# SEPARATE OPINION OF JUDGE TOMKA

*Jurisdiction* ratione materiae *of Court under ICSFT — Criminal law nature of ICSFT — Ukraine's claims related to support in internal armed conflict — Rights Ukraine seeks to protect implausible at provisional measures stage — Court should have analysed whether Ukraine's claims within scope of ICSFT — Supply of arms outside scope of "funds" — Ukraine's claims outside Court's jurisdiction.*

*Jurisdiction* ratione materiae *of Court under the CERD — Court should have analysed Ukraine's claims in detail — No absolute right under CERD to native-language education — Alleged discrimination in equality before law within scope of CERD — Some but not all of Ukraine's claims within scope of Court's jurisdiction under CERD — Court has jurisdiction over those claims.*

*Procedural preconditions to jurisdiction under CERD — Recourse to negotiation and CERD procedures not overly burdensome relative to Court — Logical reading of text of Article 22 requires preconditions to be cumulative — Precondition to engage CERD procedures supported by context — Departure from practice not to consider* travaux préparatoires — Travaux *confirm preconditions are cumulative — Requiring recourse to Committee procedures however excessively formalistic in circumstances of present case.*

*State responsibility — Requirement of breach of international* obligation *for State responsibility.*

1. The way in which the Court has dealt with the preliminary objections of the Russian Federation as regards its jurisdiction *ratione materiae* and determined that it has jurisdiction under both of the Conventions relied on by Ukraine calls for some comments. I will start with the International Convention for the Suppression of the Financing of Terrorism (hereinafter the "ICSFT").

## I. The International Convention for the Suppression of the Financing of Terrorism

2. The ICSFT is a typical criminal law convention. It precisely defines, in Article 2, the offence of the financing of terrorism by describing both its objective element (the act itself or *actus reus*) and its subjective element *(mens rea)*. States parties to the Convention have the obligation — as is typical for criminal law conventions — to establish as criminal offences

under their domestic law the offences defined in Article 2 and to provide for appropriate penalties which take into account the grave nature of the offences. States parties have the obligation — again typical for criminal law conventions — to establish as may be necessary their jurisdiction over the offences defined in the Convention. The Convention also creates an obligation for the States parties to co-operate in the prevention of the offences. That obligation of co-operation is further specified in the Convention (Art. 18). The object of the Convention is clearly spelled out in its preamble, which provides that States have agreed on this Convention,

> "[b]eing convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators".

The Convention has to be viewed and interpreted in light of its object and purpose, taking into account its nature as a criminal law convention.

3. According to Ukraine, this Convention is applicable to acts involving the use of arms and armed force in the eastern part of Ukraine, which have occurred in what can be characterized as an internal armed conflict. The Memorial of Ukraine refers in particular to actions by the so-called Donetsk People's Republic ("DPR") and Luhansk People's Republic ("LPR") opposing the efforts of the Government of Ukraine, also involving the use of force, to reinstate its full control over the region.

4. It is to be recalled that, in its Order on provisional measures of 19 April 2017, the Court declined the request of Ukraine based on the ICSFT. The Court did not consider that the rights for which Ukraine sought protection were at least plausible, not having been convinced that there were "sufficient reasons for considering that the other elements set out in Article 2, paragraph 1, such as the elements of intention or knowledge . . . [were] present" (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, pp. 131-132, para. 75). As the Court noted, "[a]t th[at] stage of the proceedings, Ukraine ha[d] not put before the Court evidence which affords a sufficient basis to find it plausible that these elements [specified in Article 2] [were] present" *(ibid.)*.

