INTERNATIONAL COURT OF JUSTICE

# LEGAL CONSEQUENCES ARISING FROM THE POLICIES AND PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM

## EXHIBITS TO THE WRITTEN STATEMENT OF THE HASHEMITE KINGDOM OF JORDAN

**VOLUME IV**

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INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA *v.* UNITED STATES OF AMERICA)

MERITS

**JUDGMENT OF 27 JUNE 1986**

# 1986

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE DES ACTIVITÉS MILITAIRES ET PARAMILITAIRES AU NICARAGUA ET CONTRE CELUI-CI

(NICARAGUA c. ÉTATS-UNIS D'AMÉRIQUE)

FOND

**ARRÊT DU 27 JUIN 1986**

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# CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA *v.* UNITED STATES OF AMERICA)

MERITS

*Failure of Respondent to appear — Statute of the Court, Article 53 — Equality of the parties.*

*Jurisdiction of the Court — Effect of application of multilateral treaty reservation to United States declaration of acceptance of jurisdiction under Statute, Article 36, paragraph 2 — Third State "affected" by decision of the Court on dispute arising under a multilateral treaty — Character of objection to jurisdiction not exclusively preliminary — Rules of Court, Article 79.*

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*State sovereignty — Territory — Airspace — Internal and territorial waters — Right of access of foreign vessels.*

*Principles of humanitarian law — 1949 Geneva Conventions — Minimum rules applicable — Duty of States not to encourage disrespect for humanitarian law — Notification of existence and location of mines.*

*Respect for human rights — Right of States to choose political system, ideology and alliances.*

*1956 Treaty of Friendship, Commerce and Navigation — Jurisdiction of the Court — Obligation under customary international law not to commit acts calculated to defeat object and purpose of a treaty — Review of relevant treaty provisions.*

*Claim for reparation.*

*Peaceful settlement of disputes.*

## JUDGMENT

*Present : President* NAGENDRA SINGH ; *Vice-President* DE LACHARRIÈRE ; *Judges* LACHS, RUDA, ELIAS, ODA, AGO, SETTE-CAMARA, SCHWEBEL, Sir Robert JENNINGS, MBAYE, BEDJAOUI, NI, EVENSEN ; *Judge* ad hoc COLLIARD ; *Registrar* TORRES BERNÁRDEZ.

In the case concerning military and paramilitary activities in and against Nicaragua,

*between*

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos Argüello Gómez, Ambassador,

as Agent and Counsel,

Mr. Ian Brownlie, Q.C., F.B.A., Chichele Professor of Public International Law in the University of Oxford ; Fellow of All Souls College, Oxford,

Hon. Abram Chayes, Felix Frankfurter Professor of Law, Harvard Law School ; Fellow, American Academy of Arts and Sciences,

Mr. Alain Pellet, Professor at the University of Paris-Nord and the *Institut d'études politiques de Paris,*

Mr. Paul S. Reichler, Reichler and Appelbaum, Washington, D.C. ; Member of the Bar of the United States Supreme Court ; Member of the Bar of the District of Columbia,

as Counsel and Advocates,

Mr. Augusto Zamora Rodríguez, Legal Adviser to the Foreign Ministry of the Republic of Nicaragua,
Miss Judith C. Appelbaum, Reichler and Appelbaum, Washington, D.C. ; Member of the Bars of the District of Columbia and the State of California,
Mr. David Wippman, Reichler and Appelbaum, Washington, D.C.,

as Counsel,

*and*

the United States of America,

THE COURT,

composed as above,

*delivers the following Judgment :*

1. On 9 April 1984 the Ambassador of the Republic of Nicaragua to the Netherlands filed in the Registry of the Court an Application instituting proceedings against the United States of America in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. In order to found the jurisdiction of the Court the Application relied on declarations made by the Parties accepting the compulsory jurisdiction of the Court under Article 36 of the Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of the United States of America. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. At the same time as the Application was filed, the Republic of Nicaragua also filed a request for the indication of provisional measures under Article 41 of the Statute. By an Order dated 10 May 1984, the Court rejected a request made by the United States for removal of the case from the list, indicated, pending its final decision in the proceedings, certain provisional measures, and decided that, until the Court delivers its final judgment in the case, it would keep the matters covered by the Order continuously under review.

4. By the said Order of 10 May 1984, the Court further decided that the written proceedings in the case should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. By an Order dated 14 May 1984, the President of the Court fixed 30 June 1984 as time-limit for the filing of a Memorial by the Republic of Nicaragua and 17 August 1984 as time-limit for the filing of a Counter-Memorial by the United States of America on the questions of jurisdiction and admissibility and these pleadings were duly filed within the time-limits fixed.

5. In its Memorial on jurisdiction and admissibility, the Republic of Nicaragua contended that, in addition to the basis of jurisdiction relied on in the Application, a Treaty of Friendship, Commerce and Navigation signed by the Parties

in 1956 provides an independent basis for jurisdiction under Article 36, paragraph 1, of the Statute of the Court.

6. Since the Court did not include upon the bench a judge of Nicaraguan nationality, Nicaragua, by a letter dated 3 August 1984, exercised its right under Article 31, paragraph 2, of the Statute of the Court to choose a judge *ad hoc* to sit in the case. The person so designated was Professor Claude-Albert Colliard.

7. On 15 August 1984, two days before the closure of the written proceedings on the questions of jurisdiction and admissibility, the Republic of El Salvador filed a Declaration of Intervention in the case under Article 63 of the Statute. Having been supplied with the written observations of the Parties on the Declaration pursuant to Article 83 of the Rules of Court, the Court, by an Order dated 4 October 1984, decided not to hold a hearing on the Declaration of Intervention, and decided that that Declaration was inadmissible inasmuch as it related to the phase of the proceedings then current.

8. On 8-10 October and 15-18 October 1984 the Court held public hearings at which it heard the argument of the Parties on the questions of the jurisdiction of the Court to entertain the dispute and the admissibility of the Application.

9. By a Judgment dated 26 November 1984, the Court found that it had jurisdiction to entertain the Application on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court ; that it had jurisdiction to entertain the Application in so far as it relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 21 January 1956, on the basis of Article XXIV of that Treaty ; that it had jurisdiction to entertain the case ; and that the Application was admissible.

10. By a letter dated 18 January 1985 the Agent of the United States referred to the Court's Judgment of 26 November 1984 and informed the Court as follows :

> "the United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law. The United States remains firmly of the view, for the reasons given in its written and oral pleadings that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan application of 9 April 1984 is inadmissible. Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims."

11. By an Order dated 22 January 1985 the President of the Court, after referring to the letter from the United States Agent, fixed 30 April 1985 as time-limit for a Memorial of Nicaragua and 31 May 1985 as time-limit for a Counter-Memorial of the United States of America on the merits of the dispute. The Memorial of Nicaragua was filed within the time-limit so fixed ; no pleading was filed by the United States of America, nor did it make any request for extension of the time-limit. In its Memorial, communicated to the United States pursuant to Article 43 of the Statute of the Court, Nicaragua invoked Article 53 of the Statute and called upon the Court to decide the case despite the failure of the Respondent to appear and defend.

12. On 10 September 1985, immediately prior to the opening of the oral proceedings, the Agent of Nicaragua submitted to the Court a number of documents referred to as "Supplemental Annexes" to the Memorial of Nicaragua. In application of Article 56 of the Rules of Court, these documents were treated as "new documents" and copies were transmitted to the United States of America, which did not lodge any objection to their production.

13. On 12-13 and 16-20 September 1985 the Court held public hearings at which it was addressed by the following representatives of Nicaragua : H.E. Mr. Carlos Argüello Gómez, Hon. Abram Chayes, Mr. Paul S. Reichler, Mr. Ian Brownlie, and Mr. Alain Pellet. The United States was not represented at the hearing. The following witnesses were called by Nicaragua and gave evidence : Commander Luis Carrión, Vice-Minister of the Interior of Nicaragua (examined by Mr. Brownlie) ; Dr. David MacMichael, a former officer of the United States Central Intelligence Agency (CIA) (examined by Mr. Chayes) ; Professor Michael John Glennon (examined by Mr. Reichler) ; Father Jean Loison (examined by Mr. Pellet) ; Mr. William Huper, Minister of Finance of Nicaragua (examined by Mr. Argüello Gómez). Questions were put by Members of the Court to the witnesses, as well as to the Agent and counsel of Nicaragua, and replies were given either orally at the hearing or subsequently in writing. On 14 October 1985 the Court requested Nicaragua to make available certain further information and documents, and one Member of the Court put a question to Nicaragua. The verbatim records of the hearings and the information and documents supplied in response to these requests were transmitted by the Registrar to the United States of America.

14. Pursuant to Article 53, paragraph 2, of the Rules of Court, the pleadings and annexed documents were made accessible to the public by the Court as from the date of opening of the oral proceedings.

15. In the course of the written proceedings, the following submissions were presented on behalf of the Government of Nicaragua :

in the Application :

> "Nicaragua, reserving the right to supplement or to amend this Application and subject to the presentation to the Court of the relevant evidence and legal argument, requests the Court to adjudge and declare as follows :
>
> *(a)* That the United States, in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express charter and treaty obligations to Nicaragua, and in particular, its charter and treaty obligations under :
>
> – Article 2 (4) of the United Nations Charter ;
> – Articles 18 and 20 of the Charter of the Organization of American States ;
> – Article 8 of the Convention on Rights and Duties of States ;
>
> – Article I, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife.
>
> *(b)* That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by :

– armed attacks against Nicaragua by air, land and sea ;

– incursions into Nicaraguan territorial waters ;
– aerial trespass into Nicaraguan airspace ;
– efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.

*(c)* That the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua.

*(d)* That the United States, in breach of its obligation under general and customary international law, has intervened and is intervening in the internal affairs of Nicaragua.

