent danger so great that defensive action is necessary for self-preservation.³³ There is no evidence that the framers of the U.N. Charter intended to impose new limits on this traditional right of States by inserting article 51, which expressly reserves a right of self-defense "if an armed attack occurs."³⁴ A restrictive

³¹ See, e.g., Fonteyne, supra note 2, at 262-65.

³² Louis R. Beres, After the Gulf War: Israel, Pre-emption, and Anticipatory Self-Defense, 13 Hous. J. Int'l L. 259, 263 (1991).

³³ Schachter, supra note 13, at 1634.

³⁴ Myres S. McDougal, The Soviet Cuban Quarantine and Self-Defense, 57 Am. J. Int'l L. 597, 599 (1963).

interpretation of article 51 would require an incorrect substitution of the words "if an armed attack occurs" with the words "if, and only if, an armed attack occurs."³⁵ This interpretation would be inconsistent with principles of treaty interpretation.³⁶ It would also ignore the reality that, in modern warfare, a State cannot simply wait to absorb a lethal first strike without risking annihilation.³⁷

Atlantis had good reason to fear an imminent attack from Bergenia. Bergenia began exporting double the amount of oil called for by Organization of Oil-Producing States (OPS) directives, funneling the additional receipts into the purchase of offensive weapons. (C. 2,3). By early 1990, Bergenia was diverting nearly 23% of its G.N.P. to military expenditures, (C. 3), a figure roughly double that of many similarly situated States.³⁸ Further, Bergenia had massed forces along Atlantis' borders, and had mobilized forces in preparation for a conflict with Atlantis. (C. 2,3). Bergenia also had formed a Coalition with other States designed to ensure numerical superiority over Atlantis in case of armed conflict. (C. 3). Those actions, combined with Bergenia's continued persecution of people of the same ethnic group as the population of Atlantis, (C. 2-4), sent Atlantis a clear signal of impending hostilities. Atlantis responded with a limited intervention that was consistent with its legal right of self-defense.

³⁵ Id.

³⁶ Id.

³⁷ Wolfgang G. Friedmann, The Changing Structure of International Law 259-60 (1964); Beres, supra note 32, at 266.

³⁸ See 1991 International Reports, IBC Int'l Country Risk Guide, August 1991 (listing military expenditures as percentage of G.N.P.: Iran 11.70%; Kuwait 12.84%; Israel 12-15%).

C. Atlantis' Continued Presence in Province Despite, Contrary U.N. Security Council Resolutions, Is Consistent With International Law

Article 25 of the U.N. Charter requires Members to obey Security Council decisions, and Security Council Resolution 910 (1990) (C. 5) ordered Atlantis to withdraw from Province. However, articles 55 and 56 require Members to take "joint and separate action" to ensure "observance of human rights and fundamental freedoms."³⁹ When a Security Council resolution conflicts with the legal rights and duties of a State, that State must determine which principles of international law are of overriding importance. Atlantis has determined that its legal right and duty to protect Ethlantians from severe human rights violations is of greater importance than its duty to obey Resolution 910. This Court is the appropriate body to decide whether Atlantis' intervention complied with international law.

II. **BERGENIA'S ARMED AGGRESSION AGAINST ATLANTIS VIOLATED INTERNATIONAL LAW**

Bergenia violated both treaty law and customary international law by attacking Atlantis and committing war crimes during the hostilities. Bergenia's conduct is not justified by U.N. Security Council actions, nor by doctrines of self-defense, military necessity, or belligerent reprisal.

A. Security Council Resolution 928 (1990) Did Not Authorize Armed Measures Against Atlantis

The Security Council's authorization of "all necessary means" in Resolution 928 (1990) (C. 5) did not imply that Bergenia could launch an armed attack against Atlantis. The U.N. Charter prohibits the use of force,⁴⁰ except in cases of self-defense or humanitarian intervention. Because the Security Council must comply with the principles of the United Nations,⁴¹ it must follow Chapter VII

³⁹ U.N. Charter arts. 56 & 55(c).

⁴⁰ Id. art. 2, para. 4.