5. This conclusion of the Court has led Ukraine to "repackage" its original claims, as presented in its Application instituting proceedings (Judgment, para. 18) into a new version as formulated in its Memorial (*ibid.*, para. 19), while in substance they remain more or less the same. It is apparent from the Memorial of Ukraine that it continues to charge the Russian Federation of committing acts which, in its view, are contrary to the ICSFT. Chapter 2, consisting of some forty pages, of that written pleading is entitled "Russian Financing of Terrorism in Ukraine". Its

purpose is to describe "the myriad ways in which the Russian Federation, acting through numerous state officials, not only tolerated but fostered and supported the funding of illegal armed groups in Ukraine, including by providing weapons used for the acts of terrorism recounted in Chapter 1" (Memorial of Ukraine, p. 80, para. 132). Ukraine submits that "Russian financing of terrorism in Ukraine" consisted of "massive" supply of weapons and ammunition to "illegal armed groups in Ukraine" (*ibid.*, pp. 81-85, paras. 133-136), the supply or "transfer" of the Russian Buk anti-aircraft missile used to destroy flight MH17 (*ibid.*, pp. 86-98, paras. 137-154), the supply of multiple launch rocket systems, which were used to shell Ukrainian civilians, to the DPR and LPR (*ibid.*, pp. 98-104, paras. 155-161), the provision of explosives used to bomb Ukrainian cities (*ibid.*, pp. 104-108, paras. 162-168), "comprehensive training on Russian territory" of the DPR, LPR and other armed groups (*ibid.*, pp. 109-113, paras. 169-173) and Russian fundraising for illegal armed groups in Ukraine (*ibid.*, pp. 113-119, paras. 174-180).

6. On the one hand, the Court recalls that, as it stated in its Judgment on the preliminary objection in *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (*I.C.J. Reports 1996 (II)*, pp. 809-810),

> "in order to determine the Court's jurisdiction *ratione materiae* under a compromissory clause concerning disputes relating to the interpretation or application of a treaty, it is necessary to ascertain whether the acts of which the applicant complains 'fall within the provisions' of the treaty containing the clause" (Judgment, para. 57).

On the other hand, the Court ultimately fails to ascertain whether the above-mentioned acts, described in Chapter 2 of Ukraine's Memorial, fall within the provisions of the ICSFT. Instead, the Court focuses its attention on the definition of perpetrators of offences of financing acts of terrorism. Not surprisingly, the ICSFT, as a criminal law convention, uses in Article 2 the expression "any person". This is typical language used in many criminal codes and statutes to describe a perpetrator. The Court leaves the other element of the offences *(mens rea)*, specifically, either the intention of a perpetrator that the funds should be used or his knowledge that they are to be used to commit an act of terrorism, for the merits stage of the proceedings (*ibid.*, para. 63).

7. The Court has also refrained from determining the scope of the term "funds" used in the Convention, in particular whether it includes the provisions of weapons by a State, despite the fact that it is determining its jurisdiction *ratione materiae* (*ibid.*, para. 56). As the Court acknowledges "[t]his may require the interpretation of the provisions that define the scope of the treaty" (*ibid.*, para. 57). One such provision is Article 1, paragraph 1, of the ICSFT, which defines the term "funds" for the purposes of that Convention. The Court accepts that the scope of this term "relate[s] to the scope of the ICSFT" (*ibid.*, para. 62) but rather surpris-

ingly takes the view that it "need not be addressed at the present stage of the proceedings" (Judgment, para. 62). According to the Court, the interpretation of the definition of "funds" "could be relevant as appropriate at the stage of an examination of the merits" *(ibid.)*.

8. I am not convinced that this is the right approach. The ascertainment of the scope of the term "funds" is a distinctly legal issue which is a matter of interpretation of the Convention. The scope of that term "relate[s] to the scope of the ICSFT" *(ibid.)* and thus has a direct bearing on the scope of the Court's jurisdiction *ratione materiae*. Determining the scope of jurisdiction *ratione materiae* more precisely at this jurisdictional stage of the proceedings would have assisted in clarifying which of the claims presented by Ukraine, if any, fall within the Court's jurisdiction and could be further argued at the merits stage. This issue has been left open despite the fact that the legal definition of the term "funds" for the purposes of the ICSFT is not closely intertwined with the merits. Thus, the principal task of the jurisdictional stage of the proceedings has not been fully realized. Moreover, it is useful to recall the past jurisprudence of the Court. In 1972, the Court stated that it "must . . . always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13). Although this statement was made by the Court in response to India's argument that Pakistan could not challenge the Court's jurisdiction as it did not raise it as a "preliminary" objection, the Court resorted to that jurisprudence some thirty-five years later when it asserted that its 1996 Judgment on jurisdiction and admissibility in the *Genocide* case dealt implicitly with an issue that neither party raised before it in 1996 during the jurisdictional phase of the proceedings, but which was relevant for the Court's jurisdiction (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 91, para. 118).