*(e)* That the United States, in breach of its obligation under general and customary international law, has infringed and is infringing the freedom of the high seas and interrupting peaceful maritime commerce.

*(f)* That the United States, in breach of its obligation under general and customary international law, has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua.

*(g)* That, in view of its breaches of the foregoing legal obligations, the United States is under a particular duty to cease and desist immediately :

from all use of force – whether direct or indirect, overt or covert – against Nicaragua, and from all threats of force against Nicaragua ;

from all violations of the sovereignty, territorial integrity or political independence of Nicaragua, including all intervention, direct or indirect, in the internal affairs of Nicaragua ;

from all support of any kind – including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support – to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Nicaragua ;

from all efforts to restrict, block or endanger access to or from Nicaraguan ports ;

and from all killings, woundings and kidnappings of Nicaraguan citizens.

*(h)* That the United States has an obligation to pay Nicaragua, in its own right and as *parens patriae* for the citizens of Nicaragua, reparations for damages to person, property and the Nicaraguan economy caused by the foregoing violations of international law in a sum to be determined by the Court. Nicaragua reserves the right to introduce to the Court a precise evaluation of the damages caused by the United States" ;

in the Memorial on the merits :

"The Republic of Nicaragua respectfully requests the Court to grant the following relief :

*First :* the Court is requested to adjudge and declare that the United

States has violated the obligations of international law indicated in this Memorial, and that in particular respects the United States is in continuing violation of those obligations.

*Second :* the Court is requested to state in clear terms the obligation which the United States bears to bring to an end the aforesaid breaches of international law.

*Third :* the Court is requested to adjudge and declare that, in consequence of the violations of international law indicated in this Memorial, compensation is due to Nicaragua, both on its own behalf and in respect of wrongs inflicted upon its nationals ; and the Court is requested further to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua.

*Fourth :* without prejudice to the foregoing request, the Court is requested to award to the Republic of Nicaragua the sum of 370,200,000 United States dollars, which sum constitutes the minimum valuation of the direct damages, with the exception of damages for killing nationals of Nicaragua, resulting from the violations of international law indicated in the substance of this Memorial.

With reference to the fourth request, the Republic of Nicaragua reserves the right to present evidence and argument, with the purpose of elaborating the minimum (and in that sense provisional) valuation of direct damages and, further, with the purpose of claiming compensation for the killing of nationals of Nicaragua and consequential loss in accordance with the principles of international law in respect of the violations of international law generally, in a subsequent phase of the present proceedings in case the Court accedes to the third request of the Republic of Nicaragua."

16. At the conclusion of the last statement made on behalf of Nicaragua at the hearing, the final submissions of Nicaragua were presented, which submissions were identical to those contained in the Memorial on the merits and set out above.

17. No pleadings on the merits having been filed by the United States of America, which was also not represented at the oral proceedings of September 1985, no submissions on the merits were presented on its behalf.

* * * * *

18. The dispute before the Court between Nicaragua and the United States concerns events in Nicaragua subsequent to the fall of the Government of President Anastasio Somoza Debayle in Nicaragua in July 1979, and activities of the Government of the United States in relation to Nicaragua since that time. Following the departure of President Somoza, a Junta of National Reconstruction and an 18-member government was installed by the body which had led the armed opposition to President Somoza, the Frente Sandinista de Liberación Nacional (FSLN). That body had initially an extensive share in the new government, described as a "democratic coalition", and as a result of later resignations and reshuffles, became

almost its sole component. Certain opponents of the new Government, primarily supporters of the former Somoza Government and in particular ex-members of the National Guard, formed themselves into irregular military forces, and commenced a policy of armed opposition, though initially on a limited scale.

19. The attitude of the United States Government to the "democratic coalition government" was at first favourable ; and a programme of economic aid to Nicaragua was adopted. However by 1981 this attitude had changed. United States aid to Nicaragua was suspended in January 1981 and terminated in April 1981. According to the United States, the reason for this change of attitude was reports of involvement of the Government of Nicaragua in logistical support, including provision of arms, for guerrillas in El Salvador. There was however no interruption in diplomatic relations, which have continued to be maintained up to the present time. In September 1981, according to testimony called by Nicaragua, it was decided to plan and undertake activities directed against Nicaragua.

20. The armed opposition to the new Government in Nicaragua, which originally comprised various movements, subsequently became organized into two main groups : the Fuerza Democrática Nicaragüense (FDN) and the Alianza Revolucionaria Democrática (ARDE). The first of these grew from 1981 onwards into a trained fighting force, operating along the borders with Honduras ; the second, formed in 1982, operated along the borders with Costa Rica. The precise extent to which, and manner in which, the United States Government contributed to bringing about these developments will be studied more closely later in the present Judgment. However, after an initial period in which the "covert" operations of United States personnel and persons in their pay were kept from becoming public knowledge, it was made clear, not only in the United States press, but also in Congress and in official statements by the President and high United States officials, that the United States Government had been giving support to the *contras*, a term employed to describe those fighting against the present Nicaraguan Government. In 1983 budgetary legislation enacted by the United States Congress made specific provision for funds to be used by United States intelligence agencies for supporting "directly or indirectly, military or paramilitary operations in Nicaragua". According to Nicaragua, the *contras* have caused it considerable material damage and widespread loss of life, and have also committed such acts as killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping. It is contended by Nicaragua that the United States Government is effectively in control of the *contras*, that it devised their strategy and directed their tactics, and that the purpose of that Government was, from the beginning, to overthrow the Government of Nicaragua.

21. Nicaragua claims furthermore that certain military or paramilitary operations against it were carried out, not by the *contras*, who at the time claimed responsibility, but by persons in the pay of the United States

Government, and under the direct command of United States personnel, who also participated to some extent in the operations. These operations will also be more closely examined below in order to determine their legal significance and the responsibility for them ; they include the mining of certain Nicaraguan ports in early 1984, and attacks on ports, oil installations, a naval base, etc. Nicaragua has also complained of overflights of its territory by United States aircraft, not only for purposes of intelligence-gathering and supply to the *contras* in the field, but also in order to intimidate the population.

22. In the economic field, Nicaragua claims that the United States has withdrawn its own aid to Nicaragua, drastically reduced the quota for imports of sugar from Nicaragua to the United States, and imposed a trade embargo ; it has also used its influence in the Inter-American Development Bank and the International Bank for Reconstruction and Development to block the provision of loans to Nicaragua.

23. As a matter of law, Nicaragua claims, *inter alia,* that the United States has acted in violation of Article 2, paragraph 4, of the United Nations Charter, and of a customary international law obligation to refrain from the threat or use of force ; that its actions amount to intervention in the internal affairs of Nicaragua, in breach of the Charter of the Organization of American States and of rules of customary international law forbidding intervention ; and that the United States has acted in violation of the sovereignty of Nicaragua, and in violation of a number of other obligations established in general customary international law and in the inter-American system. The actions of the United States are also claimed by Nicaragua to be such as to defeat the object and purpose of a Treaty of Friendship, Commerce and Navigation concluded between the Parties in 1956, and to be in breach of provisions of that Treaty.

24. As already noted, the United States has not filed any pleading on the merits of the case, and was not represented at the hearings devoted thereto. It did however make clear in its Counter-Memorial on the questions of jurisdiction and admissibility that "by providing, upon request, proportionate and appropriate assistance to third States not before the Court" it claims to be acting in reliance on the inherent right of self-defence "guaranteed ... by Article 51 of the Charter" of the United Nations, that is to say the right of collective self-defence.

25. Various elements of the present dispute have been brought before the United Nations Security Council by Nicaragua, in April 1984 (as the Court had occasion to note in its Order of 10 May 1984, and in its Judgment on jurisdiction and admissibility of 26 November 1984, *I.C.J. Reports 1984,* p. 432, para. 91), and on a number of other occasions. The subject-matter of the dispute also forms part of wider issues affecting Central America at present being dealt with on a regional basis in the

context of what is known as the "Contadora Process" (*I.C.J. Reports 1984*, pp. 183-185, paras. 34-36 ; pp. 438-441, paras. 102-108).

* * *

26. The position taken up by the Government of the United States of America in the present proceedings, since the delivery of the Court's Judgment of 26 November 1984, as defined in the letter from the United States Agent dated 18 January 1985, brings into operation Article 53 of the Statute of the Court, which provides that "Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim". Nicaragua, has, in its Memorial and oral argument, invoked Article 53 and asked for a decision in favour of its claim. A special feature of the present case is that the United States only ceased to take part in the proceedings after a Judgment had been given adverse to its contentions on jurisdiction and admissibility. Furthermore, it stated when doing so "that the judgment of the Court was clearly and manifestly erroneous as to both fact and law", that it "remains firmly of the view . . . that the Court is without jurisdiction to entertain the dispute" and that the United States "reserves its rights in respect of any decision by the Court regarding Nicaragua's claims".

27. When a State named as party to proceedings before the Court decides not to appear in the proceedings, or not to defend its case, the Court usually expresses regret, because such a decision obviously has a negative impact on the sound administration of justice (cf. *Fisheries Jurisdiction, I.C.J. Reports 1973*, p. 7, para. 12 ; p. 54, para. 13 ; *I.C.J. Reports 1974*, p. 9, para. 17 ; p. 181, para. 18 ; *Nuclear Tests, I.C.J. Reports 1974*, p. 257, para. 15 ; p. 461, para. 15 ; *Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 7, para. 15 ; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 18, para. 33). In the present case, the Court regrets even more deeply the decision of the respondent State not to participate in the present phase of the proceedings, because this decision was made after the United States had participated fully in the proceedings on the request for provisional measures, and the proceedings on jurisdiction and admissibility. Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits. It is not possible to argue that the Court had jurisdiction only to declare that it lacked jurisdiction. In the normal course of events, for a party to appear before a court entails acceptance of the possibility of the court's finding against that party. Furthermore the Court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to "reserve its rights"

in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision. Under Article 36, paragraph 6, of its Statute, the Court has jurisdiction to determine any dispute as to its own jurisdiction, and its judgment on that matter, as on the merits, is final and binding on the parties under Articles 59 and 60 of the Statute (cf. *Corfu Channel, Judgment of 15 December 1949, I.C.J. Reports 1949,* p. 248).

