

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 RESPONDENT

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

Atlantis, Bergenia, Carola and Devon are major oil-producing States that occupy territory bordering on Media Gulf.(Compromis at 1)[hereinafter C.] The four states joined the Organization of Oil-Producing States (OPS).(C. 1) OPS is an informal inter-governmental organization whose non-binding directives and resolutions influence the prices, production and purchasers of oil.(C. 1)

On 10 July 1978 Atlantis and Bergenia entered into a bilateral treaty for the construction and operation of a pipeline to carry Bergenian oil over Atlantisan territory.(C. 1) By the terms of the treaty Atlantis and Bergenia agreed that the pipeline would operate at the maximum capacity of the pipes, with control of the flow at pump stations in both of the countries. Work began immediately after ratification of the agreement, and the installation began operation in early 1980 in accordance with the terms of the treaty.(C. 1)

During the 1980s, certain dissident groups in the north-eastern part of Bergenia (Province) attempted to disrupt the government and incite riots.(C. 1) Province, which lies along Atlantis' southern border, is populated mostly by Ethlantians, who are people of the same cultural and racial group as the population of Atlantis.(C. 1) As part of its internal political process, Bergenia had passed laws that provided these Ethlantians with their own defined areas in which to live, and established a special legal process for those dissidents who were charged with disruption of governmental activities.(C. 1-2) Tensions grew

and during some of the riots a number of demonstrators were killed by riot police.(C. 2) Some of the Ethlantian dissidents attempted to secede from Bergenia.(C. 2)

Atlantis began to inject itself into this internal crisis by complaining to Bergenia about the treatment of the Ethlantians, and warning that this was leading to insecurity and tension between the two states.(C. 2) Atlantis also complained about Bergenia's oil export levels, which were double the level of OPS guidelines.(C. 2) Atlantis claimed that Bergenia was interfering with stable oil prices and that its choice not to follow OPS-set production guidelines threatened to destroy the OPS.(C. 2) Atlantis underscored its displeasure by stating that over 75% of its Gross National Product stems from the production and sale of oil, which had decreased in price by 17%.(C. 2)

As dissidents continued to worsen the situation in Province, Atlantis mobilized large numbers of its military forces and engaged in a show of force along the border its shares with Bergenia.(C. 2) Concerned over this mobilization, Bergenia reinforced its own forces along the border and deployed large numbers of Security Police--special military troops sent to ensure the security of Province.(C. 2)

On 1 January 1990, Atlantis made a formal demand that the Ethlantians of Province be given autonomy, and Atlantis stated that if Bergenia failed to act, Atlantis would take any actions necessary to aid the Ethlantians in attaining that goal.(C. 2-3)

In the wake of extensive media coverage, teams from international non-governmental groups entered Province on 10 March 1990 to study the problems there.(C. 3) The teams did report some abuses toward the Ethlantians, including deprivation of certain rights guaranteed under Bergonian law.(C. 3)

During this period, Bergenia found it necessary to increase its purchases of

high technology weapons, including ballistic and cruise missiles, high technology aircraft, and modernized conventional weaponry.(C. 3) Nearly 23% of its Gross National Product was now lost to military expenditures.(C. 3)

On 1 July 1990, after Bergenia failed to give in to the pressure to modify its oil export practices, Atlantis shut down the pipeline without giving notice.(C. 3) Atlantis admitted that the measure was taken solely to compel Bergenia to conform its oil prices, production, and sales to the OPS guidelines.(C. 3)

Two weeks later Bergenia ordered full-scale mobilization of its military forces and began to deploy them in positions designed to assure defenses against attack from Atlantis.(C. 3) Bergenia also gained the support of several other states in the region who agreed to provide military assistance, if necessary, as a measure of collective self-defense.(C. 3) This group of states--Carola, Devon, Victoria, and Bergenia--agreed that if military action were taken, they would act as a Coalition, supplying military forces and materials, and operating under the military command and leadership of Bergenia.(C. 3-4) Bergenia would assume full responsibility for the conduct of any hostilities with Atlantis.(C. 4)

Atlantis again made allegations to the international organizations who had sent investigating teams into Bergenia, asserting that the Ethlantians continued to suffer under Bergenian rule.(C. 4) Atlantis claimed to have evidence of torture and substandard living conditions.(C. 4) The international teams noted that the demands of Atlantis upon Bergenia for changes in its domestic policies had produced no effect and that the UN Human Rights Commission had not seen fit to act on Atlantis' allegations.(C. 4)

On 10 August 1990, Atlantis without warning or formal declaration of war sent major military forces into Province.(C. 4) Atlantis claimed that it was acting pursuant to its right of self-defense, its rights under the United Nations

Charter, and its rights under customary international law relating to humanitarian intervention.(C. 4) Atlantis informed the United Nations Security Council of its action after it entered Province.(C. 4) Military forces from Atlantis quickly overran Province.(C. 4) They immediately took control of the police and public services and removed border controls at crossings between Atlantis and Province. (C. 4-5) Steps were taken to link communications and transportation facilities in Province with those of Atlantis.(C. 5)

Bergenia immediately petitioned the Security Council, denouncing the actions of Atlantis as aggression contrary both to customary international law and to Article 2(4) of the Charter.(C. 5) Upon receiving Bergenia's petition the Security Council met and unanimously adopted binding Resolution 910 (1990).(C. 5) Resolution 910 states in its preamble that the Security Council affirms "the inherent rights of individual or collective self-defense in response to the armed attack by Atlantis."(C. 5) The Resolution declares 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.

Atlantis did not withdraw its forces, but reinforced them, and minor skirmishes between the two sides ensued.(C. 5) On 25 August 1990, the Security Council passed Resolution 928 (1990), noting Atlantis' failure to comply with Resolution 910 and authorizing under Chapter VII of the 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)

Bergenia announced that in addition to considering itself authorized to act

under the resolutions, it reserved its right of self-defense under Article 51 of the Charter and under customary law.(C. 5-6)

The Security Council's October 15 deadline arrived without any sign of compliance by Atlantis.(C. 6) While Bergenia was consulting with its Coalition partners, Atlantis increased its military presence in the region.(C. 6) In the pre-dawn hours of October 16 the armed divisions of the Coalition, under the military direction of Bergenia, engaged the Atlantisan forces entrenched in Province and those stationed in Atlantis itself.(C. 6)

Coalition forces, having superior air power, launched air attacks on Atlantis and Province.(C. 6) These actions were aimed at military installations, aircraft, military bases and military forces, as well as power stations and utility facilities.(C. 6) One such attack, on the Alpha power station in Atlantis, which supplies power to a region largely civilian in character, did result sizable number of civilian casualties, predominately workers at the power station.(C. 6) Coalition forces attacked and rendered useless the bridges that cross the Beta River dividing the capital of Atlantis.(C. 6) Some food and medical supplies could not be transported to the civilian population in the area.(C. 6)

Coalition forces destroyed the Delta Sanitation Plant which served the military forces of Atlantis.(C. 7) Shortly after the attacks, cholera outbreaks occurred in the military detachments served by the Delta Plant, and in the civilian communities that were also served.(C. 7) Atlantis attacked a missile launching site, using ballistic missiles with limited targeting accuracy, causing widespread destruction.(C. 6-7) Gamma Hospital was approximately one-eighth of a mile from this site, in the capital city.(C. 6) The hospital was used to treat casualties of the war, including wounded prisoners of war.(C. 6-7)