9. On the basis of the extremely cursory treatment of the Russian Federation's objection, without really applying the *Oil Platforms* test and without considering whether various acts of the Russian Federation of which the Applicant complains in Chapter 2 of the Memorial fall within the provisions of Articles 8, 9, 10, 12 and 18 identified by Ukraine as relevant for its claims in its submissions (Memorial of Ukraine, pp. 362-363, para. 653), the Court "concludes that the objection raised by the Russian Federation to its jurisdiction *ratione materiae* under the ICSFT cannot be upheld" (Judgment, para. 64).

10. Despite the above comments on the treatment by the Court of the preliminary objections raised by the Russian Federation against the Court's jurisdiction on the basis of Article 24 of the ICSFT, I agree with the Court's view that "[t]he financing by a State of acts of terrorism is not

addressed by the ICSFT" and that such activity "lies outside the scope of the Convention" (Judgment, paras. 59, 60 and 61). The Court's conclusion on its jurisdiction under the ICSFT should be read in light of this view, which is expressed repeatedly in its Judgment.

11. The acts of which Ukraine complains of in Chapter 2 of its Memorial (pp. 80-119), describing them as "Russian Financing of Terrorism in Ukraine", referred to already in paragraph 5 of this opinion, are the acts of the Russian Federation, to a great extent consisting of providing weapons to the DPR and the LPR. Even if proven, they, in my view, do not fall within the scope of the ICSFT. This has led me to respectfully disagree with the conclusion of the majority.

## II. The International Convention on the Elimination of All Forms of Racial Discrimination

12. This brings me to the Court's treatment of the jurisdictional objections of the Russian Federation as to Ukraine's claims under the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "the CERD").

13. The Court's determination of its jurisdiction *ratione materiae* under the CERD is not much more detailed. In fact it consists of just three paragraphs. In the first one (Judgment, para. 94), the Court says what it does not need to do at this stage of the proceedings. In the next paragraph (*ibid.*, para. 95), the Court recalls that at the jurisdictional stage of the proceedings it "only needs to ascertain whether the measures of which Ukraine complains fall within the provisions of the Convention". And in the final paragraph of its "analysis", the Court simply considers that

> "taking into account the broadly formulated rights and obligations contained in the Convention . . . and the non-exhaustive list of rights in Article 5, . . . the measures of which Ukraine complains . . . are capable of having an adverse effect on the enjoyment of certain rights protected under CERD" (*ibid.*, para. 96).

It concludes that "[t]hese measures thus fall within the provisions of the Convention" *(ibid.)*. The Court simply asserts this conclusion without reasonably and sufficiently demonstrating it.

14. Again, there is no specific analysis of the preliminary objections of the Russian Federation, presented on almost forty pages (Preliminary Objections submitted by the Russian Federation, Vol. I, pp. 139-182, paras. 294-359). By way of example, the Respondent argues that "Article 5 *(e)* (v) of CERD does not include, as Ukraine alleges, an absolute right to education 'in native language'" (*ibid.*, p. 158, para. 329). The Court provides no answer to this argument, which concerns the scope of the CERD, rather leaving the issue open for the merits.

15. However, certain of the claims of Ukraine, like the claim that the Respondent "fail[s] to guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in the enjoyment of . . . the right to equal treatment before the tribunals and all other organs administering justice" (Memorial of Ukraine, p. 363, para. 653 (i)), fall within the scope of the CERD. Whether the Respondent has failed to comply with this obligation still remains to be proven by the Applicant, while the Respondent will have full opportunity to rebut these allegations. This, however, is a matter properly for the merits. Since at least some of the claims of Ukraine fall within the scope of the CERD, although I am not satisfied that the Court refrained to specify which ones, I have in the end voted with the majority.