28. When Article 53 of the Statute applies, the Court is bound to "satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim" of the party appearing is well founded in fact and law. In the present case, the Court has had the benefit of both Parties pleading before it at the earlier stages of the procedure, those concerning the request for the indication of provisional measures and to the questions of jurisdiction and admissibility. By its Judgment of 26 November 1984, the Court found, *inter alia,* that it had jurisdiction to entertain the case ; it must however take steps to "satisfy itself" that the claims of the Applicant are "well founded in fact and law". The question of the application of Article 53 has been dealt with by the Court in a number of previous cases, referred to above, and the Court does not therefore find it necessary to recapitulate the content of these decisions. The reasoning adopted to dispose of the basic problems arising was essentially the same, although the words used may have differed slightly from case to case. Certain points of principle may however be restated here. A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation ; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute. There is however no question of a judgment automatically in favour of the party appearing, since the Court is required, as mentioned above, to "satisfy itself" that that party's claim is well founded in fact and law.

29. The use of the term "satisfy itself" in the English text of the Statute (and in the French text the term "s'assurer") implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence. For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law (cf. *"Lotus", P.C.I.J., Series A, No. 10,* p. 31), so that the absence of one party has less impact. As the Court observed in the *Fisheries Jurisdiction* cases :

> "The Court . . ., as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be

> relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court." (*I.C.J. Reports 1974,* p. 9, para. 17 ; p. 181, para. 18.)

Nevertheless the views of the parties to a case as to the law applicable to their dispute are very material, particularly, as will be explained below (paragraphs 184 and 185), when those views are concordant. In the present case, the burden laid upon the Court is therefore somewhat lightened by the fact that the United States participated in the earlier phases of the case, when it submitted certain arguments on the law which have a bearing also on the merits.

30. As to the facts of the case, in principle the Court is not bound to confine its consideration to the material formally submitted to it by the parties (cf. *Brazilian Loans, P.C.I.J., Series A, No. 20/21,* p. 124 ; *Nuclear Tests, I.C.J. Reports 1974,* pp. 263-264, paras. 31, 32). Nevertheless, the Court cannot by its own enquiries entirely make up for the absence of one of the Parties ; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts. It would furthermore be an over-simplification to conclude that the only detrimental consequence of the absence of a party is the lack of opportunity to submit argument and evidence in support of its own case. Proceedings before the Court call for vigilance by all. The absent party also forfeits the opportunity to counter the factual allegations of its opponent. It is of course for the party appearing to prove the allegations it makes, yet as the Court has held :

> "While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details ; for this might in certain unopposed cases prove impossible in practice." (*Corfu Channel, I.C.J. Reports 1949,* p. 248.)

31. While these are the guiding principles, the experience of previous cases in which one party has decided not to appear shows that something more is involved. Though formally absent from the proceedings, the party in question frequently submits to the Court letters and documents, in ways and by means not contemplated by the Rules. The Court has thus to strike a balance. On the one hand, it is valuable for the Court to know the views of both parties in whatever form those views may have been expressed. Further, as the Court noted in 1974, where one party is not appearing "it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts" (*Nuclear Tests, I.C.J. Reports 1974,* p. 263, para. 31 ; p. 468, para. 32). On the other hand, the Court has to emphasize

that the equality of the parties to the dispute must remain the basic principle for the Court. The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage ; therefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage. The provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions. The treatment to be given by the Court to communications or material emanating from the absent party must be determined by the weight to be given to these different considerations, and is not susceptible of rigid definition in the form of a precise general rule. The vigilance which the Court can exercise when aided by the presence of both parties to the proceedings has a counterpart in the special care it has to devote to the proper administration of justice in a case in which only one party is present.

* * *

32. Before proceeding further, the Court considers it appropriate to deal with a preliminary question, relating to what may be referred to as the justiciability of the dispute submitted to it by Nicaragua. In its Counter-Memorial on jurisdiction and admissibility the United States advanced a number of arguments why the claim should be treated as inadmissible : *inter alia,* again according to the United States, that a claim of unlawful use of armed force is a matter committed by the United Nations Charter and by practice to the exclusive competence of other organs, in particular the Security Council ; and that an "ongoing armed conflict" involving the use of armed force contrary to the Charter is one with which a court cannot deal effectively without overstepping proper judicial bounds. These arguments were examined by the Court in its Judgment of 26 November 1984, and rejected. No further arguments of this nature have been submitted to the Court by the United States, which has not participated in the subsequent proceedings. However the examination of the merits which the Court has now carried out shows the existence of circumstances as a result of which, it might be argued, the dispute, or that part of it which relates to the questions of use of force and collective self-defence, would be non-justiciable.

33. In the first place, it has been suggested that the present dispute should be declared non-justiciable, because it does not fall into the category of "legal disputes" within the meaning of Article 36, paragraph 2, of the Statute. It is true that the jurisdiction of the Court under that provision is limited to "legal disputes" concerning any of the matters enumerated in the text. The question whether a given dispute between two States is or is not a "legal dispute" for the purposes of this provision may itself be a matter in dispute between those two States ; and if so, that dispute is to be

settled by the decision of the Court in accordance with paragraph 6 of Article 36. In the present case, however, this particular point does not appear to be in dispute between the Parties. The United States, during the proceedings devoted to questions of jurisdiction and admissibility, advanced a number of grounds why the Court should find that it had no jurisdiction, or that the claim was not admissible. It relied *inter alia* on proviso *(c)* to its own declaration of acceptance of jurisdiction under Article 36, paragraph 2, without ever advancing the more radical argument that the whole declaration was inapplicable because the dispute brought before the Court by Nicaragua was not a "legal dispute" within the meaning of that paragraph. As a matter of admissibility, the United States objected to the application of Article 36, paragraph 2, not because the dispute was not a "legal dispute", but because of the express allocation of such matters as the subject of Nicaragua's claims to the political organs under the United Nations Charter, an argument rejected by the Court in its Judgment of 26 November 1984 (*I.C.J. Reports 1984*, pp. 431-436). Similarly, while the United States contended that the nature of the judicial function precludes its application to the substance of Nicaragua's allegations in this case – an argument which the Court was again unable to uphold (*ibid.*, pp. 436-438) –, it was careful to emphasize that this did not mean that it was arguing that international law was not relevant or controlling in a dispute of this kind. In short, the Court can see no indication whatsoever that, even in the view of the United States, the present dispute falls outside the category of "legal disputes" to which Article 36, paragraph 2, of the Statute applies. It must therefore proceed to examine the specific claims of Nicaragua in the light of the international law applicable.

34. There can be no doubt that the issues of the use of force and collective self-defence raised in the present proceedings are issues which are regulated both by customary international law and by treaties, in particular the United Nations Charter. Yet it is also suggested that, for another reason, the questions of this kind which arise in the present case are not justiciable, that they fall outside the limits of the kind of questions a court can deal with. It is suggested that the plea of collective self-defence which has been advanced by the United States as a justification for its actions with regard to Nicaragua requires the Court to determine whether the United States was legally justified in adjudging itself under a necessity, because its own security was in jeopardy, to use force in response to foreign intervention in El Salvador. Such a determination, it is said, involves a pronouncement on political and military matters, not a question of a kind that a court can usefully attempt to answer.

35. As will be further explained below, in the circumstances of the dispute now before the Court, what is in issue is the purported exercise by the United States of a right of collective self-defence in response to an armed attack on another State. The possible lawfulness of a response to the imminent threat of an armed attack which has not yet taken place has not

been raised. The Court has therefore to determine first whether such attack has occurred, and if so whether the measures allegedly taken in self-defence were a legally appropriate reaction as a matter of collective self-defence. To resolve the first of these questions, the Court does not have to determine whether the United States, or the State which may have been under attack, was faced with a necessity of reacting. Nor does its examination, if it determines that an armed attack did occur, of issues relating to the collective character of the self-defence and the kind of reaction, necessarily involve it in any evaluation of military considerations. Accordingly the Court can at this stage confine itself to a finding that, in the circumstances of the present case, the issues raised of collective self-defence are issues which it has competence, and is equipped, to determine.

* * *

36. By its Judgment of 26 November 1984, the Court found that it had jurisdiction to entertain the present case, first on the basis of the United States declaration of acceptance of jurisdiction, under the optional clause of Article 36, paragraph 2, of the Statute, deposited on 26 August 1946 and secondly on the basis of Article XXIV of a Treaty of Friendship, Commerce and Navigation between the Parties, signed at Managua on 21 January 1956. The Court notes that since the institution of the present proceedings, both bases of jurisdiction have been terminated. On 1 May 1985 the United States gave written notice to the Government of Nicaragua to terminate the Treaty, in accordance with Article XXV, paragraph 3, thereof ; that notice expired, and thus terminated the treaty relationship, on 1 May 1986. On 7 October 1985 the United States deposited with the Secretary-General of the United Nations a notice terminating the declaration under the optional clause, in accordance with the terms of that declaration, and that notice expired on 7 April 1986. These circumstances do not however affect the jurisdiction of the Court under Article 36, paragraph 2, of the Statute, or its jurisdiction under Article XXIV, paragraph 2, of the Treaty to determine "any dispute between the Parties as to the interpretation or application" of the Treaty. As the Court pointed out in the *Nottebohm* case :

> "When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim ; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent

lapse of the Declaration [or, as in the present case also, the Treaty containing a compromissory clause], by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." (*I.C.J. Reports 1953,* p. 123.)