Victoria's ground troops entered Province and found that they were unable to

dislodge Atlantisan troops who were entrenched in the Epsilon Caves there.(C. 7) They used flame-throwers and riot control agents to force them out.(C. 7) These troops, obviously blinded by riot control agents, left the caves with their hands in the air, demanding the right to surrender.(C. 7) A Victorian lieutenant, ignoring their pleas, ordered his platoon to fire on them.(C. 7) Many Atlantisans, though unarmed and on open ground, were killed.(C. 7) Bergenia troops entered the village of Zeta located in central Province.(C. 7) Thirty local insurgents, members of the Ethlantian Liberation Front who had controlled the village, were executed.(C. 7) Atlantis executed 30 captured personnel near the Atlantisan city of Eta.(C. 7) Atlantis claimed they were spies and mercenaries.(C. 7)

To inhibit Atlantis from landing on the coast of Devon, which borders Atlantis on the North, Bergenia spilled oil from Atlantis' Theta Refinery Complex into the waters along the coast of Atlantis.(C. 7) The oil spread along the coast and caused Devon's desalination plants to shut down, and causing other damage.(C. 7-8)

The military forces of Atlantis intentionally ignited the Iota oil fields in Bergenia to create smoke and fumes to obstruct attacks by the Coalition Forces.(C. 8) The fires caused severe damage to the environment.(C. 8) Fumes were carried by prevailing winds to other parts of Bergenia and to neutral states, harming crops and endangering the health of the population.(C. 8) Bergenia military forces in turn ignited the Kappa oil fields in Atlantis creating smoke and fumes and obscuring visibility.(C. 8) There was severe and wide-spread damage to the environment.(C. 8)

Because of the smoke and fumes, and the confusion of military and civilian targets, the Atlantisan airmen could not see their targets.(C. 8) Despite this lack of visibility they attacked the "general targeting area" and in doing so

inflicted heavy civilian casualties in the Bergenia city of Lambda.(C. 8)

Prisoners taken by Atlantis suffered harsh conditions.(C. 8) Devonese troops, without authorization or knowledge of the Bergenia High Command, marched a column of eight hundred Atlantian captives north for internment, of which seven hundred reached Devon's Fort Mu prison camp.(C. 8) Devon's food supply and distribution system had become nearly paralyzed in the weeks following 16 October 1990.(C. 8) The internees in Devon were fed an inadequate diet and lived in makeshift housing.(C. 8) Both officers and enlisted personnel were obliged to work long hours of heavy labor repairing and rebuilding roads and damage to military installations.(C. 8-9)

Fighting continued until 30 December 1990, when after heavy military casualties and severe destruction of civilian installations, hostilities were terminated by both sides, following a provisional cease-fire agreement. The Security Council then adopted Resolution 930 declaring that all states were requested to take measures necessary to assure the maintenance of peace and security in the region, and that they were to take prompt and effective measures to resolve their claims against each other.

In response to Resolution 930, Atlantis and Bergenia signed a Compromis bringing their disputes regarding Atlantis' closing down the pipeline, Bergenia's oil export practices and the recent military actions undertaken by both of them, before the International Court of Justice.

The Governments of Atlantis and Bergenia are members of the United Nations and have ratified the Hague Conventions of 1907, the Geneva Conventions of 1949, and the Geneva Additional Protocols of 1977.

QUESTIONS PRESENTED

I.

Whether a state's economic sovereignty may be restricted by enforcing limits on exports of its natural resources that were established through cartel policies, when the cartel arrangement on its face is non-binding, the state has renounced the limits, and there is no evidence of regional state practice requiring states to adhere to the cartel's guidelines.

II.

Whether a state may breach a binding bilateral treaty in order to coerce another state into relinquishing its economic sovereignty and free market access, and in order to force changes in that other state's domestic political policies.

III.

Whether a state may use armed force to intervene in the territory of another state to redress perceived failings in that other state's treatment of its own citizens, when the invading state has not been attacked and does not have reasonable fear of attack, and has not sought redress through the U.N. Security Council or International Court of Justice.

IV.

Whether a state that has suffered unprovoked armed invasion may use force to defend itself, either unilaterally or collectively, when the U.N. Security Council has condemned the aggressive invasion and called on Members to use "all necessary means" to effect the aggressor's withdrawal, but has not chosen to require Members to provide forces under a unified U.N. command structure.

V.

Whether in defending itself against armed aggression a state violates international law when, in spite of its care in selecting and attacking targets to minimize collateral damage to civilians, some civilian casualties occur, when it criminally punishes insurgents who are not part of the aggressor's armed forces, and when it uses only weapons that are not prohibited by customary law or any convention to which that state is a party; and whether a state may be jointly responsible for the criminal acts of members of another independent state's armed force, even though officials of the state neither knew nor reasonably should have known of the criminal activity.

VI.

Whether a state commits a crime against peace when it initiates a war of aggression by forcibly invading another state for the purpose of interfering in that other state's domestic economic and political processes; and whether the invading state commits war crimes when it unnecessarily harms civilians by using inherently inaccurate weapons against targets, attacks targets for the purpose of creating environmental pollution, conducts indiscriminate bombing of a "general target area," and executes captured personnel.

SUMMARY OF PLEADINGS

Bergenia's oil export policies are entirely consistent with both customary and conventional international law. Bergenia has the sovereign right to control its natural resources, and its economic destiny. This right was not delegated to the Organization of Oil-Producing States (OPS) by the non-binding OPS agreement. Since the OPS agreement does not meet the definition of a treaty or of customary

international law, it has not become binding on OPS members. Therefore, Bergenia had no legal duty to obey the OPS guidelines.

Atlantis, however, did have a duty to comply with the terms of the Pipeline Treaty, which was binding under conventional and customary international law. Atlantis freely agreed to be bound by the terms of the treaty, and could not unilaterally withdraw. To legally withdraw from the Pipeline Treaty, Atlantis needed to show breach, impossibility of performance, or fundamental change in circumstance. Because Atlantis did not do this, shutting down the pipeline was a violation of international law. Furthermore, it was an illegal attempt to coerce Bergenia into following the OPS guidelines.

Atlantis' invasion of Bergenian territory was illegal armed aggression, prohibited under the U.N. Charter and customary international law. The invasion had all of the characteristics of an attempted annexation of Province, rather than a humanitarian intervention as Atlantis claimed. Atlantis' use of force violated Bergenia's territorial integrity and threatened its political independence. Therefore, it was illegal under the U.N. Charter.

The invasion was not justifiable self-defense under the U.N. Charter, as Bergenia had not launched an armed attack against Atlantis. Defense to an armed attack is the only acceptable justification for use of force under the U.N. Charter. The doctrine of anticipatory self-defense, which may allow for self-defense prior to an actual attack, also does not justify Atlantis' invasion of Bergenia. To qualify as anticipatory self-defense, an action must be in response to a threat which is instant and overwhelming. None of the circumstances prior to the attack by Atlantis indicate that an attack by Bergenia was imminent. Therefore, there was no justification for anticipatory self-defense.

Atlantis also cannot justify its invasion under the doctrine of humanitarian intervention. Humanitarian intervention is not an accepted doctrine that

justifies the use of force under the U.N. Charter or customary international law. On the contrary, international law supports the right of a nation to independence, sovereignty, and freedom from intervention in its internal affairs. The role of Ethlantians in Bergenia was an exclusively internal policy matter, and Atlantis' intervention was illegal.

Finally, Atlantis directly defied a binding Security Council Resolution ordering it to withdraw its troops from Bergenia. Such defiance of a legal obligation is a direct contravention of international law.