16. Moreover, I am not convinced by the Court's treatment of the question of the procedural preconditions for seising it contained in Article 22 of the CERD. When interpreting the nature of these preconditions, the Court concludes that they are alternative. Accordingly, prior to seising the Court with a dispute under the CERD, either, at least, a good-faith attempt of negotiations on the issues falling within the subject-matter of the Convention must have been made, or the dispute must have been referred to the Committee on the Elimination of Racial Discrimination (hereinafter "the Committee") without that dispute having been settled.

17. The main basis for this conclusion by the Court is its view that

> "should negotiation and the CERD Committee procedure be considered cumulative, States would have to try to negotiate an agreed solution to their dispute and, after negotiation has not been successful, take the matter before the [CERD] Committee for further negotiation, again in order to reach an agreed solution" (Judgment, para. 110).

According to the Court "the context of Article 22 of CERD does not support this interpretation" *(ibid.)*.

18. However, the relevant provisions for the procedure before the Committee are contained in Articles 11 to 13 of the Convention. Nowhere is the condition of prior negotiations before referring the matter to the Committee stipulated in those three Articles. Under Article 11, paragraph 1, of the Convention "[i]f a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee". The Committee then transfers the communication to the State party concerned. Under paragraph 2 of the same Article, if the matter is not adjusted within six months, either by bilateral negotiations or by any other procedure, either State shall have the right to refer the matter again to the Committee. As is clear from the provisions of Article 11, negotiations are an element of

the process instituted before the Committee, not a precondition for seising it of the matter.

19. It follows from the above that, once a State brings a matter to the attention of the Committee under Article 11, it demonstrates its willingness to enter into negotiations with the other State party within the context of the procedures in the Committee. If that negotiation or the continuation of the procedures do not lead to the settlement of a dispute, either party may bring it to the Court, as both negotiations and conciliation procedures under Articles 11-13 of the CERD will have been tried to no result.

20. The Court believes that such expressions as "without delay" (Art. 2, para. 1) or "speedily" (preamble) support its interpretation as these provisions "show the States parties' aim to eradicate all forms of racial discrimination effectively and promptly" (Judgment, para. 111). And the Court adds that "the achievement of such aims could be rendered more difficult if the procedural preconditions under Article 22 were cumulative".

21. This view can underestimate the usefulness of other means of peaceful settlement of disputes and the role of other bodies and, on the other hand, unrealistically estimate that the Court can resolve a dispute "speedily". The present dispute was brought before the Court on 16 January 2017 and, taking into account the current docket of the Court, the Court's Judgment on the merits most likely will not be rendered earlier than sometime in 2023.

22. In my view, Article 22 should be interpreted to the effect that the conditions provided therein are cumulative. Under Article 22, a dispute which is to be referred to the Court must be one that "is not settled by negotiation or by the procedures expressly provided for in this Convention". Ukraine focuses heavily on the ordinary meaning of the word "or" to support its position that the preconditions are alternative. However, it is not the ordinary meaning of "or" which the Court must determine; it is the ordinary meaning of the phrase "which is not settled by negotiation or by the procedures . . .". This phrase admits two meanings. First, it could refer to a dispute which is not settled by negotiation and which is not settled by the procedures, as the Russian Federation argues. Second, it could refer to a dispute which is not settled by negotiation or is not settled by the procedures before the Committee, as Ukraine maintains. Which of these interpretations is correct depends on the reading to be given to "not" and "or" together in this phrase.

23. A logical reading of the text of Article 22 favours the interpretation that the conditions are cumulative. The words "not" and "or" are logical connectors, so it is reasonable to apply propositional logic to the interpretation of the phrase in which they are used. According to the first De Mor-

gan's law of formal propositional logic "the negation of a disjunction is equal to the conjunction of the negation of the alternates — that is not ($p$ or $q$) equals not $p$ and not $q$, or symbolically $\sim(p \vee q) \equiv \sim p \cdot \sim q$"[1]. This is consistent with the semantic context of Article 22. A dispute can be settled either by direct negotiation between the parties or by the procedures referred to in Articles 11-13 of the CERD, but not by both simultaneously. Accordingly, with respect to a dispute that is outside the jurisdiction of the Court, the "or" must be disjunctive. The negation of this disjunction should accordingly be read to refer to disputes settled neither by negotiation nor by the CERD procedure. Only when negotiation and the procedures have not led to the resolution of a dispute, is the condition met in accordance with the ordinary meaning of the terms of Article 22.