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37. In the Judgment of 26 November 1984 the Court however also declared that one objection advanced by the United States, that concerning the exclusion from the United States acceptance of jurisdiction under the optional clause of "disputes arising under a multilateral treaty", raised "a question concerning matters of substance relating to the merits of the case", and concluded :

"That being so, and since the procedural technique formerly available of joinder of preliminary objections to the merits has been done away with since the 1972 revision of the Rules of Court, the Court has no choice but to avail itself of Article 79, paragraph 7, of the present Rules of Court, and declare that the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance does not possess, in the circumstances of the case, an exclusively preliminary character, and that consequently it does not constitute an obstacle for the Court to entertain the proceedings instituted by Nicaragua under the Application of 9 April 1984." (*I.C.J. Reports 1984,* pp. 425-426, para. 76.)

38. The present case is the first in which the Court has had occasion to exercise the power first provided for in the 1972 Rules of Court to declare that a preliminary objection "does not possess, in the circumstances of the case, an exclusively preliminary character". It may therefore be appropriate to take this opportunity to comment briefly on the rationale of this provision of the Rules, in the light of the problems to which the handling of preliminary objections has given rise. In exercising its rule-making power under Article 30 of the Statute, and generally in approaching the complex issues which may be raised by the determination of appropriate procedures for the settlement of disputes, the Court has kept in view an approach defined by the Permanent Court of International Justice. That Court found that it was at liberty to adopt

"the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law" (*Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2,* p. 16).

39. Under the Rules of Court dating back to 1936 (which on this point reflected still earlier practice), the Court had the power to join an objection to the merits "whenever the interests of the good administration of justice require it" (*Panevezys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 75,*

p. 56), and in particular where the Court, if it were to decide on the objection, "would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution" *(ibid.)*. If this power was exercised, there was always a risk, namely that the Court would ultimately decide the case on the preliminary objection, after requiring the parties fully to plead the merits, – and this did in fact occur (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3). The result was regarded in some quarters as an unnecessary prolongation of an expensive and time-consuming procedure.

40. Taking into account the wide range of issues which might be presented as preliminary objections, the question which the Court faced was whether to revise the Rules so as to exclude for the future the possibility of joinder to the merits, so that every objection would have to be resolved at the preliminary stage, or to seek a solution which would be more flexible. The solution of considering all preliminary objections immediately and rejecting all possibility of a joinder to the merits had many advocates and presented many advantages. In the *Panevezys-Saldutiskis Railway* case, the Permanent Court defined a preliminary objection as one

> "submitted for the purpose of excluding an examination by the Court of the merits of the case, and being one upon which the Court can give a decision without in any way adjudicating upon the merits" (*P.C.I.J., Series A/B, No. 76*, p. 22).

If this view is accepted then of course every preliminary objection should be dealt with immediately without touching the merits, or involving parties in argument of the merits of the case. To find out, for instance, whether there is a dispute between the parties or whether the Court has jurisdiction, does not normally require an analysis of the merits of the case. However that does not solve all questions of preliminary objections, which may, as experience has shown, be to some extent bound up with the merits. The final solution adopted in 1972, and maintained in the 1978 Rules, concerning preliminary objections is the following : the Court is to give its decision

> "by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection, or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings." (Art. 79, para. 7.)

41. While the variety of issues raised by preliminary objections cannot possibly be foreseen, practice has shown that there are certain kinds of preliminary objections which can be disposed of by the Court at an early stage without examination of the merits. Above all, it is clear that a question of jurisdiction is one which requires decision at the preliminary

stage of the proceedings. The new rule enumerates the objections contemplated as follows :

> "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits . . ." (Art. 79, para. 1.)

It thus presents one clear advantage : that it qualifies certain objections as preliminary, making it quite clear that when they are exclusively of that character they will have to be decided upon immediately, but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage.

* *

42. The Court must thus now rule upon the consequences of the United States multilateral treaty reservation for the decision which it has to give. It will be recalled that the United States acceptance of jurisdiction deposited on 26 August 1946 contains a proviso excluding from its application :

> "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction".

The 1984 Judgment included pronouncements on certain aspects of that reservation, but the Court then took the view that it was neither necessary nor possible, at the jurisdictional stage of the proceedings, for it to take a position on all the problems posed by the reservation.

43. It regarded this as not necessary because, in its Application, Nicaragua had not confined its claims to breaches of multilateral treaties but had also invoked a number of principles of "general and customary international law", as well as the bilateral Treaty of Friendship, Commerce and Navigation of 1956. These principles remained binding as such, although they were also enshrined in treaty law provisions. Consequently, since the case had not been referred to the Court solely on the basis of multilateral treaties, it was not necessary for the Court, in order to consider the merits of Nicaragua's claim, to decide the scope of the reservation in question : "the claim . . . would not in any event be barred by the multilateral treaty reservation" (*I.C.J. Reports 1984*, p. 425, para. 73). Moreover, it was not found possible for the reservation to be definitively dealt with at the jurisdictional stage of the proceedings. To make a judgment on the scope of the reservation would have meant giving a definitive interpretation of the term "affected" in that reservation. In its 1984 Judgment, the Court held

that the term "affected" applied not to multilateral treaties, but to the parties to such treaties. The Court added that if those parties wished to protect their interests "in so far as these are not already protected by Article 59 of the Statute", they "would have the choice of either instituting proceedings or intervening" during the merits phase. But at all events, according to the Court, "the determination of the States 'affected' could not be left to the parties but must be made by the Court" (*I.C.J. Reports 1984*, p. 425, para. 75). This process could however not be carried out at the stage of the proceedings in which the Court then found itself ; "it is only when the general lines of the judgment to be given become clear", the Court said, "that the States 'affected' could be identified" *(ibid.)*. The Court thus concluded that this was "a question concerning matters of substance relating to the merits of the case" (*ibid.*, para. 76). Since "the question of what States may be 'affected' by the decision on the merits is not in itself a jurisdictional problem", the Court found that it

> "has no choice but to avail itself of Article 79, paragraph 7, of the present Rules of Court, and declare that the objection based on the multilateral treaty reservation . . . does not possess, in the circumstances of the case, an exclusively preliminary character" (*ibid.*, para. 76).

44. Now that the Court has considered the substance of the dispute, it becomes both possible and necessary for it to rule upon the points related to the United States reservation which were not settled in 1984. It is necessary because the Court's jurisdiction, as it has frequently recalled, is based on the consent of States, expressed in a variety of ways including declarations made under Article 36, paragraph 2, of the Statute. It is the declaration made by the United States under that Article which defines the categories of dispute for which the United States consents to the Court's jurisdiction. If therefore that declaration, because of a reservation contained in it, excludes from the disputes for which it accepts the Court's jurisdiction certain disputes arising under multilateral treaties, the Court must take that fact into account. The final decision on this point, which it was not possible to take at the jurisdictional stage, can and must be taken by the Court now when coming to its decision on the merits. If this were not so, the Court would not have decided whether or not the objection was well-founded, either at the jurisdictional stage, because it did not possess an exclusively preliminary character, or at the merits stage, because it did to some degree have such a character. It is now possible to resolve the question of the application of the reservation because, in the light of the Court's full examination of the facts of the case and the law, the implications of the argument of collective self-defence raised by the United States have become clear.

45. The reservation in question is not necessarily a bar to the United States accepting the Court's jurisdiction whenever a third State which may

be affected by the decision is not a party to the proceedings. According to the actual text of the reservation, the United States can always disregard this fact if it "specially agrees to jurisdiction". Besides, apart from this possibility, as the Court recently observed : "in principle a State may validly waive an objection to jurisdiction which it might otherwise have been entitled to raise" (*I.C.J. Reports 1985,* p. 216, para. 43). But it is clear that the fact that the United States, having refused to participate at the merits stage, did not have an opportunity to press again at that stage the argument which, in the jurisdictional phase, it founded on its multilateral treaty reservation cannot be tantamount to a waiver of the argument drawn from the reservation. Unless unequivocally waived, the reservation constitutes a limitation on the extent of the jurisdiction voluntarily accepted by the United States ; and, as the Court observed in the *Aegean Sea Continental Shelf* case,

> "It would not discharge its duty under Article 53 of the Statute if it were to leave out of its consideration a reservation, the invocation of which by the Respondent was properly brought to its notice earlier in the proceedings." (*I.C.J. Reports 1978,* p. 20, para. 47.)

The United States has not in the present phase submitted to the Court any arguments whatever, either on the merits proper or on the question – not exclusively preliminary – of the multilateral treaty reservation. The Court cannot therefore consider that the United States has waived the reservation or no longer ascribes to it the scope which the United States attributed to it when last stating its position on this matter before the Court. This conclusion is the more decisive inasmuch as a respondent's non-participation requires the Court, as stated for example in the *Fisheries Jurisdiction* cases, to exercise "particular circumspection and . . . special care" (*I.C.J. Reports 1974,* p. 10, para. 17, and p. 181, para. 18).