⁴¹ Id. art. 25.

procedures before employing armed force.⁴² Under article 41, the Security Council should first employ means short of the use of force to resolve threatening situations. If those means fail, the Security Council may then authorize armed action under article 42, and may call upon U.N. Members to supply troops and military materials.⁴³

Resolution 928 (1990) permits only peaceful means of dispute resolution because its content is compatible only with an article 41 action. First, the Security Council did not expressly invoke article 42 as the basis for Resolution 928. (C. 5). Second, the Council did not request troops and materials from U.N. Members under article 43, which is an implied requirement of article 42 armed action. Third, the Council did not establish a centralized command structure under articles 46 and 47, which is also an implied requirement of article 42 armed action. Finally, the Council and parties have not yet exhausted peaceful options as required by article 41. Until article 41 measures had proven inadequate, the Council could not resort to article 42.⁴⁴ Bergenia and its allies violated the U.N. Charter by militarily enforcing Resolution 928 without article 42 authorization by the Security Council.

B. The Principle of Self-Defense Does Not Justify the Coalition's Armed Attack

U.N. Charter article 51 permits Members to exercise their right of self-defense against armed aggression until the Security Council takes measures to maintain peace and security.⁴⁵ The Council implemented Resolution 928 "to restore international peace and security in the area." (C. 5). Thus, Bergenia

⁴² Id. arts. 39-51.

⁴³ Id. art. 43.

⁴⁴ Id. art. 42.

⁴⁵ Id. art. 51.

could not exercise its right of self-defense against Atlantis unless the Council had been unable to restore order in Province.⁴⁶ At the time Resolution 928 was adopted, however, Atlantis had already occupied Province as part of a legitimate humanitarian intervention. Bergenian troops were facing no immediate threat of armed aggression, and the Security Council was in the process of peacefully resolving the conflict. Further, Bergenia has no basis for employing armed force because its own illegal atrocities against the Ethlantians created the conflict. The Coalition armed attack was premature, unauthorized, and unjustifiable.

C. Bergenian Violated Applicable Treaty Law Throughout the Armed Conflict

1. Bergenian is Responsible for All Violations by Its Coalition Partners

The principle of estoppel prevents a State from denying international responsibility for a dependent State's actions.⁴⁷ The Coalition States maintained dependent relationships with Bergenia during the war because they agreed to operate under Bergenian's military command and leadership. (C. 4). Bergenia also accepted full responsibility for all Coalition actions. (C. 4). Consequently, Bergenia should be estopped from denying its responsibility for the Coalition's conduct during the hostilities.

Applicable treaties also impute State responsibility for violations committed by individuals that are part of the State's armed forces. The Geneva POW Convention states that "[p]risoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining

⁴⁶ See Thomas M. Franck and Faiza Patel, The Gulf Crisis in International and Foreign Relations Law-UN Police Action in Lieu of War: "The Old Order Changeth," 85 Am. J. Int'l L. 63 (1991).

⁴⁷ See Ian Brownlie, Principles of Public International Law 456 (4th ed. 1990).

Power is responsible for the treatment given them."⁴⁸ Geneva Protocol I provides that "[a] Party to the conflict...shall be responsible for all acts committed by persons forming part of its armed forces."⁴⁹ Similarly, the Hague Convention holds a belligerent party responsible for all acts committed by persons forming part of the party's armed forces.⁵⁰ Thus, Bergenia is ultimately responsible for actions taken by members of its armed forces during the conflict.

2. The Coalition's Actions During the Conflict Violated International Law

a. Coalition Members Violated International Law by Bombing a Civilian Power Station and Civilian Bridges

In order to protect both civilian populations and property, Protocol I requires States to direct their operations only against military objectives.⁵¹ A valid military objective is one which makes an effective contribution to military action, and whose destruction offers a definite military advantage.⁵² Attacks that cause unnecessary civilian deaths are war crimes under Protocol I.⁵³ When considering a target that serves both military and civilian populations, a State must assess both the military advantage gained from attacking the target and the damage inflicted on civilians.⁵⁴ An attack is illegal if it causes incidental

⁴⁸ Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 12, 6 U.S.T. 3316, 74 U.N.T.S. 135 [hereinafter Geneva POW Convention].