The U.N. Charter and customary international law permit states like Bergenia to use force to resist armed aggression. Chapter VII of the Charter provides for both individual and collective self-defense, and for Security Council authorized enforcement actions. Once the Security Council determines that there is a breach of peace and that other measures would be inadequate to remedy the situation, it has broad discretion as to how to conduct enforcement actions. In Resolution 910, the Council determined that Atlantis had committed aggression and, when Atlantis failed to withdraw, the Council invoked Chapter VII and called on Member States to use "all necessary means" to effect withdrawal. Bergenia and the Coalition acted within the scope of this Security Council mandate.

Even if this Court does not view the Coalition's action as an enforcement action, it was valid collective self-defense under Article 51 of the Charter, which preserves the customary law inherent right of individual or collective self-defense. Under the Charter, once attacked, a state may continue self-defense measures until peace is restored or the Council calls for a cessation. Resolution 928 validated Bergenia's continued Article 51 rights. The Coalition's response was necessary and proportional because it was directed solely at driving Atlantis out of Bergenia.

Bergenia and the Coalition conducted their combat operations so as to minimize unnecessary civilian casualties and collateral damage, and otherwise acted in full compliance with the laws of war. The customary law principle of military necessity permits deviation from most of the laws of war when required for self-preservation, and customary law also permits belligerent reprisals when not specifically prohibited by convention.

The Beta River bridges were valid military targets because they were lines of communication to the Atlantis capital, a vital command and control center. The Coalition did not target the food and medical supplies. The Alpha power station and Delta Sanitation Plant served both military and civilian purposes, and were therefore valid military targets that were attacked with precision and minimal collateral damage. Overwhelming military necessity forced Bergenia to release oil into the Gulf to prevent an amphibious assault. The unfortunate environmental results were not the intent of the action. When Atlantis attacked Bergenia's Iota oil fields for the purpose of creating environmental pollution, Bergenia conducted a belligerent reprisal to destroy the Kappa oil fields. This was permitted because this response was proportional and not directed for the purpose of harming the environment.

A state is responsible for war crimes committed by members of its armed forces, and a state can incur joint responsibility for international law violations if it assists the other state in the commission of illegal acts. However, Bergenia is not responsible for the Victorian officer's shooting of unarmed Atlantian soldiers or for the Devonese use of officer POW labor. In both cases the perpetrators were under the independent control of their own nation's armed forces and Bergenia officials neither knew nor reasonably should have known of the violations.

While Bergenia could be jointly liable for a collective Coalition decision

to use weapons prohibited by a convention or customary law, no such weapons were used. Flame-throwers are not prohibited weapons for use against purely military targets. Although customary law norm banning first use of certain chemical weapons has evolved from the Geneva Gas Protocol it does not encompass riot control agents.

Atlantis committed a crime against peace, in accordance with the Nuremberg Principles, by launching its war of aggression. During the conduct of that war, Atlantis committed war crimes. Atlantis breached its duty to plan and carry out attacks so as to minimize civilian casualties, and its duty to use means of warfare that discriminate between civilian and military objects. Atlantis caused unnecessary harm to civilians and non-military objects by repeatedly using ballistic missiles of known inaccuracy to attack a missile site. The site was located sufficiently far from the hospital to avoid collateral damage if attacked by a reasonably accurate weapon. Atlantis also violated the laws of war by attacking Iota oil field for the purpose of causing environmental pollution. Atlantisan airmen indiscriminately bombed a city--again in violation of the laws of war. And finally, Atlantis summarily executed 30 POWs, alleging they were spies and mercenaries. Atlantis is guilty of both crimes against peace and war crimes.

PLEADINGS AND AUTHORITIES

I. BERGENIA'S OIL EXPORT POLICIES ARE CONSISTENT WITH INTERNATIONAL LAW

Bergenia has the exclusive right to control its natural resources and its economic destiny. Bergenia's decision to depart from the Organization of Oil-Producing States (OPS) guidelines was a legitimate exercise of its sovereignty and was fully consistent with international law. The directives and resolutions of the OPS are not legally binding. Therefore, Bergenia did not breach international law by increasing its oil exports.

A. Bergenia Has the Sovereign Right to Control Its Natural Resources and Its Economic Destiny

When Bergenia joined the OPS it merely agreed to cooperate with the OPS in an informal management of oil prices and production in the region.(C.1) It did not relinquish its sovereign right to determine its own level of oil exports based on its own economic requirements.

The Permanent Court of International Justice declined to find that a state abandons its sovereignty by entering into a treaty or agreement.¹ The community of nations recognizes the right of economic self-determination as among the paramount sovereign rights of states.² The United Nations (U.N.) has also recognized the inalienable right of each state to exercise permanent sovereignty over its natural resources, such as oil.³ While General Assembly Resolutions are

¹ S.S. Wimbledon (U.K., Fr., Italy, Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 25.

² See, e.g., Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975) [hereinafter Charter of Economic Rights]; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1966) [hereinafter Declaration on the Inadmissibility of Intervention].

³ Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 3171 (XXVII); U.N. GAOR, 28th Sess., Supp No. 30, at 52, U.N. Doc. A/9400 (1973).

not binding international law, they are indicative of the will of the U.N. members and are thus persuasive evidence of this fundamental element of state sovereignty.⁴ Bergenia bases its oil export policies on its own determination of its economic needs. Bergenia has never delegated any of this sovereign right.

B. The OPS Agreement Is Not Binding Under Customary or Conventional Law

In order for Bergenia to be obligated to follow the OPS guidelines, the OPS agreement must be binding under conventional or customary international law.

1. The OPS Agreement Is Not a Treaty Binding Upon Bergenia as Conventional International Law

A treaty is a written international agreement, concluded between states and governed by international law.⁵ The phrase "governed by international law" implies the production of legal effects and the creation of rights and obligations between the parties.⁶ Treaties are legally binding because they manifest both the terms of international legal rules and the consent of states to be bound by those rules.⁷ The Vienna Convention on the Law of Treaties codifies the substantive customary international law of treaties.⁸ Although neither Atlantis nor Bergenia are parties to the Convention, its substantive provisions express prior rules of customary law that are binding upon all states.⁹

⁴ Ian Brownlie, Principles of Public International Law 14 (3d ed. 1979); Oscar Schachter, The Right of States to Use Armed Force, 82 Mich. L. Rev. 1620 (1984).

⁵ Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27, at 289, 1155 U.N.T.S. 331 (May 23, 1969), reprinted in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

⁶ Eduardo Jimenez de Arechaga, International Law in the Past Third of a Century, 159 R.C.A.D.I. 1, 35 (1978).

⁷ Mark W. Janis, An Introduction to International Law 10 (1988).

⁸ See, e.g., Anthony D'Amato, The Concept of Custom in International Law 107 (1971); Rudolf Bernhardt, Treaties, in 1 Encyclopedia of Public International Law 459 (Rudolf Bernhardt ed., 1981).

⁹ Id.

The OPS members agreed that its directives and resolutions would not be legally binding. (C. 1) Under the terms of the Vienna Convention and the customary law definition of a treaty, the OPS agreement is not a binding treaty because its members did not intend or consent to be bound. This Court has stated that a treaty may also be created by a unilateral declaration of legal obligation.¹⁰ Bergenia has never declared an intent to be bound by the OPS agreement. Under international treaty law, Bergenia had no obligation to follow the OPS guidelines.

2. The OPS Guidelines Are Not Binding Under Customary International Law

Customary international law is the generalization of the practice of states.¹¹ To be recognized as customary international law, a practice must evidence consistent state practice and opinio juris, or a sense of legal obligation.¹² To manifest custom, a practice must be uniform, consistent, and followed by a substantial number of states.¹³ The burden of proving the existence of a customary international norm lies on the party claiming it.¹⁴ Consistent state practice may be limited to a region, and thus evidence a norm of regional customary law.¹⁵ The Compromis does not indicate that the OPS members consistently followed the OPS guidelines. Atlantis cannot show that adherence to the guidelines is consistent state practice, even in the Gulf region, and thus fails to meet its burden of proving customary international or regional law.