46. It has also been suggested that the United States may have waived the multilateral treaty reservation by its conduct of its case at the jurisdictional stage, or more generally by asserting collective self-defence in accordance with the United Nations Charter as justification for its activities vis-à-vis Nicaragua. There is no doubt that the United States, during its participation in the proceedings, insisted that the law applicable to the dispute was to be found in multilateral treaties, particularly the United Nations Charter and the Charter of the Organization of American States ; indeed, it went so far as to contend that such treaties supervene and subsume customary law on the subject. It is however one thing for a State to advance a contention that the law applicable to a given dispute derives from a specified source ; it is quite another for that State to consent to the Court's having jurisdiction to entertain that dispute, and thus to apply that law to the dispute. The whole purpose of the United States argument as to the applicability of the United Nations and Organization of American

States Charters was to convince the Court that the present dispute is one "arising under" those treaties, and hence one which is excluded from jurisdiction by the multilateral treaty reservation in the United States declaration of acceptance of jurisdiction. It is impossible to interpret the attitude of the United States as consenting to the Court's applying multilateral treaty law to resolve the dispute, when what the United States was arguing was that, for the very reason that the dispute "arises under" multilateral treaties, no consent to its determination by the Court has ever been given. The Court was fully aware, when it gave its 1984 Judgment, that the United States regarded the law of the two Charters as applicable to the dispute ; it did not then regard that approach as a waiver, nor can it do so now. The Court is therefore bound to ascertain whether its jurisdiction is limited by virtue of the reservation in question.

47. In order to fulfil this obligation, the Court is now in a position to ascertain whether any third States, parties to multilateral treaties invoked by Nicaragua in support of its claims, would be "affected" by the Judgment, and are not parties to the proceedings leading up to it. The multilateral treaties discussed in this connection at the stage of the proceedings devoted to jurisdiction were four in number : the Charter of the United Nations, the Charter of the Organization of American States, the Montevideo Convention on the Rights and Duties of States of 26 December 1933, and the Havana Convention on the Rights and Duties of States in the Event of Civil Strife of 20 February 1928 (cf. *I.C.J. Reports 1984,* p. 422, para. 68). However, Nicaragua has not placed any particular reliance on the latter two treaties in the present proceedings ; and in reply to a question by a Member of the Court on the point, the Nicaraguan Agent stated that while Nicaragua had not abandoned its claims under these two conventions, it believed "that the duties and obligations established by these conventions have been subsumed in the Organization of American States Charter". The Court therefore considers that it will be sufficient to examine the position under the two Charters, leaving aside the possibility that the dispute might be regarded as "arising" under either or both of the other two conventions.

48. The argument of the Parties at the jurisdictional stage was addressed primarily to the impact of the multilateral treaty reservation on Nicaragua's claim that the United States has used force against it in breach of the United Nations Charter and of the Charter of the Organization of American States, and the Court will first examine this aspect of the matter. According to the views presented by the United States during the jurisdictional phase, the States which would be "affected" by the Court's judgment were El Salvador, Honduras and Costa Rica. Clearly, even if only one of these States is found to be "affected", the United States reservation takes full effect. The Court will for convenience first take the case of El Salvador, as there are certain special features in the position of this State. It is primarily for the benefit of El Salvador, and to help it to respond to an alleged armed attack by Nicaragua, that the United States

claims to be exercising a right of collective self-defence, which it regards as a justification of its own conduct towards Nicaragua. Moreover, El Salvador, confirming this assertion by the United States, told the Court in the Declaration of Intervention which it submitted on 15 August 1984 that it considered itself the victim of an armed attack by Nicaragua, and that it had asked the United States to exercise for its benefit the right of collective self-defence. Consequently, in order to rule upon Nicaragua's complaint against the United States, the Court would have to decide whether any justification for certain United States activities in and against Nicaragua can be found in the right of collective self-defence which may, it is alleged, be exercised in response to an armed attack by Nicaragua on El Salvador. Furthermore, reserving for the present the question of the content of the applicable customary international law, the right of self-defence is of course enshrined in the United Nations Charter, so that the dispute is, to this extent, a dispute "arising under a multilateral treaty" to which the United States, Nicaragua and El Salvador are parties.

49. As regards the Charter of the Organization of American States, the Court notes that Nicaragua bases two distinct claims upon this multilateral treaty : it is contended, first, that the use of force by the United States against Nicaragua in violation of the United Nations Charter is equally a violation of Articles 20 and 21 of the Organization of American States Charter, and secondly that the actions it complains of constitute intervention in the internal and external affairs of Nicaragua in violation of Article 18 of the Organization of American States Charter. The Court will first refer to the claim of use of force alleged to be contrary to Articles 20 and 21. Article 21 of the Organization of American States Charter provides :

> "The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof."

Nicaragua argues that the provisions of the Organization of American States Charter prohibiting the use of force are "coterminous with the stipulations of the United Nations Charter", and that therefore the violations by the United States of its obligations under the United Nations Charter also, and without more, constitute violations of Articles 20 and 21 of the Organization of American States Charter.

50. Both Article 51 of the United Nations Charter and Article 21 of the Organization of American States Charter refer to self-defence as an exception to the principle of the prohibition of the use of force. Unlike the United Nations Charter, the Organization of American States Charter does not use the expression "collective self-defence", but refers to the case of "self-defence in accordance with existing treaties or in fulfillment thereof", one such treaty being the United Nations Charter. Furthermore it is evident that if actions of the United States complied with all requirements of the United Nations Charter so as to constitute the exer-

cise of the right of collective self-defence, it could not be argued that they could nevertheless constitute a violation of Article 21 of the Organization of American States Charter. It therefore follows that the situation of El Salvador with regard to the assertion by the United States of the right of collective self-defence is the same under the Organization of American States Charter as it is under the United Nations Charter.

51. In its Judgment of 26 November 1984, the Court recalled that Nicaragua's Application, according to that State, does not cast doubt on El Salvador's right to receive aid, military or otherwise, from the United States (*I.C.J. Reports 1984*, p. 430, para. 86). However, this refers to the direct aid provided to the Government of El Salvador on its territory in order to help it combat the insurrection with which it is faced, not to any indirect aid which might be contributed to this combat by certain United States activities in and against Nicaragua. The Court has to consider the consequences of a rejection of the United States justification of its actions as the exercise of the right of collective self-defence for the sake of El Salvador, in accordance with the United Nations Charter. A judgment to that effect would declare contrary to treaty-law the indirect aid which the United States Government considers itself entitled to give the Government of El Salvador in the form of activities in and against Nicaragua. The Court would of course refrain from any finding on whether El Salvador could lawfully exercise the right of individual self-defence ; but El Salvador would still be affected by the Court's decision on the lawfulness of resort by the United States to collective self-defence. If the Court found that no armed attack had occurred, then not only would action by the United States in purported exercise of the right of collective self-defence prove to be unjustified, but so also would any action which El Salvador might take or might have taken on the asserted ground of individual self-defence.

52. It could be argued that the Court, if it found that the situation does not permit the exercise by El Salvador of its right of self-defence, would not be "affecting" that right itself but the application of it by El Salvador in the circumstances of the present case. However, it should be recalled that the condition of the application of the multilateral treaty reservation is not that the "right" of a State be affected, but that the State itself be "affected" – a broader criterion. Furthermore whether the relations between Nicaragua and El Salvador can be qualified as relations between an attacker State and a victim State which is exercising its right of self-defence, would appear to be a question in dispute between those two States. But El Salvador has not submitted this dispute to the Court ; it therefore has a right to have the Court refrain from ruling upon a dispute which it has not submitted to it. Thus, the decision of the Court in this case would affect this right of El Salvador and consequently this State itself.

53. Nor is it only in the case of a decision of the Court rejecting the United States claim to be acting in self-defence that El Salvador would be

"affected" by the decision. The multilateral treaty reservation does not require, as a condition for the exclusion of a dispute from the jurisdiction of the Court, that a State party to the relevant treaty be "adversely" or "prejudicially" affected by the decision, even though this is clearly the case primarily in view. In other situations in which the position of a State not before the Court is under consideration (cf. *Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 32 ; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 20, para. 31) it is clearly impossible to argue that that State may be differently treated if the Court's decision will not necessarily be adverse to the interests of the absent State, but could be favourable to those interests. The multilateral treaty reservation bars any decision that would "affect" a third State party to the relevant treaty. Here also, it is not necessary to determine whether the decision will "affect" that State unfavourably or otherwise ; the condition of the reservation is met if the State will necessarily be "affected", in one way or the other.

54. There may of course be circumstances in which the Court, having examined the merits of the case, concludes that no third State could be "affected" by the decision : for example, as pointed out in the 1984 Judgment, if the relevant claim is rejected on the facts (*I.C.J. Reports 1984*, p. 425, para. 75). If the Court were to conclude in the present case, for example, that the evidence was not sufficient for a finding that the United States had used force against Nicaragua, the question of justification on the grounds of self-defence would not arise, and there would be no possibility of El Salvador being "affected" by the decision. In 1984 the Court could not, on the material available to it, exclude the possibility of such a finding being reached after fuller study of the case, and could not therefore conclude at once that El Salvador would necessarily be "affected" by the eventual decision. It was thus this possibility which prevented the objection based on the reservation from having an exclusively preliminary character.

55. As indicated in paragraph 49 above, there remains the claim of Nicaragua that the United States has intervened in the internal and external affairs of Nicaragua in violation of Article 18 of the Organization of American States Charter. That Article provides :

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements."

The potential link, recognized by this text, between intervention and the use of armed force, is actual in the present case, where the same activities attributed to the United States are complained of under both counts, and

the response of the United States is the same to each complaint – that it has acted in self-defence. The Court has to consider what would be the impact, for the States identified by the United States as likely to be "affected", of a decision whereby the Court would decline to rule on the alleged violation of Article 21 of the Organization of American States Charter, concerning the use of force, but passed judgment on the alleged violation of Article 18. The Court will not here enter into the question whether self-defence may justify an intervention involving armed force, so that it has to be treated as not constituting a breach either of the principle of non-use of force or of that of non-intervention. At the same time, it concludes that in the particular circumstances of this case, it is impossible to say that a ruling on the alleged breach by the United States of Article 18 of the Organization of American States Charter would not "affect" El Salvador.