24. When the context is taken into account, a cumulative reading that requires recourse to the inter-State dispute settlement procedures of the Committee should also be preferred in order to preserve the effectiveness of Articles 11 to 13 of the CERD and the Conciliation Commissions foreseen thereunder. According to the rule codified in Article 31, paragraph 2, of the Vienna Convention on the Law of Treaties, the context to be considered comprises the full text of the CERD, including its preamble. The particular context for the interpretation of Article 22 of the CERD includes the Conciliation Commission process established in Articles 12 to 13.

25. It would undermine the procedures in the Committee to interpret recourse to them as optional before seisin of the Court. The principle of effectiveness "has an important role in the law of treaties and in the jurisprudence of this Court" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 455, para. 52). The necessity of a cumulative reading to preserve the effectiveness of Articles 11 to 13 of the CERD is reflected in the difference between the procedures in the Committee and the Court. From the perspective of a claiming State, there are several reasons to prefer the Court. First, the procedures in the Committee produce a report containing findings of fact and recommendations (Art. 13, para. 1), while a judgment of the Court has binding effect in accordance with Article 94, paragraph 1, of the Charter of the United Nations and Article 59 of the Statute. Additionally, there is no possibility for interim relief during the procedures in the Committee, while the Court has the power to indicate binding provisional measures under Article 41 of its Statute.

[1] "Augustus De Morgan", *Britannica Academic*, Encyclopædia Britannica, 26 October 2016, https://academic.eb.com/levels/collegiate/article/Augustus-De-Morgan/29609. Accessed 3 October 2019.

26. This preference is borne out in the practice of States. States do not resort to the inter-State procedures before the Committee unless there is no access to the Court. The only exception is the case between Qatar and the United Arab Emirates, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, which is also pending before the Court. In view of the above, the context strongly favours the interpretation of the procedural preconditions of Article 22 of the CERD as cumulative. To hold otherwise is tantamount to holding that States anticipated Articles 11 to 13 of the CERD to serve as a residual mechanism against States which make reservations to Article 22, thus not accepting the jurisdiction of the Court. However, nothing suggests that this was the intention of States when they negotiated the text of the future Convention.

27. Indeed, the *travaux préparatoires* of the CERD indicate the opposite, and confirm the interpretation that the preconditions are cumulative. The Court, in a departure from its recent practice — even in paragraph 59 of the Judgment as regards the ICSFT — declines to look at the CERD *travaux*. Although "[t]he Court notes that both Parties rely on the *travaux préparatoires* of CERD in support of their respective arguments", in its view "there is no need for [the Court] to examine the *travaux préparatoires*" (Judgment, para. 112). This is rather a "spectacular" turn-around, as just eight years ago, when the Court interpreted the same provision, Article 22 of the CERD, the *travaux* were not ignored. There, also after noting that "both Parties have made extensive arguments relating to the *travaux préparatoires*, citing them in support of their respective interpretations" of Article 22 and after mentioning, by example, four other cases when it resorted to the *travaux préparatoires*, the Court came to the conclusion that "in this case . . . an examination of the *travaux préparatoires* is *warranted*" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 142; emphasis added). As consistency is a virtue in judicial approach and reasoning, I see no reason for the Court to change its approach.