¹⁰ Nuclear Tests (Austl. v. Fr.) 1974 I.C.J. 253 (June 22).

¹¹ Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, at 191 (Dec. 18).

¹² D'Amato, supra note 8 at 56-65; North Sea Continental Shelf (F.R.G. v. Den) (F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

¹³ Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, at 191 (Dec. 18); North Sea Continental Shelf (F.R.G. v. Den) (F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20); see also Brownlie, supra note 4, at 6.

¹⁴ S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A), No. 10, at 28 (Sept. 7); see also Brownlie, supra note 4, at 10.

¹⁵ Asylum (Colom. v. Peru), 1950 I.C.J. 266 (June 13).

Even if Atlantis could prove the existence of a consistent state practice, it would still have to show that OPS members acted out of a sense of legal obligation.¹⁶ The OPS members initially agreed that the guidelines would not be legally binding, and there is no indication their intentions have changed during the life of the agreement. Therefore, both consistent state practice and opinio juris are lacking and adherence to the OPS guidelines is not customary international law. Bergenia seeks only reciprocity--to be bound to the same standard as other OPS members.¹⁷

II. ATLANTIS VIOLATED INTERNATIONAL LAW BY SHUTTING DOWN THE PIPELINE

Unlike the OPS guidelines, the Pipeline Treaty is legally binding on the parties. By unilaterally abrogating its treaty obligations, Atlantis violated not only the treaty itself, but principles of customary international law.

A. Shutting Down the Pipeline Violated both the Binding Pipeline Treaty and Customary International Law

Pacta sunt servanda, the concept that states are bound to perform in good faith the treaties they make, is a fundamental principle of customary law.¹⁸ Thus, customary law bound Atlantis to the terms of the Pipeline Treaty.

1. The Pipeline Treaty Was Legally Binding

This Court recognizes treaties as a binding source of law to be applied in cases it adjudicates.¹⁹ Atlantis and Bergenia freely and mutually agreed upon the terms of the Pipeline Treaty, and agreed to be bound by its terms.(C.1) This

¹⁶ See, e.g., S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A), No. 10, at 28 (Sept. 7); North Sea Continental Shelf (F.R.G. v. Den.)(F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

¹⁷ See, e.g., Arthur Lenhoff, Reciprocity: The Legal Aspect of a Perennial Idea, 49 Nw. U. L. Rev. 619 (1955); Bruno Simma, Reciprocity, in 1 Encyclopedia of Public International Law 400 (Rudolf Bernhardt ed., 1981).

¹⁸ Chorzów Factory (Jurisdiction), 1927 P.C.I.J. (Ser. A) No. 9, at 21.

¹⁹ Statute of the ICJ, art. 38(1)(a).

reciprocal consent is the source of the legal obligation inherent in this and all treaties.²⁰ By breaching its legal obligation under the Pipeline Treaty, Atlantis violated conventional international law.

Article 26 of the Vienna Convention states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."²¹ Termination or withdrawal from a treaty requires the consent of all the parties to the treaty, unless the withdrawing party claims breach, impossibility of performance or a fundamental change in circumstances.²² A party seeking to withdraw from a treaty must provide notice to the other parties.²³

2. There Was No Fundamental Change in Circumstances of the Pipeline Treaty

Atlantis may claim that the increased level of Bergenian oil exports constitutes a fundamental change in circumstances that justifies its breach of the Pipeline Treaty. In the Fisheries case, this Court stated that Article 62 may be considered a codification of existing customary law on treaty termination.²⁴ Article 62 requires that the changed circumstances be part of the essential basis of consent to the treaty, and that the change radically transform the obligations of the party terminating the treaty.²⁵

Atlantis failed to meet these conditions. The OPS guidelines could not have been an essential basis of Atlantis' consent to be bound by the Pipeline Treaty, because the level of Bergenian oil exported is completely unrelated to the

²⁰ Riccardo Monaco, Sources of International Law, in 1 Encyclopedia of Public International Law 428 (Rudolf Bernhardt ed., 1981).

²¹ Vienna Convention, supra note 5, art. 26.

²² Id. art. 56-62; see Michael Akehurst, Termination of Treaties, in 1 Encyclopedia of Public International Law 507 (Rudolf Bernhardt ed., 1981).

²³ Vienna Convention, supra note 5, art. 65-68.

²⁴ Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3 (Feb. 2).

²⁵ Vienna Convention, supra note 5, art. 62.

construction and operation of the pipeline. By increasing its oil exports, Bergenia did not radically transform Atlantis' obligations under the Pipeline Treaty. Furthermore, there may have been no change in circumstances at all because the Compromis does not indicate that Bergenia ever complied with the OPS guidelines.

B. The Pipeline Shut-Down Was Illegal Economic Coercion

Atlantis' stated reason for shutting down the pipeline was to compel Bergenia to follow the OPS guidelines and decrease its oil exports.(C. 3) The community of nations has repeatedly denounced such attempts at economic coercion.²⁶ The Declaration on Friendly Relations specifically states, "No state may use or encourage the use of economic . . . measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."²⁷ The Declaration reflects the Members' agreed-upon interpretation of seven basic principles of the Charter.²⁸ By shutting down the oil pipeline, Atlantis was attempting to force Bergenia to forego its sovereign right to determine its level of oil exports. Atlantis engaged in economic coercion, in violation of customary international law.

III. ATLANTIS' INVASION OF BERGENIA WAS ILLEGAL ARMED AGGRESSION

A. The U.N. Charter Prohibits Atlantis' Use of Force

The most fundamental tenet of the U.N. Charter is the prohibition on the use

²⁶ See, e.g., Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) [hereinafter Declaration on Friendly Relations]; Charter of Economic Rights, supra note 2, art. 32; Declaration on the Inadmissibility of Intervention, supra note 2.

²⁷ Declaration on Friendly Relations, supra note 25.

²⁸ See Louis Henkin et al., International Law: Cases and Materials 102 (1980).

of force.²⁹ Article 2(4) prohibits the use or threat of force against the political independence or territorial integrity of any state. Atlantis' attack on Province was a use of force directed at both Bergenia's territorial integrity and its political independence. Atlantisan armed forces occupied Bergenian territory under force of arms, removing the border controls and linking communication and transportation facilities in Province.(C. 4-5) Those measures are indicative of a permanent annexation, not a humanitarian intervention.

B. Atlantis Cannot Justify Its Invasion as Self-Defense Under Either the U.N. Charter or Customary International Law

By signing the U.N. Charter, Atlantis renounced its right to use force against other countries, except in the very narrow circumstances allowed by the Charter. Article 51 preserves the customary law "inherent right of individual or collective self-defence" when member states fall victim to armed aggression, "until the Security Council has taken measures necessary to maintain international peace and security."³⁰

Article 51 imposes two criteria: an "armed attack" must occur before a nation may retaliate with force; and, under customary law, the victim's response must be necessary and proportional.³¹ Atlantis cannot meet either requirement.

1. There Was No Armed Attack Against Atlantis

The term "armed attack" has been narrowly construed by almost all legal authorities and governments.³² This Court, in the Nicaragua case,³³ held that a

²⁹ U.N. Charter art. 2, para. 4.

³⁰ Id. art. 51.