56. The Court therefore finds that El Salvador, a party to the United Nations Charter and to the Charter of the Organization of American States, is a State which would be "affected" by the decision which the Court would have to take on the claims by Nicaragua that the United States has violated Article 2, paragraph 4, of the United Nations Charter and Articles 18, 20 and 21 of the Organization of American States Charter. Accordingly, the Court, which under Article 53 of the Statute has to be "satisfied" that it has jurisdiction to decide each of the claims it is asked to uphold, concludes that the jurisdiction conferred upon it by the United States declaration of acceptance of jurisdiction under Article 36, paragraph 2, of the Statute does not permit the Court to entertain these claims. It should however be recalled that, as will be explained further below, the effect of the reservation in question is confined to barring the applicability of the United Nations Charter and Organization of American States Charter as multilateral treaty law, and has no further impact on the sources of international law which Article 38 of the Statute requires the Court to apply.

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57. One of the Court's chief difficulties in the present case has been the determination of the facts relevant to the dispute. First of all, there is marked disagreement between the Parties not only on the interpretation of the facts, but even on the existence or nature of at least some of them. Secondly, the respondent State has not appeared during the present merits phase of the proceedings, thus depriving the Court of the benefit of its complete and fully argued statement regarding the facts. The Court's task was therefore necessarily more difficult, and it has had to pay particular heed, as said above, to the proper application of Article 53 of its Statute. Thirdly, there is the secrecy in which some of the conduct attributed to one or other of the Parties has been carried on. This makes it more difficult for the Court not only to decide on the imputability of the facts, but also to

establish what are the facts. Sometimes there is no question, in the sense that it does not appear to be disputed, that an act was done, but there are conflicting reports, or a lack of evidence, as to who did it. The problem is then not the legal process of imputing the act to a particular State for the purpose of establishing responsibility, but the prior process of tracing material proof of the identity of the perpetrator. The occurrence of the act itself may however have been shrouded in secrecy. In the latter case, the Court has had to endeavour first to establish what actually happened, before entering on the next stage of considering whether the act (if proven) was imputable to the State to which it has been attributed.

58. A further aspect of this case is that the conflict to which it relates has continued and is continuing. It has therefore been necessary for the Court to decide, for the purpose of its definition of the factual situation, what period of time, beginning from the genesis of the dispute, should be taken into consideration. The Court holds that general principles as to the judicial process require that the facts on which its Judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case. While the Court is of course very well aware, from reports in the international press, of the developments in Central America since that date, it cannot, as explained below (paragraphs 62 and 63), treat such reports as evidence, nor has it had the benefit of the comments or argument of either of the Parties on such reports. As the Court recalled in the *Nuclear Tests* cases, where facts, apparently of such a nature as materially to affect its decision, came to its attention after the close of the hearings :

> "It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings." (*I.C.J. Reports 1974*, p. 264, para. 33 ; p. 468, para. 34.)

Neither Party has requested such action by the Court ; and since the reports to which reference has been made do not suggest any profound modification of the situation of which the Court is seised, but rather its intensification in certain respects, the Court has seen no need to reopen the hearings.

* *

59. The Court is bound by the relevant provisions of its Statute and its Rules relating to the system of evidence, provisions devised to guarantee the sound administration of justice, while respecting the equality of the parties. The presentation of evidence is governed by specific rules relating to, for instance, the observance of time-limits, the communication of

evidence to the other party, the submission of observations on it by that party, and the various forms of challenge by each party of the other's evidence. The absence of one of the parties restricts this procedure to some extent. The Court is careful, even where both parties appear, to give each of them the same opportunities and chances to produce their evidence ; when the situation is complicated by the non-appearance of one of them, then *a fortiori* the Court regards it as essential to guarantee as perfect equality as possible between the parties. Article 53 of the Statute therefore obliges the Court to employ whatever means and resources may enable it to satisfy itself whether the submissions of the applicant State are well-founded in fact and law, and simultaneously to safeguard the essential principles of the sound administration of justice.

60. The Court should now indicate how these requirements have to be met in this case so that it can properly fulfil its task under that Article of its Statute. In so doing, it is not unaware that its role is not a passive one ; and that, within the limits of its Statute and Rules, it has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved.

61. In this context, the Court has the power, under Article 50 of its Statute, to entrust "any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion", and such a body could be a group of judges selected from among those sitting in the case. In the present case, however, the Court felt it was unlikely that an enquiry of this kind would be practical or desirable, particularly since such a body, if it was properly to perform its task, might have found it necessary to go not only to the applicant State, but also to several other neighbouring countries, and even to the respondent State, which had refused to appear before the Court.

62. At all events, in the present case the Court has before it documentary material of various kinds from various sources. A large number of documents has been supplied in the form of reports in press articles, and some also in the form of extracts from books. Whether these were produced by the applicant State, or by the absent Party before it ceased to appear in the proceedings, the Court has been careful to treat them with great caution ; even if they seem to meet high standards of objectivity, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence.

63. However, although it is perfectly proper that press information should not be treated in itself as evidence for judicial purposes, public knowledge of a fact may nevertheless be established by means of these sources of information, and the Court can attach a certain amount of weight to such public knowledge. In the case of *United States Diplomatic*

*and Consular Staff in Tehran,* the Court referred to facts which "are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries" (*I.C.J. Reports 1980,* p. 9, para. 12). On the basis of information, including press and broadcast material, which was "wholly consistent and concordant as to the main facts and circumstances of the case", the Court was able to declare that it was satisfied that the allegations of fact were well-founded (*ibid.*, p. 10, para. 13). The Court has however to show particular caution in this area. Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source. It is with this important reservation that the newspaper reports supplied to the Court should be examined in order to assess the facts of the case, and in particular to ascertain whether such facts were matters of public knowledge.

64. The material before the Court also includes statements by representatives of States, sometimes at the highest political level. Some of these statements were made before official organs of the State or of an international or regional organization, and appear in the official records of those bodies. Others, made during press conferences or interviews, were reported by the local or international press. The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. They may then be construed as a form of admission.

65. However, it is natural also that the Court should treat such statements with caution, whether the official statement was made by an authority of the Respondent or of the Applicant. Neither Article 53 of the Statute, nor any other ground, could justify a selective approach, which would have undermined the consistency of the Court's methods and its elementary duty to ensure equality between the Parties. The Court must take account of the manner in which the statements were made public ; evidently, it cannot treat them as having the same value irrespective of whether the text is to be found in an official national or international publication, or in a book or newspaper. It must also take note whether the text of the official statement in question appeared in the language used by the author or on the basis of a translation (cf. *I.C.J. Reports 1980,* p. 10, para. 13). It may also be relevant whether or not such a statement was brought to the Court's knowledge by official communications filed in conformity with the relevant requirements of the Statute and Rules of Court. Furthermore, the Court has inevitably had sometimes to interpret the statements, to ascertain precisely to what degree they constituted acknowledgments of a fact.

66. At the hearings in this case, the applicant State called five witnesses to give oral evidence, and the evidence of a further witness was offered in

the form of an affidavit "subscribed and sworn" in the United States, District of Columbia, according to the formal requirements in force in that place. A similar affidavit, sworn by the United States Secretary of State, was annexed to the Counter-Memorial of the United States on the questions of jurisdiction and admissibility. One of the witnesses presented by the applicant State was a national of the respondent State, formerly in the employ of a government agency the activity of which is of a confidential kind, and his testimony was kept strictly within certain limits ; the witness was evidently concerned not to contravene the legislation of his country of origin. In addition, annexed to the Nicaraguan Memorial on the merits were two declarations, entitled "affidavits", in the English language, by which the authors "certify and declare" certain facts, each with a notarial certificate in Spanish appended, whereby a Nicaraguan notary authenticates the signature to the document. Similar declarations had been filed by Nicaragua along with its earlier request for the indication of provisional measures.

67. As regards the evidence of witnesses, the failure of the respondent State to appear in the merits phase of these proceedings has resulted in two particular disadvantages. First, the absence of the United States meant that the evidence of the witnesses presented by the Applicant at the hearings was not tested by cross-examination ; however, those witnesses were subjected to extensive questioning from the bench. Secondly, the Respondent did not itself present any witnesses of its own. This latter disadvantage merely represents one aspect, and a relatively secondary one, of the more general disadvantage caused by the non-appearance of the Respondent.

68. The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact ; it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself. Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight ; as the Court observed in relation to a particular witness in the *Corfu Channel* case :

> "The statements attributed by the witness . . . to third parties, of which the Court has received no personal and direct confirmation, can be regarded only as allegations falling short of conclusive evidence." (*I.C.J. Reports 1949*, pp. 16-17.)

69. The Court has had to attach considerable significance to the declarations made by the responsible authorities of the States concerned in view of the difficulties which it has had to face in determining the facts.

Nevertheless, the Court was still bound to subject these declarations to the necessary critical scrutiny. A distinctive feature of the present case was that two of the witnesses called to give oral evidence on behalf of Nicaragua were members of the Nicaraguan Government, the Vice-Minister of the Interior (Commander Carrión), and the Minister of Finance (Mr. Huper). The Vice-Minister of the Interior was also the author of one of the two declarations annexed to the Nicaraguan Memorial on the merits, the author of the other being the Minister for Foreign Affairs. On the United States side, an affidavit was filed sworn by the Secretary of State. These declarations at ministerial level on each side were irreconcilable as to their statement of certain facts. In the view of the Court, this evidence is of such a nature as to be placed in a special category. In the general practice of courts, two forms of testimony which are regarded as prima facie of superior credibility are, first the evidence of a disinterested witness – one who is not a party to the proceedings and stands to gain or lose nothing from its outcome – and secondly so much of the evidence of a party as is against its own interest. Indeed the latter approach was invoked in this case by counsel for Nicaragua.