28. The draft of the Convention submitted by the Economic and Social Council to the General Assembly on the basis of the report of the Commission on Human Rights contained neither institutional provisions establishing the Committee nor a provision on dispute resolution (Draft International Convention on the Elimination of All Forms of Racial Discrimination, UN doc. E/RES/1015 B (XXXVII)). Instead, these provisions were added to the text during negotiations in the Third Committee (Report of the Third Committee: Draft International Convention on the Elimination of All Forms of Racial Discrimination, UN doc. A/6181). In addition to the draft text, the Council submitted to the Assembly a working paper prepared by the Secretary-General containing draft final clauses,

including a dispute resolution clause (UN doc. E/CN.4/L.679; see also UN doc. A/6181, para. 4 *(d)*). In that paper, the Secretary-General provided four examples of compromissory clauses based on previous multilateral treaties (UN doc. E/CN.4/L.679, pp. 15-16). The Third Committee discussed the question of a compromissory clause at its 1367th Meeting on 7 December 1965 (see UN doc. A/C.3/SR.1367). As a basis for discussion, the officers of the Committee suggested a similar text:

> "Any dispute between two or more Contracting States over the interpretation or application of this Convention, which is not settled by negotiation, shall at the request of any of the parties to the dispute be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement." (UN doc. A/C.3/L.1237, p. 4; see also UN doc. A/6181, para. 197.)

29. The addition of words "or by the procedures expressly provided for in this Convention" after "negotiation" was jointly proposed as an amendment by Ghana, Mauritania and the Philippines (UN doc. A/C.3/L.1313; see also UN doc. A/6181, para. 199). This proposed amendment was adopted unanimously by the Third Committee (UN doc. A/C.3/SR.1367, para. 41). During the discussion, only Ghana provided views on the amendment. Its delegate

> "said that [it] was self-explanatory. Provision had been made in the draft Convention for machinery which should be used in the settlement of disputes *before recourse was had* to the International Court of Justice. The amendment simply referred to the procedures provided for in the Convention." (UN doc. A/C.3/SR.1367, para. 29; emphasis added.)

The amendment was not further discussed prior to the adoption of the Convention by the plenary of the General Assembly at its 1406th Meeting on 21 December 1965 (UN doc. A/PV.1406).

30. I admit that in the case at hand, in view of the very strenuous relationship between the two Parties in the period from 2014 to 2017, there was no chance of settling their dispute even if it had been referred to the Committee. It would have been a futile exercise. For that reason, while maintaining my interpretation of Article 22 of the Convention, I did not vote against the Court's jurisdiction under the CERD. To insist, in the circumstances of the present case, on the prior referral of the dispute to the Committee would have been an exercise in excessive formalism. Even if the Application was premature, this defect could have been remedied by the Applicant and it would make no sense to require Ukraine to institute fresh proceedings (cf. *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14; *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J.,*

*Series A, No. 2*, p. 34; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83).

## III. Breaches of an "International Obligation"

31. A final point on precision in drafting merits mention. The Court occasionally refers to "breaches of the Convention", "breaches of Articles" or "violat[ions] of a number of provisions of the ICSFT and CERD" (e.g. Judgment, paras. 30, 79, 90 and 93). It is rather regrettable that the principal judicial organ of the United Nations does not pay sufficient attention to the precision of the language it uses. Under international law, for an act of a State to be wrongful, such act, consisting of an action or omission, must both be attributable to the State and constitute a breach of an *international obligation* of the State (Article 3 of ARSIWA). The International Law Commission intentionally chose this language because it is "long established" (*Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, p. 35, Commentary to Article 2, para. 7). As the Commission correctly stated in its Commentary to then Article 3 of the Draft Articles adopted in the first reading, it is "more appropriate to refer . . . to 'breach of an international *obligation*' rather than 'breach of a *rule*' or of a '*norm* of international law'" (*YILC*, 1973, Vol. II, p. 184, Commentary to Article 3, paragraph 15; emphasis in the original). As the Commission explained, that expression is

> "the most accurate. A rule is the objective expression of the law; an obligation is a subjective legal phenomenon and it is by reference to that phenomenon that the conduct of a subject of international law is judged, whether it is in compliance with the obligation or whether it is in breach of it." *(Ibid.)*

And as the Commission observed, the phrase "breach of an international obligation" corresponds to the language of Article 36, paragraph 2 *(c)*, of the Statute of the International Court of Justice (*YILC*, 2001, Vol. II, Part Two, p. 35, Commentary to Article 2, paragraph 7). The Court could have been inspired by the language of its own basic instrument.

*(Signed)* Peter Tomka.