³¹ Don Wallace, Jr., International Law and the Use of Force: Reflections on the Need for Reform, 19 Int'l Law. 259 (1985); Oscar Schachter, United Nations Law in the Gulf Conflict, 85 Am. J. Int'l L. 452, 464 (1991).

³² Id.

³³ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (Judgment on Merits of June 27, 1986).

state may not exercise the inherent right of self-defense unless the attack upon it amounts to an outright "armed attack." None of Bergenia's actions prior to the Atlantis attack constituted an armed attack under the strict requirements of the U.N. Charter.

2. Atlantis May Not Use Armed Aggression in Response to Perceived Economic Coercion from Bergenia

Bergenia was not engaging in economic aggression by increasing its oil exports, and even if it were, the use of armed force in such circumstances is impermissible. To justify retaliation for an act of economic aggression, the accusing state must prove that the intent of another state's economic activity is to harm other states.³⁴ Atlantis can make no such showing. In refusing to be bound by the OPS guidelines, Bergenia was releasing its oil onto the free market at a rate that it alone had the right to determine. The Compromis does not indicate that Bergenia increased its oil exports with the intention of harming Atlantis. Although Bergenia was increasing its military capability, there is no evidence that the military build-up was financed by the increased oil exports. Even if Bergenia was increasing its oil exports purposefully to harm Atlantis, economic activity does not justify the use of force under the U.N. Charter.³⁵

3. The Doctrine of Anticipatory Self-Defense Does Not Justify Atlantis' Armed Aggression

The right of anticipatory self-defense has been recognized only in very narrow circumstances in customary international law, and that right is conditioned on certain prerequisites.³⁶ Anticipatory self-defense generally requires that

³⁴ See, e.g., Ann Thomas & A.J. Thomas, Jr., The Concept of Aggression in International Law 90 (1972); Tom J. Farer, Political and Economic Coercion in Contemporary International Law, 79 Am. J. Int'l L. 405 (1985).

³⁵ See, e.g., Tom J. Farer, Political and Economic Aggression in Contemporary International Law, in The Current Legal Regulation of the Use of Force 123 (Antonio Cassese ed., 1986).

³⁶ See, e.g., Schachter, supra note 4.

the threat be "instant, overwhelming, and [leave] no choice of means, and no moment for deliberation."³⁷ This formulation of anticipatory self-defense doctrine reflects a widespread international desire to restrict the right of self-defense to situations where an attack has actually occurred.³⁸ There is no evidence that Bergenia was planning to attack Atlantis. The buildup of arms and the strengthening of its borders with Atlantis were merely responses to Atlantis' threats and preparations for invasion.(C. 2) Atlantis has no basis to claim that an attack by Bergenia was imminent, and that there were no other means of resolving their differences.

4. Atlantis' Response Was Neither Necessary nor Proportional

In order to invoke the right of self-defense under Article 51 of the U.N. Charter, Atlantis must show not only that it was responding to an armed attack, but that its response was both necessary and proportional to the initial attack.³⁹ Proportionality suggests that defensive measures should be confined to the territory of the defending state.⁴⁰ Atlantis invaded Bergenia territory with no evidence that Bergenia was planning to use force against Atlantis.(C.4) Atlantis' response was neither necessary nor proportional to its dispute with Bergenia. Even if Atlantis could prove that Bergenia was violating international human rights law, the appropriate response to such violations would be a request for action by the Security Council or resort to this Court.⁴¹ The resort to force was unwarranted and inconsistent with international law.

³⁷ Edward Gordon et al., International Law and the United States Action in Grenada: A Report, 18 Int'l Law. 331, 367 (1984)(quoting Daniel Webster).

³⁸ Schachter, supra note 4; Louis Henkin, How Nations Behave 295 (2d ed. 1979).

³⁹ Wallace, supra note 31.

⁴⁰ Ian Brownlie, International Law and the Use of Force 372 (1963).

⁴¹ U.N. Charter art. 2, para. 4, arts. 39-51.

C. Humanitarian Intervention Is No Justification for Atlantis' Armed Aggression

Some commentators suggest that extreme atrocities justify armed intervention by outside states, despite the Article 2(4) prohibition on the use of force.⁴² The paucity of past genuine humanitarian interventions, as well as the frequent condemnations of such actions when they do occur, indicates that there is no customary norm permitting such intervention.⁴³ Indeed, the doctrine is contrary to the fundamental precepts of sovereignty and non-intervention embodied in the U.N. Charter and customary international law.⁴⁴

The U.N. has affirmed each state's paramount right to independence and sovereignty.⁴⁵ The Declaration on Friendly Relations affirms that the strict observance of the obligation of non-intervention is essential to ensure peace.⁴⁶ The Declaration on the Inadmissibility of Intervention condemns armed intervention, declaring that "[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."⁴⁷ This prohibition against interference in states' internal policies forbids intervention for any reason, even a humanitarian one. In addition, the doctrine appears to conflict directly with Article 2(4) of the U.N.

⁴² See Richard B. Lillich, Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives, in Law and Civil War in the Modern World 229-51 (1974).

⁴³ See Ian Brownlie, Humanitarian Intervention, in Law and Civil War in the Modern World 217, 217-28 (1974).

⁴⁴ See, e.g., Richard B. Lillich, Economic Coercion and the International Legal Order, 52 Int'l Aff. 358 (1975); Meinhard Schroder, Principle of Non-Intervention, in 1 Encyclopedia of Public International Law 358 (Rudolf Bernhardt ed., 1981).

⁴⁵ U.N. Charter, arts. 1 & 2; Declaration on the Inadmissibility of Intervention, supra note 2; Declaration on Friendly Relations, supra note 26.

⁴⁶ Declaration on Friendly Relations, supra note 26, Preamble.

⁴⁷ Declaration on the Inadmissibility of Intervention, supra note 2.

Charter.⁴⁸ The Charter forbids the use of force except in very narrow circumstances, none of which Atlantis met.

International law does not support the use of armed force to intervene in a country's internal affairs.⁴⁹ Bergenia's treatment of the Ethlantians is solely within the domain of its sovereign right to political, social, and economic determination. Atlantis' invasion is a completely unjustified use of force, forbidden by the U.N. Charter and customary law.

D. Atlantis Breached Its Duty to Withdraw Under Security Council Resolution 910.

Even if Atlantis were legally entitled to invade Bergenia, its failure to comply with Security Council Resolution 910 was a flagrant contravention of international law. Unanimous Security Council resolutions are binding on all U.N. members.⁵⁰ Resolution 910, demanding that Atlantis withdraw its troops from Bergenia, was therefore legally binding on Atlantis. By ignoring the Resolution, Atlantis violated international law.

IV. BERGENIA'S RESPONSE TO ARMED AGGRESSION WAS FULLY JUSTIFIED UNDER INTERNATIONAL LAW.

The U.N. Charter and customary international law permit states to use force to resist armed aggression. The Charter provides both for individual and collective self-defense and for Council-authorized enforcement actions.⁵¹ Customary international law contains an inherent right of self-defense.⁵²

⁴⁸ Brownlie, supra note 44, at 221.

⁴⁹ See, e.g., Schroder, supra note 45, at 359.

⁵⁰ U.N. Charter art. 25 & art. 27, para. 3; Legal Consequences for States of the Continual Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 16 (21 June), reprinted in 10 I.L.M. 677, 712.

⁵¹ U.N. Charter arts. 39-51.

⁵² Ian Brownlie, The United Nations Charter and the Use of Force, 1945-1985, in The Current Legal Regulation of the Use of Force 497 (Antonio Cassese ed. 1986).