⁴⁹ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 91, 16 I.L.M. 1391 [hereinafter Protocol I].

⁵⁰ Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention].

⁵¹ Protocol I, supra note 49, art. 48.

⁵² Id. art. 52, para. 2.

⁵³ Id. art. 85, paras. 3(a) & 5.

⁵⁴ Id. arts. 50, 52.

injuries to civilians in excess of the military advantage obtained.⁵⁵

Bergenia and its allies breached Protocol I by attacking the Alpha power station and the bridges crossing the Beta River, and by destroying the Delta Sanitation Plant. (C. 6,7). Bergenia derived very little military gain from its attacks on the power station and the bridges. The structures were being used mostly by the civilian populace. The Alpha station supplied power to a largely civilian area, while the bridges provided transportation routes for civilians. (C. 6). The Bergenian attacks also caused severe injury to the civilian population. The attacks resulted in heavy civilian casualties and rendered basic food and medical supplies inaccessible to civilians. (C. 6). The destruction of the Delta Sanitation Plant created severe harm to Atlantisan civilians by causing an outbreak of cholera. (C. 7). Bergenia breached its international obligations by engaging in attacks that offered little military advantage while causing severe harm to civilian populations.

b. The Coalition's Treatment of Persons Hors de Combat, Prisoners of War, and Ethlantian Civilians Was Illegal

Protocol I prohibits attacks upon persons hors de combat.⁵⁶ A person is an hors de combat after clearly expressing an intent to surrender and submitting to the power of an adverse Party.⁵⁷ At the Epsilon Caves, Atlantisans were in the hands of an enemy power, and by exiting the caves with their hands in the air, they were expressing an intent to surrender. (C. 7). Victorian troops committed a war crime by killing several Atlantisan hors de combat. (C. 7).

International law also extends protection to prisoners of war (POWs). POWs

⁵⁵ Id. art. 51, para. 5(b).

⁵⁶ Id. art. 41, para. 1; art. 85, para. 3(e).

⁵⁷ Id. art. 41, para. 2 (a),(b).

must be treated humanely,⁵⁸ including the avoidance of measures that would cause POW deaths.⁵⁹ Devonese troops failed to provide sufficient care to Atlantisan POWs. One hundred POWs died in a march to the Fort Mu Prison Camp (C. 8), presumably from fatigue. Even though POWs must be housed in conditions as favorable as those of the Detaining Power's troops,⁶⁰ the Atlantisan POWs were quartered in makeshift housing. (C. 8). Because the location was an established prison camp, the Devonese troops probably occupied barracks which were better than those provided for POWs.

States may use POW labor, but they cannot force captured officers to perform physical labor.⁶¹ The tasks performed by POWs must also have no connection with the operations of war.⁶² Devon violated both of those provisions by forcing Atlantisan officers to perform physical labor, (C. 8), and by having POWs repair and rebuild military installations. (C. 9). Bergenia must share responsibility for those actions because Devon was militarily dependent on Bergenia.

Civilians are also accorded certain safeguards to ensure that they are not subject to widespread abuses in times of war. Civilians are entitled to various fundamental guarantees under Protocol I.⁶³ For example, the murder of civilians is prohibited at any time and in any place whatsoever.⁶⁴ Additionally, no

⁵⁸ Hague Convention, supra note 50, art. 4; Geneva POW Convention, supra note 48, art. 13.

⁵⁹ Geneva POW Convention, supra note 48, art. 13.

⁶⁰ Id. art. 25.

⁶¹ Hague Convention, supra note 50, art. 6; Geneva POW Convention, supra note 48, art. 49.

⁶² Hague Convention, supra note 50, art. 6.

⁶³ Protocol I, supra note 49, art. 75.