70. A member of the government of a State engaged, not merely in international litigation, but in litigation relating to armed conflict, will probably tend to identify himself with the interests of his country, and to be anxious when giving evidence to say nothing which could prove adverse to its cause. The Court thus considers that it can certainly retain such parts of the evidence given by Ministers, orally or in writing, as may be regarded as contrary to the interests or contentions of the State to which the witness owes allegiance, or as relating to matters not controverted. For the rest, while in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require it to treat such evidence with great reserve. The Court believes this approach to be the more justified in view of the need to respect the equality of the parties in a case where one of them is no longer appearing ; but this should not be taken to mean that the non-appearing party enjoys *a priori* a presumption in its favour.

71. However, before outlining the limits of the probative effect of declarations by the authorities of the States concerned, the Court would recall that such declarations may involve legal effects, some of which it has defined in previous decisions (*Nuclear Tests, United States Diplomatic and Consular Staff in Tehran* cases). Among the legal effects which such declarations may have is that they may be regarded as evidence of the truth of facts, as evidence that such facts are attributable to the States the authorities of which are the authors of these declarations and, to a lesser degree, as evidence for the legal qualification of these facts. The Court is here concerned with the significance of the official declarations as evidence of specific facts and of their imputability to the States in question.

72. The declarations to which the Court considers it may refer are not limited to those made in the pleadings and the oral argument addressed to it in the successive stages of the case, nor are they limited to statements made by the Parties. Clearly the Court is entitled to refer, not only to the Nicaraguan pleadings and oral argument, but to the pleadings and oral argument submitted to it by the United States before it withdrew from participation in the proceedings, and to the Declaration of Intervention of El Salvador in the proceedings. It is equally clear that the Court may take account of public declarations to which either Party has specifically drawn attention, and the text, or a report, of which has been filed as documentary evidence. But the Court considers that, in its quest for the truth, it may also take note of statements of representatives of the Parties (or of other States) in international organizations, as well as the resolutions adopted or discussed by such organizations, in so far as factually relevant, whether or not such material has been drawn to its attention by a Party.

73. In addition, the Court is aware of the existence and the contents of a publication of the United States State Department entitled *"Revolution Beyond Our Borders", Sandinista Intervention in Central America* intended to justify the policy of the United States towards Nicaragua. This publication was issued in September 1985, and on 6 November 1985 was circulated as an official document of the United Nations General Assembly and the Security Council, at the request of the United States (A/40/858 ; S/17612) ; Nicaragua had circulated in reply a letter to the Secretary-General, annexing *inter alia* an extract from its Memorial on the Merits and an extract from the verbatim records of the hearings in the case (A/40/907 ; S/17639). The United States publication was not submitted to the Court in any formal manner contemplated by the Statute and Rules of Court, though on 13 September 1985 the United States Information Office in The Hague sent copies to an official of the Registry to be made available to anyone at the Court interested in the subject. The representatives of Nicaragua before the Court during the hearings were aware of the existence of this publication, since it was referred to in a question put to the Agent of Nicaragua by a Member of the Court. They did not attempt to refute before the Court what was said in that publication, pointing out that materials of this kind "do not constitute evidence in this case", and going on to suggest that it "cannot properly be considered by the Court". The Court however considers that, in view of the special circumstances of this case, it may, within limits, make use of information in such a publication.

* *

74. In connection with the question of proof of facts, the Court notes that Nicaragua has relied on an alleged implied admission by the United States. It has drawn attention to the invocation of collective self-defence by the United States, and contended that "the use of the justification of

collective self-defence constitutes a major admission of direct and substantial United States involvement in the military and paramilitary operations" directed against Nicaragua. The Court would observe that the normal purpose of an invocation of self-defence is to justify conduct which would otherwise be wrongful. If advanced as a justification in itself, not coupled with a denial of the conduct alleged, it may well imply both an admission of that conduct, and of the wrongfulness of that conduct in the absence of the justification of self-defence. This reasoning would do away with any difficulty in establishing the facts, which would have been the subject of an implicit overall admission by the United States, simply through its attempt to justify them by the right of self-defence. However, in the present case the United States has not listed the facts or described the measures which it claims to have taken in self-defence ; nor has it taken the stand that it is responsible for all the activities of which Nicaragua accuses it but such activities were justified by the right of self-defence. Since it has not done this, the United States cannot be taken to have admitted all the activities, or any of them ; the recourse to the right of self-defence thus does not make possible a firm and complete definition of admitted facts. The Court thus cannot consider reliance on self-defence to be an implicit general admission on the part of the United States ; but it is certainly a recognition as to the imputability of some of the activities complained of.

* * * * *

75. Before examining the complaint of Nicaragua against the United States that the United States is responsible for the military capacity, if not the very existence, of the *contra* forces, the Court will first deal with events which, in the submission of Nicaragua, involve the responsibility of the United States in a more direct manner. These are the mining of Nicaraguan ports or waters in early 1984 ; and certain attacks on, in particular, Nicaraguan port and oil installations in late 1983 and early 1984. It is the contention of Nicaragua that these were not acts committed by members of the *contras* with the assistance and support of United States agencies. Those directly concerned in the acts were, it is claimed, not Nicaraguan nationals or other members of the FDN or ARDE, but either United States military personnel or persons of the nationality of unidentified Latin American countries, paid by, and acting on the direct instructions of, United States military or intelligence personnel. (These persons were apparently referred to in the vocabulary of the CIA as "UCLAs" – "Unilaterally Controlled Latino Assets", and this acronym will be used, purely for convenience, in what follows.) Furthermore, Nicaragua contends that such United States personnel, while they may have refrained from themselves entering Nicaraguan territory or recognized territorial waters, directed the operations and gave very close logistic, intelligence and practical support. A further complaint by Nicaragua which does not

relate to *contra* activity is that of overflights of Nicaraguan territory and territorial waters by United States military aircraft. These complaints will now be examined.

* *

76. On 25 February 1984, two Nicaraguan fishing vessels struck mines in the Nicaraguan port of El Bluff, on the Atlantic coast. On 1 March 1984 the Dutch dredger *Geoponte*, and on 7 March 1984 the Panamanian vessel *Los Caraibes* were damaged by mines at Corinto. On 20 March 1984 the Soviet tanker *Lugansk* was damaged by a mine in Puerto Sandino. Further vessels were damaged or destroyed by mines in Corinto on 28, 29 and 30 March. The period for which the mines effectively closed or restricted access to the ports was some two months. Nicaragua claims that a total of 12 vessels or fishing boats were destroyed or damaged by mines, that 14 people were wounded and two people killed. The exact position of the mines – whether they were in Nicaraguan internal waters or in its territorial sea – has not been made clear to the Court : some reports indicate that those at Corinto were not in the docks but in the access channel, or in the bay where ships wait for a berth. Nor is there any direct evidence of the size and nature of the mines ; the witness Commander Carrión explained that the Nicaraguan authorities were never able to capture an unexploded mine. According to press reports, the mines were laid on the sea-bed and triggered either by contact, acoustically, magnetically or by water pressure ; they were said to be small, causing a noisy explosion, but unlikely to sink a ship. Other reports mention mines of varying size, some up to 300 pounds of explosives. Press reports quote United States administration officials as saying that mines were constructed by the CIA with the help of a United States Navy Laboratory.

77. According to a report in *Lloyds List and Shipping Gazette,* responsibility for mining was claimed on 2 March 1984 by the ARDE. On the other hand, according to an affidavit by Mr. Edgar Chamorro, a former political leader of the FDN, he was instructed by a CIA official to issue a press release over the clandestine radio on 5 January 1984, claiming that the FDN had mined several Nicaraguan harbours. He also stated that the FDN in fact played no role in the mining of the harbours, but did not state who was responsible. According to a press report, the *contras* announced on 8 January 1984, that they were mining all Nicaraguan ports, and warning all ships to stay away from them ; but according to the same report, nobody paid much attention to this announcement. It does not appear that the United States Government itself issued any

warning or notification to other States of the existence and location of the mines.

78. It was announced in the United States Senate on 10 April 1984 that the Director of the CIA had informed the Senate Select Committee on Intelligence that President Reagan had approved a CIA plan for the mining of Nicaraguan ports ; press reports state that the plan was approved in December 1983, but according to a member of that Committee, such approval was given in February 1984. On 10 April 1984, the United States Senate voted that

> "it is the sense of the Congress that no funds . . . shall be obligated or expended for the purpose of planning, directing, executing or supporting the mining of the ports or territorial waters of Nicaragua".

During a televised interview on 28 May 1984, of which the official transcript has been produced by Nicaragua, President Reagan, when questioned about the mining of ports, said "Those were homemade mines . . . that couldn't sink a ship. They were planted in those harbors . . . by the Nicaraguan rebels." According to press reports quoting sources in the United States administration, the laying of mines was effected from speed boats, not by members of the ARDE or FDN, but by the "UCLAs". The mother ships used for the operation were operated, it is said, by United States nationals ; they are reported to have remained outside the 12-mile limit of Nicaraguan territorial waters recognized by the United States. Other less sophisticated mines may, it appears, have been laid in ports and in Lake Nicaragua by *contras* operating separately ; a Nicaraguan military official was quoted in the press as stating that "most" of the mining activity was directed by the United States.

79. According to Nicaragua, vessels of Dutch, Panamanian, Soviet, Liberian and Japanese registry, and one *(Homin)* of unidentified registry, were damaged by mines, though the damage to the *Homin* has also been attributed by Nicaragua rather to gunfire from minelaying vessels. Other sources mention damage to a British or a Cuban vessel. No direct evidence is available to the Court of any diplomatic protests by a State whose vessel had been damaged ; according to press reports, the Soviet Government accused the United States of being responsible for the mining, and the British Government indicated to the United States that it deeply deplored the mining, as a matter of principle. Nicaragua has also submitted evidence to show that the mining of the ports caused a rise in marine insurance rates for cargo to and from Nicaragua, and that some shipping companies stopped sending vessels to Nicaraguan ports.