A. Bergenia and the Coalition Participated in an Authorized Enforcement Action Under Chapter VII of the U.N. Charter

The U.N. Charter establishes the Security Council, with the power and responsibility to maintain peace.⁵³ Chapter VII of the Charter provides several options to states when the use of force becomes necessary and unavoidable.⁵⁴

1. The Security Council Has the Power to Determine When To Authorize Collective Enforcement of Its Decisions

Article 39 authorizes the Council to determine the existence of a breach of peace or act of aggression, and to make recommendations to resolve the situation or to take enforcement actions under Articles 41 and 42. The Council may use military force to restore peace whenever it determines that other measures "would be inadequate."⁵⁵ Article 42 gives the Council unrestricted discretion as the final arbiter of its own authority to take military action.⁵⁶

The Council also has broad discretion as to how to conduct enforcement actions. Article 42 authorizes the Council to "take such action as may be necessary" and specifically allows for military operations by forces of member states. Article 43 does not preclude the voluntary provision of troops by member states.⁵⁷ The U.N. has conducted enforcement actions,⁵⁸ but has never entered into Article 43 agreements to require states to provide forces. The Charter does not require a unified force or even coordinated actions, although it provides for

⁵³ U.N. Charter art. 23-24.

⁵⁴ Id. arts. 39-51.

⁵⁵ Id. art. 42.

⁵⁶ Burns H. Weston, Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy, 85 Am. J. Int'l L. 516, 517 (1991).

⁵⁷ Id.

⁵⁸ Schachter, supra note 58, at 462.

such a unified U.N. command structure.⁵⁹ As this Court noted in the Expenses case, rejecting the argument that enforcement actions must be based strictly on Article 42, "The Court cannot accept so limited a view of the powers of the Security Council" ⁶⁰

2. The Security Council Authorized Bergenia's and the Coalition's Response to Atlantis' Armed Aggression

Resolution 910 met the Article 39 requirement to determine the existence of aggression by condemning Atlantis' invasion of Bergenia and calling for withdrawal of Atlantisan forces.(C. 5) When Atlantis failed to comply, the Council invoked Chapter VII of the Charter and, in Resolution 928, called upon member states to use "all necessary means" to effect withdrawal of Atlantisan forces.(C. 5) The Council thus recognized that non-forcible measures had not been and would not be adequate to restore peace, fulfilling the prerequisite for Article 42 action. Bergenia had a duty under international law to implement these binding resolutions.⁶¹ Exercising its broad discretion in enforcement actions, the Council called upon member states to enforce its decisions and condoned the Coalition's actions. It chose not to implement Article 43 or create a U.N. force.

Bergenia and the Coalition acted within the scope of the Security Council's mandate to use "all necessary means." The Council must have envisioned the use of military force. The Coalition's response was necessary and proportional to Atlantis' aggression, and it conducted its operations in accordance with the laws of war. Therefore, the Coalition conducted a valid U.N. enforcement action.

B. Bergenia Acted in Self-Defense Within the Scope of the Security Council's Mandate, the United Nations Charter, and Customary Law

⁵⁹ U.N. Charter arts. 43-47; Leslie C. Green, Iraq, the U.N. and the Law, 29 Alberta L. Rev. 560, 575 (1991).

⁶⁰ Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), 1962 I.C.J. 151, 167 (July 20); see also Schachter, supra note 58, at 461.

⁶¹ U.N. Charter art. 25.

Even if this Court does not view the Coalition's action as an Article 42 enforcement, it was a valid exercise of collective self-defense under Article 51. The first use of armed force by a state is prima facie evidence of an act of aggression.⁶² A state may continue self-defense measures until peace is restored or the Council determines under Article 39 that the self-defense has gone too far and has become itself a threat to peace.⁶³ Although a narrow reading of the Article's language could imply that self-defense measures are not authorized once the Council adopts any measures, such an interpretation would leave a state unable to defend itself if, as in the case of Atlantis, an invader refuses to comply with a Council order to withdraw.⁶⁴ Any requirement for prior Council approval would eviscerate the right of self-defense, because inaction by the Council (or a single permanent member's veto) would leave the victim at an invader's mercy.⁶⁵

The exercise of Article 51 rights is compatible with Council actions under other provisions of Chapter VII. Article 51 itself states that self-defense actions do not preempt the Council's authority and responsibility to restore peace.⁶⁶ Similarly, the Council's exercise of its authority does not negate a state's inherent right of self-defense, a customary law right that is not "inconsistent with the Purposes of the United Nations."⁶⁷ Because Council

⁶² Definition of Aggression, G.A. Res. 3314, art. 2, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975), 13 I.L.M. 710 (1974)[hereinafter G.A. Res. 3314]; see also Green, supra note 59, at 571.

⁶³ Eugene V. Rostow, Until What? Enforcement Action or Collective Self Defense?, 85 Am. J. Int'l L. 506, 510-11 (1991); Schachter, supra note 58, at 458.

⁶⁴ See Schachter, supra note 58, at 458; Green, supra note 59, at 566; Yoram Dinstein, War, Aggression and Self-Defense 197 (1988).

⁶⁵ Rostow, supra note 63, at 510; Schachter, supra note 58, at 461.

⁶⁶ U.N. Charter art. 51.

⁶⁷ Rostow, supra note 63, at 513-14.

authority under Article 42 is highly flexible, the Council could approve Article 51 collective defense as its "action" within the meaning of Article 42.⁶⁸

Resolution 910 established that Atlantis' first use of force constituted aggression.(C. 5) Resolution 928 validated the necessity of force to repel the invader and affirmed Bergenia's continued Article 51 rights.(C. 5) The Coalition response was directed solely at driving Atlantis out of Bergenia and its military measures were commensurate with the actions of Atlantis.(C. 6-8) The Council did not direct Bergenia or the Coalition to cease self-defense measures.(C. 9) Therefore, Bergenia and the Coalition complied fully with Article 51 and customary international law.

V. BERGENIA CONDUCTED COMBAT OPERATIONS IN FULL COMPLIANCE WITH THE LAWS OF WAR

A. The Coalition Exercised Care in Selecting and Attacking Targets So As To Minimize Collateral Damage and Civilian Casualties

The laws of war apply in undeclared wars.⁶⁹ Nations must plan and carry out their operations so as to minimize civilian casualties and use means and methods that allow for discrimination between civilian and military objects.⁷⁰ Appropriate military targets are those "which by their nature, location, purpose or use make an effective contribution to military action" and the destruction of which would offer "a definite military advantage."⁷¹ This includes lines of

⁶⁸ Oscar Schachter, United Nations Law in the Gulf Conflict, 85 Am. J. Int'l L. 452, 464 (1991).

⁶⁹ Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, para. 1, 6 U.S.T. 3316, 74 U.N.T.S. 135 [hereinafter Geneva POW Convention]; Protocol Additional (Protocol I) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 1, para. 3-4, 16 I.L.M. 1391 [hereinafter Protocol I]; see also 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].

⁷⁰ Protocol I, supra note 69, art. 52.

⁷¹ Id.

communication and infrastructure that do or could support military operations.⁷² Power plants are also valid military targets because their purpose--power generation--makes an effective contribution to the war effort.⁷³ Agricultural areas and food and water supplies cannot be attacked for the purpose of denying sustenance to the civilian population.⁷⁴ However, sanitation plants are not prohibited targets.⁷⁵ Belligerent reprisals are otherwise illegal acts committed to compel another state to cease illegitimate acts of warfare.⁷⁶ Customary law permits such reprisals, unless specifically prohibited by convention.⁷⁷ The customary law principle of military necessity permits, if necessary for self-preservation, violation of laws of war that do not go to the fundamental standards of civilization.⁷⁸ Some of the conventional laws are similarly qualified in their applicability.⁷⁹

The Coalition complied with each of these requirements. The Coalition attacked military installations, aircraft, military bases, military forces, and lines of communication--the primary military objectives of any war. The bridges across the Beta River were valid military targets because these were lines of communication that contributed to the Atlantisan army's mobility and ability to

⁷² 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)[hereinafter Commentary on the Additional Protocols].