⁶⁴ Id. art. 75, para. 2.

criminal sentence may be passed unless it follows a conviction pronounced by an impartial and regularly constituted court.⁶⁵ The members of the Ethlantian Liberation Front (ELF) (C. 7) should have been treated as civilians because they were not recognizable as POWs,⁶⁶ nor were they members of the armed forces of either Atlantis or Bergenia.⁶⁷ Bergenia did not afford ELF members the protections befitting their civilian status. Bergenia's disregard of its treaty obligations resulted in the summary executions of ELF members, a flagrant violation of international law. (C. 7).

c. Victoria Violated International Law by Using Riot Control Gases Against Atlantisans

Customary international law prohibits the use of riot control agents during warfare. State practice and opinio juris have amply established this norm. Since World War I, States have used gaseous weapons only in a few isolated incidents,⁶⁸ incurring virtual unanimous condemnation by the world community. Treaties and declarations have declared the illegality of gaseous weapons. For example, the Gas Protocol prohibits "the use in war of asphyxiating, poisonous or other gases."⁶⁹ The comprehensive scope of those terms indicates that riot control agents are included in the category of prohibited gases.⁷⁰ Many observers conclude that subsequent state practice has elevated the Gas Protocol to the level

⁶⁵ Id. art. 75, para. 4.

⁶⁶ Geneva POW Convention, supra note 48, art. 4.

⁶⁷ See Protocol I, supra note 49, art. 43.

⁶⁸ See Timothy L. McCormack, International Weapons and the Use of Chemical Weapons in the Gulf War, 21 Cal. W. Int'l L.J. 1, 6 (1990).

⁶⁹ Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Gas Protocol].

⁷⁰ See Ann Thomas & A.J. Thomas, Jr., Legal Limits on the Use of Chemical and Biological Weapons 74 (1970).

of customary international law.⁷¹ The United Nations General Assembly has also condemned the use of "any chemical agents of warfare."⁷² Victorian ground troops violated customary international law by debilitating Atlantisan troops with riot control agents at the Epsilon Caves, (C. 7), and Bergenia must share responsibility for that violation.

d. Bergenia Caused Major Environmental Damage by Spilling Oil Along Atlantis' Coast

States must ensure that their actions during a conflict do not cause severe damage to the natural environment.⁷³ States must also refrain from methods of warfare that are directed against the general health of another State's civilian population.⁷⁴ When Bergenia spilled oil from an Atlantisan oil refinery, (C. 7), the plants and shrubbery of the area were destroyed. Additionally, the spill damaged Devonese desalination plants, causing a depletion of the water supply and threatening the health of the Devonese population. (C. 8). The oil spill was a violation of international law because of its adverse effects on both the natural environment and on civilian populations.

III. ATLANTIS COMPLIED WITH INTERNATIONAL LAW BEFORE AND DURING THE CONFLICT

A. Atlantis' Occupation of Province Was Orderly and Did Not Injure Civilians

A territory is occupied when it is placed under the authority of a hostile army.⁷⁵ Atlantis occupied Province after sending its military forces into the

⁷¹ See George Bunn, Banning Gas and Germ Warfare: Should the United States Agree?, 1969 Wis. L. Rev. 369, 381.

⁷² Question of Chemical and Bacteriological (Biological) Weapons, G.A. Res. 2603A, U.N. GAOR 1st Comm., 24th Sess., 1717th mtg. at 16, U.N. Doc. A. Res./2603A (1969).

⁷³ Geneva Protocol I, supra note 49, art. 55.

⁷⁴ Id. art. 55.

⁷⁵ Hague Convention, supra note 50, art. 42.

area as an act of humanitarian intervention and self-defense. An occupying power must take all measures to restore and ensure public order and safety.⁷⁶ Atlantis did maintain public order and safety in Province by managing police and public services. (C. 4).

B. Atlantis Attempted to Destroy Only Military Targets

Protocol I forbids the use of civilian populations to shield military objectives from attacks.⁷⁷ Bergenia illegally built a missile-launching site merely 660 feet from a hospital, (C. 6), endangering the hospital's staff and patients. The missile-launcher was a valid military objective,⁷⁸ and Atlantis justifiably attacked it. (C. 7). Atlantis employed ballistic missiles with limited targeting accuracy because it probably lacked a more sophisticated weapon for this purpose. Unlike Bergenia, Atlantis had not been spending increasing sums on sophisticated weapons systems.

C. Atlantis Legally Carried Out Sentences on Spies and Mercenaries

A spy may be punished after a proper trial,⁷⁹ and mercenaries are entitled to fewer protections than are combatants and prisoners of war.⁸⁰ Atlantis captured three spies and twenty-seven mercenaries, (C. 7), and accorded them the limited protections required under international law. Atlantis found those people guilty of murder (C. 7) and was therefore justified in executing them.

