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LAWS2250 International Law 2nd Semester 2009

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Question 1

82/100

1a)

The USG should seek a number of orders from the ICJ. They should seek to have Rohan return the water and electricity to the USG embassy and to remove the 'siege conditions'. They will therefore seek an obligation by Rohan to cease the wrongful act (Article 30 of the Draft Articles on the Responsibility of States for Intentionally Wrongful Acts) [✓] and under Article 31 of the Draft Articles, an obligation to make full reparation. This is likely to be through compensation for the individuals hurt by the chemical attacks (Art 36) as this is likely to be financially assessable.

USG will also seek satisfaction (Art 37). This is likely to involve a formal apology by Rohan (Art 37(2)) such as occurred in the Rainbow Warrior dispute.

The Draft Articles:

The Draft Articles (mentioned above) are not binding and were only commended to the attention of governments and adopted without a vote by the UNGA Resolution 56/83. They have however been cited by the ICJ in the Wall and Bosnian Genocide cases and therefore are considered part of International Law. I will continue my discussion on the assumption that they are binding.

Jurisdiction:

For USG to be successful in achieving these orders from the ICJ, the ICJ will first need to accept that it has jurisdiction. The principle of the ICJ is consent; therefore it will need to be shown that both USG and Rohan consent to the ICJ's jurisdiction. Art 36.1 of the ICJ Statute allows States that are parties to treaties with provisions referring disputes to the Court to use this mechanism. Both Rohan and USG are parties to the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning Settlement of Disputes (VCDR). Article 1 of this treaty allows States to refer cases to the Court if the dispute arises out of the interpretation or application of the VCDR [✓]

This dispute arises out of the siege conditions on the USG embassy in Rohan. The VCDR Art 22(1) states that diplomatic missions are inviolable. The shutting down of water and power services, and the chemical attacks on the embassy is likely to arise out of the interference with this inviolability [✓]. Furthermore Art 29(1) states that diplomatic agents, defined under Article

1(e) as including members of staff, are also inviolable. Two of the USG embassy staff have been attacked and remain in a critical condition.

Finally USG's granting of refuge to the former Rohan leader may be contrary to Article 41(3) of the VCDR if this is considered incompatible with the functions of the mission [✓]. These disputes all arise from the VCDR and therefore satisfy jurisdiction to the ICJ.

Other Preliminary Issues:

Rohan and USG are the only necessary parties to this dispute (East Timor Case). The dispute arises out of the interpretation and application of the VCDR, which is a legal and not a political dispute (Mavromatis case). Finally there is no indication, notwithstanding SC Res 2000 that the SC remains seized of the matter which lessens the likelihood that the ICJ will hear the case (Lockerbie).

Provisional Measures:

USG will (should) probably seek provisional measures (Art 41 ICJ Statute) because of the urgency of the situation and the period of the time that ICJ decisions take to be heard (often four years) [✓]. The Court must be satisfied that prima facie it has jurisdiction (Legality of the Use of Force Case) [✓]. This has already been discussed. These provisional measures would be binding on all parties (Le Grand) [✓]. However the US in the Avena case failed to comply with the ICJ's provisional measures.

There is no guarantee therefore that Rohan will comply and the siege will be lifted [✓]. If it is not then the dispute will be sent back to the SC for further action.

b)

USG will have to prove that the attacks on their embassy in Rohan are a breach of international obligations (see above) AND are attributable to Rohan. The general principle of State Responsibility is that States are only responsible for their own conduct and that of people acting on their behalf (Bosnian Genocide case). This is found in the Draft Articles Art 2(a)

Characterise the Breach:

USG will argue that the omission of Rohan in failing to prevent, and the act in failing to rectify the shutting down of water and power services and the chemical attack on its embassy (whose fault is that?) gives rise to an omission, and an act to prevent an internationally wrongful act [✓].

This was a similar combination to the Tehran Hostages case. The next step that must be proven is that this can be attributed to Rohan.

Attribution – Shut Down of Water:

Article 8 of the Draft Articles states that an act or an omission can be attributed to a State if the person or body is acting under the instructions of, or under the directions or control of that State. As the RWPC has recently been privatised it does not come under Article 4(1) as an organ of the State. However, if it can be shown that the RWPC remains under ‘effective control’ (Nicaragua) of the State then this action will be attributable. There is no need to show complete dependence, just that the RWPC acted in accordance with Rohan’s instructions or under its effective control (Bosnian Genocide) (explain: what is it?). As Rohan is under a military dictatorship, hostile to USG’s actions in granting refuge to their former PM, it is likely that there were some instructions issued by General Sauron to turn off the water and power. This is not clear on the evidence however and cannot be proven [✓].