⁷³ Id. at 633.

⁷⁴ Protocol I, supra note 69, art. 54.

⁷⁵ Commentary on the Additional Protocols, supra note 72, at 633.

⁷⁶ 2 L. Oppenheim, International Law, § 247 (H. Lauterpacht ed., 1952).

⁷⁷ Albrecht Randelzhofer, Civilian Objects, in 3 Encyclopedia of Public International Law 94 (Rudolf Bernhardt ed., 1982).

⁷⁸ Oppenheim, supra note 76, § 69, at 232; see also Georg Schwarzenberger, 2 International Law 10-12 (1968).

⁷⁹ See, e.g., Hague Convention, supra note 69, Preamble, art. 23(g).

defend its capital, a vital command and control center. The attacks were accomplished without significant collateral damage. The disruption of food and medical supplies was an unfortunate side effect, but the Coalition at no time targeted these supplies.

The Alpha power station served a military purpose, although located in a largely civilian area.(C. 6) Additional output could easily be redistributed to military users, and its destruction undoubtedly disrupted the nation's power grid. The Delta Sanitation Plant served military forces.(C. 7) The civilian casualties at both locations were regrettable, but the Coalition did not target civilians.

Nor did Bergenia target the natural environment. Faced with the overwhelming military necessity of preventing further loss of its nation to the Atlantian onslaught, Bergenia reluctantly released oil into the Gulf to forestall an amphibious invasion.(C. 8) Because this action was not directed at altering the environment and was a military necessity, it did not violate the laws of war.

Atlantis destroyed the Iota fields, an economic asset, with the intent of creating environmental pollution.(C. 9) Bergenia's attack on the Kappa oil fields was intended to destroy Atlantis' similar strategic asset in order to discourage further Atlantian war crimes. Although there were unfortunate environmental effects, this was a permitted reprisal because it was proportional and not directed against the environment.

B. Bergenia Treated Captured Ethlantian Liberation Front (ELF) Members in Accordance with International Law

The laws of war only protect combatants who are members of a state's armed forces or, in non-international conflicts, those who "have ceased to take part in hostilities."⁸⁰ There is no evidence the ELF was an adjunct to the Atlantis

⁸⁰ Geneva POW Convention, *supra* note 69, art. 3; Protocol I, *supra* note 69, arts. 1, 43, 44; Protocol Additional (Protocol II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4(1), 16 I.L.M. 1442.

military, (C. 7) and therefore it did not qualify for combatant protection in international war. They were insurgents in an internal conflict. Insurgents who are hors de combat do not receive specific protection unless they have voluntarily ceased fighting.⁸¹ The execution of ELF insurgents under Bergenian municipal civil or military law did not violate international law because captured insurgents are subject to such municipal laws.

C. Bergenia Is Not Responsible for the Isolated Criminal Acts of Other Nations' Armed Forces

A state is responsible for war crimes committed by members of its armed forces,⁸² and Detaining Powers are responsible for mistreatment of prisoners of war (POWs).⁸³ In addition, the Nuremberg Principles subject the individual war criminal to prosecution under international law.⁸⁴ Individual responsibility may also extend to military commanders who knew of war crimes in their commands, were capable of preventing them, yet failed to act.⁸⁵ A state can incur joint responsibility with another state for violations of international law only if it provides assistance in the commission of illegal acts.⁸⁶ As with the military commanders, such a joint participant must be in a position to stop the criminal

⁸¹ See Asbjørn Eide, The New Humanitarian Law in Non-International Armed Conflict, in The New Humanitarian Law of Armed Conflict 288 (Antonio Cassese ed., 1979).

⁸² Hague Convention, supra note 69, art. 3; Protocol I, supra note 69, art. 91.

⁸³ Geneva POW Convention, supra note 69, art. 12.

⁸⁴ Charter of the International Military Tribunal, art. 6, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 39 Stat. 1544, 82 U.N.T.S. 280; Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), U.N. Doc. A/236, at 1144 (1946)[hereinafter Nuremberg Principles].

⁸⁵ Protocol I, supra note 69, art. 86, para. 2; see also Commentary on the Additional Protocols, supra note 72, at 979.

⁸⁶ Ian Brownlie, State Responsibility 190 (1983).

activity.

A coalition is a temporary alliance of independent forces. Although Bergenia provided overall leadership of the Coalition's military operations, internal discipline of each independent member's armed forces remained under national control. The Victorian officer was under Victorian military authority when he ordered his troops to shoot unarmed Atlantisan soldiers who were attempting to surrender.(C. 7) Victoria is responsible its officer's act.⁸⁷ Bergenia is not responsible because that officer was not a part of the Bergenian armed forces, and because Bergenia neither knew of this individual's isolated conduct nor provided any assistance likely to result in such conduct.

The Detaining Power is responsible for the treatment of its POWs.⁸⁸ It must evacuate POWs from the combat zone as soon as possible and under conditions similar to movement of its own forces.⁸⁹ The Detaining Power should provide POWs with food, shelter and treatment similar to that provided its own troops in the same area.⁹⁰ Enlisted POWs can be required to perform labor, including "public works and building operations," provided there is no direct military purpose.⁹¹

The conditions for Atlantisan POWs complied essentially with international law. Any food shortages at Fort Mu prison camp were the result of paralysis in Devon's food distribution system, a condition equally affecting the Devonese.(C. 8) There is nothing to indicate that the POWs' shelter, working hours, or conditions of evacuation differed in any significant way from those of Devonese soldiers and civilians.(C. 8) There is no evidence that mere repairs to the

⁸⁷ Hague Convention, supra note 69, art. 23, para. c.

⁸⁸ Id., art. 12.

⁸⁹ Geneva POW Convention, supra note 69, arts. 19-20.

⁹⁰ Id., arts. 25-26.

⁹¹ Id., art. 50.

military installations contributed in any direct way to the war effort.(C. 9) Devon fulfilled its basic obligations under international law. However, Devonese troops, without Bergenia's authorization or knowledge, did require officer POWs to perform heavy labor.(C. 8-9) Although this is a technical violation of the laws of war,⁹² responsibility cannot be imputed to Bergenia because the perpetrators were under Devon's control and Bergenian officials neither knew nor reasonably should have known of the violation.

D. The Coalition's Use of Incendiary Devices and Riot Control Agents Is Permitted Under Both Conventional and Customary International Law

As overall leader of the Coalition, Bergenia would be jointly responsible had the Coalition collectively decided to use prohibited weapons. However, neither customary law nor any conventions to which Bergenia is a party prohibit the use of flame-throwers or riot control agents in combat operations. Absent any such specific prohibition, states are free to use any type of weapon in their own defense.

1. Flame-throwers Are Permitted Weapons for Use Against Military Objectives

Incendiary devices were in widespread use at the time the Hague Convention and the Protocol I were drafted, yet neither banned these devices. The only international effort to ban their use was the 1980 Conventional Weapons Convention,⁹³ which purports to codify customary law, and only bans use against civilian populations.⁹⁴ The Coalition used flame-throwers only against military targets.(C. 7)

2. Riot Control Agents Are Not Proscribed by Applicable Conventions or by Customary International Law

⁹² Id., art. 49.