⁷⁶ Id. art. 43.

⁷⁷ Geneva Protocol I, supra note 49, art. 51, para. 7.

⁷⁸ See International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 632 (1987).

⁷⁹ Hague Convention, supra note 50, art. 30.

⁸⁰ Protocol I, supra note 49, art. 47, para. 1.

D. Atlantis Was Compelled to Ignite the Oil Fields as an Act of Military Necessity

In a desperate attempt to protect its people from the numerically superior Coalition, Atlantis ignited several oil fields. However, this did not give a right of reprisal to Bergenia that would justify the burning of the Kappa oil fields. Protocol I prohibits attacks against the natural environment by way of reprisal.⁸¹ Belligerent reprisals are an unsatisfactory method of enforcing the laws of warfare because they cause continued violations of international law.⁸² Atlantis acted out of military necessity, while Bergenia damaged the environment through an impermissible use of belligerent reprisal.

IV. ATLANTIS' CLOSURE OF THE PIPELINE WAS A PERMISSIBLE RESPONSE TO BERGENIA'S ILLEGAL OIL EXPORT PRACTICES, BERGENIA'S ATROCITIES AGAINST THE ETHLANTIANS, AND BERGENIA'S ARMED THREAT AGAINST ATLANTIS

Principles of treaty termination, economic reprisal, and self-defense justify Atlantis' closure of the Atlantis-Bergenia pipeline. Bergenia violated international law by failing to follow oil export directives from the O.P.S., thus committing an act of economic aggression and attempting to benefit from its misrepresentations concerning its O.P.S. membership. Bergenia's refusal to comply with O.P.S. directives sometime after the ratification of the Pipeline Treaty constitutes a changed circumstance, permitting Atlantis to terminate the treaty. Atlantis is also justified in taking economic reprisals due to Bergenia's failure to observe O.P.S. directives and Bergenia's severe human rights violations against the Ethlantians. Further, Atlantis exercised its right of self-defense within its own borders by closing a pipeline that provided funds to a hostile enemy for the buildup of weapons that would later be used against Atlantis.

⁸¹ Id. art. 55.

⁸² See Remigiusz Bierzanek, Reprisals as a Means of Enforcing the Laws of Warfare: the Old and the New Law, in The New Humanitarian Law of Armed Conflict 232 (Antonio Cassese ed. 1979).

A. Bergenia's Oil Export Practices Violate International Law

1. Bergenia Should Be Estopped from Violating the O.P.S. Directives

The Permanent Court of International Justice recognized that State conduct and informal agreements may preclude States from later inconsistent conduct that may harm another State. In the Eastern Greenland case,⁸³ the Court held that Norway was precluded from contesting Danish sovereignty over Greenland because Norway had become a party to several international agreements that characterized Greenland as Danish, and because Norway had made informal promises to Denmark that it would not contest Danish sovereignty over Greenland.⁸⁴ The principle of estoppel prevents one State from denying the implications of conduct upon which another State has acted to its detriment, or upon which the State engaging in the conduct has secured some benefit.⁸⁵ Estoppel may be "subsumed under the general principle of good faith, which can be construed to impose on States . . . a duty to refrain from inconsistent acts vis-a-vis complying States."⁸⁶

Bergenia has violated international law by ignoring the directives of the O.P.S., contrary to its prior conduct, and at the expense of its fellow Members who relied upon that prior conduct. Bergenia joined the O.P.S. voluntarily. Bergenia either complied with the directives, or hid its noncompliance, for some years after joining the O.P.S. (C. 1,2). Bergenia's membership in the O.P.S. and

⁸³ Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (April 5).

⁸⁴ Id.; see also Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20) (holding that a series of unilateral statements by France that it would refrain from future atmospheric nuclear tests created a legal obligation for France to follow a course of conduct consistent with its statements).

⁸⁵ See, e.g., Derek W. Bowett, Estoppel Before International Tribunals and its Relation to Acquiescence, 33 Brit. Y.B. Int'l L. 176, 183 (1957).