Attribution – Chemical Attack:

The chemical attack was conducted by ‘persons unknown’. Without knowledge as to who engaged in this action it is unlikely to be found that they were under the effective control (Nicaragua, Article 8) of Rohan. Even if the lower standard of ‘overall control’, discussed in the Bosnian case as perhaps possible for terrorist attacks in used it is unlikely to be passed. Further evidence is needed.

Attribution – Adoption:

Article 11 of the Draft Articles does however allow an act or omission to be attributed to Rohan if it is found that Rohan acknowledged and adopted the conduct as its own [✓]. General Sauron, the leader of Rohan declared the two incidents as ‘an expression of Rohanian’s anger’ and warned that he would be unable to prevent further disruptions. This appears to go beyond mere acknowledgement of a factual situation (Tehran Hostages case) [✓]. The General seems to both approve of the actions, as Khomeini did in Tehran and offer a blanket amnesty for Rohanian’s to engage in further attacks. He thus appears to encourage further disruptions to the USG embassy.

This however is contentious and it will be up to the ICJ to decide whether Rohan had truly adopted the conduct, satisfying the attribution element [✓].

c)

General Principles:

Generally States are under an obligation to settle their disputes peacefully (Article 2(3) UNC) and not to resort to the use of force (Art 2(4) UNC). Article 2(4) is a norm of customary international law (Nicaragua), and thus binding to all States, including USG. The 1970 UNGA Resolution 2625 Declaration on Friendly Relations confirms that forceful armed intervention into domestic matters and reprisals against a State, both part of USG's Operation Gondor Pride, as prohibited [✓]. However, there is some discussion over the scope of Article 2(4) and its application. A wide understanding of Article 2(4) prohibits all force, while a restrictive interpretation appears to allow force that does not threaten territorial integrity, political independence or any other matters consistent with the purposes of the UN. This restrictive interpretation may allow the targeted use of force to protect nationals abroad [✓]. This will be discussed below.

Self Defence:

The first exception to Article 2(4) is that of the inherent right of self-defence (Art 51 UNC). USG must prove that the siege on their embassy amounts to an 'armed attack'. It appears likely that the shutting down of power and electricity and single chemical attack is not of 'a significant and scale or effect' (Nicaragua) [✓] as to constitute an 'armed attack' under Article 51. Although it is possible to take a cumulative approach, the two attacks together are not more substantive than mere assistance to rebels [✓] in the form of provisions of weapons and logistical support which was found in Nicaragua to not equal an armed attack.

Attribution:

The act must also be attributed to a State (Oil Platforms). This test is different to attribution of intentionally wrongful acts and it cannot be the action of non-state actors or armed bands (Nicaragua) [✓].

Necessity:

If the ICJ decides that Rohan's actions are attributable, and do amount to an armed attack USG must prove that its response was both necessary and proportional. (Nicaragua). The targeted nature of Operation Gondor Pride in seeking to protect nationals with force only as necessary as to the operational commander's discretion appears to satisfy this. It is far more proportional than the targets of opportunity attacked by the US in Oil Platforms. Furthermore all sites are necessary for the quick and effective removal of the USG embassy staff.

If it is found that USG are able to act in self-defence because Rohan's actions constitute an armed attack by State actors, USG's necessary and proportional response will be found valid. [✓] It is however unlikely that Rohan's actions amount to an armed attack.

Protection of Nationals:

Under a restrictive interpretation of UNC Article 2(4) USG may lawfully justify their use of force under the protection of nationals abroad exception. USG's short, sharp strike aimed at rescuing its nationals from the siege conditions of its embassy with no ulterior political motive cannot be said to be against the territorial integrity or political independence of Rohan. Nor can it be considered to be contrary to the object and purpose of the UN (briefly explain why). In actuality the ending of the siege will in the long run promote the peace and security of the world.

Entebbe:

The 1976 Israeli action in Uganda to free Israeli hostages led to the formation of the Entebbe Principle (Doctrine) which has dubious validity at International Law [✓]. USG will enter Rohan with force only to the extent strictly necessary to defend and extricate individuals whose lives are endangered because Rohan is unwilling to safeguard their lives (as evidenced by General Sauron's declaration). However the US' unilateral action in attempting to free the Tehran Hostages was condemned by the ICJ [✓]. In all likelihood USG's actions will not be met with much condemnation by the organs of the UN but they will not be approved as being lawful either [✓].

It is likely that USG's use of force, either through self-defence or through the rescuing of their nationals abroad, will not be considered lawful under the UN Charter.

This answer is well elaborated. Well done. 82.