⁹³ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Oct. 10, 1980, U.N. Doc. A/CONF.95/15, Annex I, 19 I.L.M. 1523.

⁹⁴ Id. at 1535.

The Hague Convention and the Geneva Additional Protocols do not address the use of riot control agents or other chemical weapons. The Geneva Gas Protocol of 1925,⁹⁵ to which Bergeia is not a party and therefore not bound, prohibits first use of "asphyxiating, toxic and other gases."⁹⁶ Whether the parties intended to include lachrymatory riot control agents as well as lethal chemical weapons is uncertain.⁹⁷ The Protocol did not reflect a codification of existing customary law because state practice, as evidenced by conduct in World War I, was unrestricted chemical warfare.⁹⁸ A rule of customary law has evolved banning first use of lethal chemical weapons, as reflected in General Assembly Resolution 2603A.⁹⁹ However, the prohibition does not include riot control agents.

The use of riot control agents to temporarily incapacitate the enemy is more humane than attack by lethal weapons. It is illogical to ban their use against an enemy in war when nations routinely use them against their own people in peacetime. During the debate on Resolution 2603A, most nations agreed that modern riot control agents are outside the scope of the Protocol and the Resolution.¹⁰⁰ Widespread use of riot control agents during World War II and the Korean War, and

⁹⁵ 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.

⁹⁶ Id.

⁹⁷ See Richard R. Baxter & Thomas Buergenthal, Legal Aspects of the Geneva Protocol of 1925, 64 Am. J. Int'l L. 853, 857-66 (1970); George Bunn, Banning Poison Gas and Germ Warfare: Should the United States Agree?, 1969 Wis. L. Rev. 375, 394-405.

⁹⁸ William V. O'Brien, Biological/Chemical Warfare and the International Law of War, 51 Geo. L.J. 1, 23-24 (1962); Timothy L. H. McCormack, International Law and the Use of Chemical Weapons in the Gulf War, 21 Cal. W. Int'l L.J. 1, 3 (1990).

⁹⁹ 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).

¹⁰⁰ See Bunn, supra note 97, at 404.

in Vietnam by the United States and Australia, is further evidence of their continued acceptance.¹⁰¹ Therefore, Bergenia's means and methods of warfare fully complied with international law.

VI. ATLANTIS' CONDUCT OF ITS AGGRESSIVE WAR VIOLATED THE LAWS OF WAR SO AS TO CONSTITUTE CRIMES AGAINST PEACE AND WAR CRIMES

A. Atlantis' War of Aggression Was a Crime Against Peace

The Nuremberg Principles reflect the customary law principle that wars of aggression are international crimes against peace for which both states and individuals are criminally liable.¹⁰² The General Assembly has defined a war of aggression as the use of force against the sovereignty or territorial integrity of another state or in a manner inconsistent with the U.N. Charter.¹⁰³ Resolution 910 reflects the Council's determination that Atlantis did commit aggression. (C. 5) Therefore, Atlantis and its leaders committed a crime against peace.

B. Atlantis Unnecessarily Endangered Civilians by Attacking Inappropriate Targets and Using Inherently Inaccurate Weapons

Nations at war have a duty to plan and carry out attacks so as to minimize civilian casualties, and must use means that allow discrimination between civilian and military objects.¹⁰⁴ Hospitals merit special protection from attack and collateral damage.¹⁰⁵ Nations must also, to the extent feasible, avoid locating

¹⁰¹ See id. at 394; Harry H. Almond, Jr., Control over Chemical Weapons-- Personal Perspectives on the Emerging United States Position, 13 U. Tol. L. Rev 1203, 1204 (1982).

¹⁰² Nuremberg Principles, supra note 84, art. 6.

¹⁰³ G.A. Res. 3314, supra note 62, art. 1; see also U.N. Charter art. 2, para. 4.

¹⁰⁴ Protocol I, supra note 69, arts. 51, 57.

¹⁰⁵ Convention Relative to the Protection of Civilian Persons in Time of War, art. 18, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, art. 19, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I].

military objectives too close to civilian concentrations and objects.¹⁰⁶ They may not direct attacks with the intent to harm the environment.¹⁰⁷

A nation's capital contains strategic military targets. To defend its capital, Bergenia located a missile site within the area of the city.(C. 6) This was a proportional response to a military necessity. In compliance with international norms, Bergenia placed this site sufficiently far from the hospital to permit attack by a reasonably accurate weapon without collateral damage to the hospital.(C. 6) However, Atlantis planned and conducted multiple attacks on the missile site using ballistic missiles of known inaccuracy, resulting in widespread destruction--presumably including damage to the hospital.(C. 7) Atlantis violated international law by failing to attack with means reasonably capable of distinguishing between civilian and military objects.

Oil fields, like other natural resources, are a civilian asset, not a tactically meaningful military objective. Atlantis ignited the Iota oil fields for the purpose of creating large amounts of toxic smoke and fumes.(C. 8) This caused severe environmental damage and endangered the health of the civilian population.(C. 8) Atlantis' attack on a non-military target was likely to and did harm civilians, as well as cause major environmental damage, in violation of international law. The smoke and fumes from the oil field fires obscured military objectives.(C. 8) However, Atlantisan airmen inflicted heavy civilian casualties by attacking the "general targeting area" despite their inability to distinguish between civilian and military objects.(C. 8) Such indiscriminate bombing of a city violates the laws of war.

C. Atlantis Illegally Executed POWs

¹⁰⁶ Protocol I, supra note 69, art. 58; Geneva Convention I, supra note 105, art. 19.

¹⁰⁷ Protocol I, supra note 69, arts. 35, 55.

Atlantis executed 30 POWs, claiming they were spies and mercenaries.(C. 7) A spy is a person who acts clandestinely to obtain information for a belligerent state.¹⁰⁸ Spies who are captured after returning to their armed force must be afforded POW treatment and incur no liability for their espionage.¹⁰⁹ A spy captured in the act is not protected as a POW, but cannot be punished without a trial by an impartial and regularly constituted court that affords minimum due process protection.¹¹⁰ Mercenaries do not qualify for POW status; however, a mercenary must be: specially recruited, a direct participant in hostilities, not a national or resident of a party to the conflict, not a member of the armed forces, and paid substantially in excess of similar members of the armed forces.¹¹¹ If alleged spies or mercenaries claim POW status, they are entitled to review by a judicial tribunal with Protecting Power (or International Red Cross) representatives present.¹¹² In this case, Atlantis merely announced the apparently summary execution of 30 captured persons.(C. 7) There is no indication that fair trials or status reviews occurred, nor is there any evidence to support the claim that they were spies or mercenaries.(C. 7) Atlantis' summary execution of these captured personnel violated international law.

CONCLUSION

For the foregoing reasons, the Respondent, the State of Bergenia, respectfully requests this Honorable Court find, adjudge, and declare as follows:

1. That Atlantis' shutting down the pipeline violated international law and

¹⁰⁸ Hague Convention, supra note 69, art. 29.

¹⁰⁹ Id., art. 31.

¹¹⁰ Id., art. 30; Protocol I, supra note 69, art. 75.

¹¹¹ Id., art. 47.

¹¹² Protocol I, supra note 69, art. 45.

applicable international agreements;

2. That Atlantis' sending military forces into Bergenia, as well as the subsequent conduct of the Atlantisan military, violated international law, the U.N. Charter, and applicable international agreements;

3. That Bergenia's oil export policies are consistent with international law and applicable international agreements;

4. That the actions of Bergenia to implement the Security Council resolutions and to defend itself are consistent with international law, the U.N. Charter, and applicable international agreements.

Respectfully submitted,