⁸⁶ Louis Henkin, et. al., International Law: Cases and Materials 129 (2d ed. 1987) (quoting Oscar Schachter, Resolutions of the General Assembly As Evidence of Law, 178 Rec. des Cours 114-21 (1982)).

its initial compliance was a strong affirmation of Bergenia intent to comply with the directives, and Atlantis relied upon that affirmation in agreeing to restrict its own oil production. The nature of the O.P.S. agreement also evidenced its Members' intent to comply with O.P.S. directives. Although the agreement does not proclaim its directives as legally binding, (C. 1), it is far more than a broad declaration of guiding principles.⁸⁷ The agreement was the result of oil production negotiations, and it sets forth specific quotas for the production and sale of a specific commodity for the benefit of all members. (C. 1,2). The apparent compliance of other Members for many years may have even elevated the directives of the O.P.S. to the level of regional customary international law.⁸⁸

Bergenia has received the benefit of membership in the O.P.S. while not meeting its obligations to its fellow Members. By limiting their oil production, Atlantis and other Members have established a climate of higher oil prices by foregoing a portion of their potential oil sales. Bergenia has directly benefitted from the sacrifices of its fellow Members, while substantially violating the obligations that it implied it would observe. Bergenia's conduct has facilitated a 17% drop in oil prices that has severely harmed Atlantis, which generates 75 % of its G.N.P. from the production and sale of oil. (C. 2).

2. Bergenia's Conduct Constitutes an Act of Economic Aggression Against Atlantis

Although U.N. General Assembly resolutions are not binding international agreements, several resolutions evidence an emerging norm that prohibits economic aggression against States. This norm prohibits "the use of economic, political or any other type of measures to coerce another State in order to obtain from it the

⁸⁷ Oscar Schachter, The Twilight Existence of Nonbinding International Agreements, 71 Am. J.Int'l L. 296 (1977).

⁸⁸ See, e.g., Asylum (Colom. v. Peru), 1950 I.C.J. 266 (1950).

subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."⁸⁹ Bergenia has engaged in a pattern of coercive conduct toward Atlantis. Bergenia misled Atlantis by agreeing to limit its oil exports through O.P.S. directives and later refusing to comply with those directives. Bergenia benefitted from higher oil prices due to production controls placed on other O.P.S. Members, while Atlantis and other Members assumed the burden of production restraints. Bergenia later funneled the additional revenue into a massive arms buildup which was eventually used against Atlantis. (C. 3).

B. Principles of Treaty Termination Permit Atlantis to Close the Pipeline

The Vienna Convention on the Law of Treaties⁹⁰ is largely "a codification of the existing customary international law of treaties," and is accepted by many countries who are not yet a party to it.⁹¹ Although neither Atlantis nor Bergenia are parties to the Vienna Convention, most of its substantive provisions reflect binding customary norms. This Court has specifically recognized that article 62 of the Vienna Convention reflects customary international law.⁹² Article 62 provides that treaty obligations may be terminated if a fundamental change in circumstances occurs, provided that "the existence of those

⁸⁹ Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States, Principle 3, para. 2, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970); see also, Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9400 (1973); Charter of Economic Rights and Duties of States, art. 32, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974); Draft Code of Crimes Against the Peace and Security of Mankind, Adopted by the U.N. Int'l L. Comm'n, U.N. GAOR, 9th Sess., Supp. No. 9, at 11, U.N. Doc. A/2693 (1954).

⁹⁰ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (1969) [hereinafter Vienna Convention].

⁹¹ Mark W. Janis, An Introduction to International Law 15 (1988).

⁹² Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3 (1st Judgment, Feb. 2).

circumstances constituted an essential basis of the consent of the parties to be bound by the treaty,"⁹³ and that "the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."⁹⁴

Bergenia's refusal to follow O.P.S. directives terminates Atlantis' treaty obligations because it constitutes a fundamental change in circumstances. When the Pipeline Treaty was concluded in 1978, Bergenia appeared to be complying with OPS directives. Atlantis would not have permitted Bergenia to operate a pipeline within Atlantis' borders had it known that the pipeline would later be used to assist Bergenia in violating OPS directives. Thus, good faith compliance with the OPS directives was an essential basis of the Pipeline Treaty, and Bergenia's violations of the OPS directives changed an essential basis of Atlantis' consent to be bound to the treaty. Bergenia's noncompliance also transformed Atlantis' obligations under the Pipeline Treaty. Atlantis' initial obligation was merely permit Bergenian oil to flow over its territory. After Bergenia's noncompliance, however, Atlantis was obliged to assist Bergenia in violating obligations owed to Atlantis and other OPS members. Once hostilities arose between the countries, the pipeline was used as a source of revenue to purchase weapons for use against Atlantisans. This radical change in circumstances terminates Atlantis' obligations under the treaty.

C. Atlantis' Closure of the Pipeline Was a Just Reprisal for Bergenia's Failure To Observe OPS Directives and for Its Atrocities Against the Ethlantians

Neither traditional principles of customary international law nor contemporary international agreements prohibit the use of economic reprisals.⁹⁵

⁹³ Vienna Convention, supra note 90, art. 62(1)(a).

⁹⁴ Id. art. 62(1)(b).

⁹⁵ See, e.g., Derek W. Bowett, International Law and Economic Coercion, 16 Va. J. Int'l L. 245, 251 (1976).

Economic reprisals are permissible where the claimant state has been injured by another state's violation of an international norm, where other remedies are reasonably exhausted or unavailable, and where the economic measures are limited to the necessities of the case and are proportionate to the wrong done.⁹⁶ This Court has refused to characterize economic reprisals as illegal. In the Iranian Hostage case,⁹⁷ this Court recognized that the United States froze Iranian assets in the U.S. in reprisal for the Iranian seizure and detention of U.S. nationals. The Court did not hold those measures to be wrongful.⁹⁸

Atlantis' closure of the Atlantis-Bergenia pipeline was fully consistent with its right of economic reprisal. Bergenia was committing extreme atrocities against the Ethlantians, triggering Atlantis' erga omnes right to respond appropriately after attempts to correct the violations had failed. Atlantis was also entitled to respond to Bergenia's illegal oil export practices. The closure of the pipeline was a limited and proportionate response to the Bergenian violations, enacted only after other solutions had failed. (C. 2,4).

D. Atlantis' Closure of the Pipeline Was an Act of Self-Defense

A State may justify unilateral economic measures that might otherwise be illegal if it can show that the measures were taken in self-defense.⁹⁹ This is particularly true where another State's wrong poses an immediate danger to a State's security or independence.¹⁰⁰ The Vienna Convention on the Law of

⁹⁶ Id. at 252; see also Henkin, et. al, supra note 86, at 541; Restatement, supra note 30, at § 905.

⁹⁷ United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7 (Dec. 15).

⁹⁸ See Henkin, et. al., supra note 86, at 546.

⁹⁹ Bowett, supra note 95, at 249.

¹⁰⁰ Id. at 250.

Treaties does not contain any provision concerning the effect of the outbreak of hostilities upon treaties,¹⁰¹ but such a provision is part of customary international law. One international organization concludes that "a State exercising its right of individual or collective self-defense in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right."¹⁰²

Atlantis was under no duty to permit Bergenian oil to flow over its territory when the proceeds from that oil were being used to amass weapons that would later be used against Atlantis. The continued performance of the Pipeline Treaty would have threatened Atlantis' security and independence. Atlantis' closure of the pipeline was fully justified as an action of self-defense in accordance with the U.N. Charter.

V. CONCLUSION

For the foregoing reasons, the Applicant, the State of Atlantis, requests this Honorable Court to adjudge and declare that:

- 1) Atlantis' actions in protecting itself and the Ethlantians fully comply with international law;
- 2) Bergenia's launching and conduct of hostilities violates applicable international law;
- 3) Bergenia's oil export practices violate international law; and,
- 4) Atlantis' closure of the Atlantis-Bergenian pipeline fully complies with international law.

Respectfully Submitted,

¹⁰¹ Henkin, et. al., supra note 86, at 503.

¹⁰² The Effects of Armed Conflicts on Treaties, Resolution of the Institut De Droit International, adopted 1985 (Helsinki Session), at art. 7.