80. On this basis, the Court finds it established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports ; that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents ; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines ; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.

* *

81. The operations which Nicaragua attributes to the direct action of United States personnel or "UCLAs", in addition to the mining of ports, are apparently the following :

(i) 8 September 1983 : an attack was made on Sandino international airport in Managua by a Cessna aircraft, which was shot down ;
(ii) 13 September 1983 : an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up ;
(iii) 2 October 1983 : an attack was made on oil storage facilities at Benjamin Zeledon on the Atlantic coast, causing the loss of a large quantity of fuel ;
(iv) 10 October 1983 : an attack was made by air and sea on the port of Corinto, involving the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population ;
(v) 14 October 1983 : the underwater oil pipeline at Puerto Sandino was again blown up ;
(vi) 4/5 January 1984 : an attack was made by speedboats and helicopters using rockets against the Potosí Naval Base ;
(vii) 24/25 February 1984 : an incident at El Bluff listed under this date appears to be the mine explosion already mentioned in paragraph 76 ;
(viii) 7 March 1984 : an attack was made on oil and storage facility at San Juan del Sur by speedboats and helicopters ;

(ix) 28/30 March 1984 : clashes occurred at Puerto Sandino between speedboats, in the course of minelaying operations, and Nicaraguan patrol boats ; intervention by a helicopter in support of the speedboats ;
(x) 9 April 1984 : a helicopter allegedly launched from a mother ship in international waters provided fire support for an ARDE attack on San Juan del Norte.

82. At the time these incidents occurred, they were considered to be acts of the *contras,* with no greater degree of United States support than the many other military and paramilitary activities of the *contras.* The declaration of Commander Carrión lists the incidents numbered (i), (ii), (iv) and (vi) above in the catalogue of activities of "mercenaries", without distinguishing these items from the rest ; it does not mention items (iii), (v) and (vii) to (x). According to a report in the *New York Times* (13 October 1983), the Nicaraguan Government, after the attack on Corinto (item (iv) above) protested to the United States Ambassador in Managua at the aid given by the United States to the *contras,* and addressed a diplomatic note in the same sense to the United States Secretary of State. The Nicaraguan Memorial does not mention such a protest, and the Court has not been supplied with the text of any such note.

83. On 19 October 1983, thus nine days after the attack on Corinto, a question was put to President Reagan at a press conference. Nicaragua has supplied the Court with the official transcript which, so far as relevant, reads as follows :

> "*Question :* Mr. President, regarding the recent rebel attacks on a Nicaraguan oil depot, is it proper for the CIA to be involved in planning such attacks and supplying equipment for air raids ? And do the American people have a right to be informed about any CIA role ?
>
> *The President :* I think covert actions have been a part of government and a part of government's responsibilities for as long as there has been a government. I'm not going to comment on what, if any, connection such activities might have had with what has been going on, or with some of the specific operations down there.
>
> But I do believe in the right of a country when it believes that its interests are best served to practice covert activity and then, while your people may have a right to know, you can't let your people know without letting the wrong people know, those that are in opposition to what you're doing."

Nicaragua presents this as one of a series of admissions "that the United States was habitually and systematically giving aid to mercenaries carrying out military operations against the Government of Nicaragua". In the view of the Court, the President's refusal to comment on the connection between covert activities and "what has been going on, or with some of the specific operations down there" can, in its context, be treated as an admission that the United States had something to do with the Corinto attack, but not necessarily that United States personnel were directly involved.

84. The evidence available to the Court to show that the attacks listed above occurred, and that they were the work of United States personnel or "UCLAs", other than press reports, is as follows. In his declaration,

Commander Carrión lists items (i), (ii), (iv) and (vi), and in his oral evidence before the Court he mentioned items (ii) and (iv). Items (vi) to (x) were listed in what was said to be a classified CIA internal memorandum or report, excerpts from which were published in the *Wall Street Journal* on 6 March 1985 ; according to the newspaper, "intelligence and congressional officials" had confirmed the authenticity of the document. So far as the Court is aware, no denial of the report was made by the United States administration. The affidavit of the former FDN leader Edgar Chamorro states that items (ii), (iv) and (vi) were the work of UCLAs despatched from a CIA "mother ship", though the FDN was told by the CIA to claim responsibility. It is not however clear what the source of Mr. Chamorro's information was ; since there is no suggestion that he participated in the operation (he states that the FDN "had nothing whatsoever to do" with it), his evidence is probably strictly hearsay, and at the date of his affidavit, the same allegations had been published in the press. Although he did not leave the FDN until the end of 1984, he makes no mention of the attacks listed above of January to April 1984.

85. The Court considers that it should eliminate from further consideration under this heading the following items :

- the attack of 8 September 1983 on Managua airport (item (i)) : this was claimed by the ARDE ; a press report is to the effect that the ARDE purchased the aircraft from the CIA, but there is no evidence of CIA planning, or the involvement of any United States personnel or UCLAs ;
- the attack on Benjamin Zeledon on 2 October 1983 (item (iii)) : there is no evidence of the involvement of United States personnel or UCLAs ;
- the incident of 24-25 February 1984 (item vii), already dealt with under the heading of the mining of ports.

86. On the other hand the Court finds the remaining incidents listed in paragraph 81 to be established. The general pattern followed by these attacks appears to the Court, on the basis of that evidence and of press reports quoting United States administration sources, to have been as follows. A "mother ship" was supplied (apparently leased) by the CIA ; whether it was of United States registry does not appear. Speedboats, guns and ammunition were supplied by the United States administration, and the actual attacks were carried out by "UCLAs". Helicopters piloted by Nicaraguans and others piloted by United States nationals were also involved on some occasions. According to one report the pilots were United States civilians under contract to the CIA. Although it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations. The execution was the task rather

of the "UCLAs", while United States nationals participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established.

* *

87. Nicaragua complains of infringement of its airspace by United States military aircraft. Apart from a minor incident on 11 January 1984 involving a helicopter, as to which, according to a press report, it was conceded by the United States that it was possible that the aircraft violated Nicaraguan airspace, this claim refers to overflights by aircraft at high altitude for intelligence reconnaissance purposes, or aircraft for supply purposes to the *contras* in the field, and aircraft producing "sonic booms". The Nicaraguan Memorial also mentions low-level reconnaissance flights by aircraft piloted by United States personnel in 1983, but the press report cited affords no evidence that these flights, along the Honduran border, involved any invasion of airspace. In addition Nicaragua has made a particular complaint of the activities of a United States SR-71 plane between 7 and 11 November 1984, which is said to have flown low over several Nicaraguan cities "producing loud sonic booms and shattering glass windows, to exert psychological pressure on the Nicaraguan Government and population".

88. The evidence available of these overflights is as follows. During the proceedings on jurisdiction and admissibility, the United States Government deposited with the Court a "Background Paper" published in July 1984, incorporating eight aerial photographs of ports, camps, an airfield, etc., in Nicaragua, said to have been taken between November 1981 and June 1984. According to a press report, Nicaragua made a diplomatic protest to the United States in March 1982 regarding overflights, but the text of such protest has not been produced. In the course of a Security Council debate on 25 March 1982, the United States representative said that

> "It is true that once we became aware of Nicaragua's intentions and actions, the United States Government undertook overflights to safeguard our own security and that of other States which are threatened by the Sandinista Government",

and continued

> "These overflights, conducted by unarmed, high-flying planes, for the express and sole purpose of verifying reports of Nicaraguan intervention, *are* no threat to regional peace and stability ; quite the contrary." (S/PV.2335, p. 48, emphasis added.)

The use of the present tense may be taken to imply that the overflights were continuing at the time of the debate. Press reports of 12 November 1984 confirm the occurrence of sonic booms at that period, and report the statement of Nicaraguan Defence Ministry officials that the plane responsible was a United States SR-71.

89. The claim that sonic booms were caused by United States aircraft in November 1984 rests on assertions by Nicaraguan Defence Ministry officials, reported in the United States press ; the Court is not however aware of any specific denial of these flights by the United States Government. On 9 November 1984 the representative of Nicaragua in the Security Council asserted that United States SR-71 aircraft violated Nicaraguan airspace on 7 and 9 November 1984 ; he did not specifically mention sonic booms in this respect (though he did refer to an earlier flight by a similar aircraft, on 31 October 1984, as having been "accompanied by loud explosions" (S/PV. 2562, pp. 8-10)). The United States representative in the Security Council did not comment on the specific incidents complained of by Nicaragua but simply said that "the allegation which is being advanced against the United States" was "without foundation" (*ibid.*, p. 28).

90. As to low-level reconnaissance flights by United States aircraft, or flights to supply the *contras* in the field, Nicaragua does not appear to have offered any more specific evidence of these ; and it has supplied evidence that United States agencies made a number of planes available to the *contras* themselves for use for supply and low-level reconnaissance purposes. According to Commander Carrión, these planes were supplied after late 1982, and prior to the *contras* receiving the aircraft, they had to return at frequent intervals to their basecamps for supplies, from which it may be inferred that there were at that time no systematic overflights by United States planes for supply purposes.

91. The Court concludes that, as regards the high-altitude overflights for reconnaissance purposes, the statement admitting them made in the Security Council is limited to the period up to March 1982. However, not only is it entitled to take into account that the interest of the United States in "verifying reports of Nicaraguan intervention" – the justification offered in the Security Council for these flights – has not ceased or diminished since 1982, but the photographs attached to the 1984 Background Paper are evidence of at least sporadic overflights subsequently. It sees no reason therefore to doubt the assertion of Nicaragua that such flights have continued. The Court finds that the incidents of overflights causing "sonic booms" in November 1984 are to some extent a matter of public knowledge. As to overflights of aircraft for supply purposes, it appears from Nicaragua's evidence that these were carried out generally, if not exclusively, by the *contras* themselves, though using aircraft supplied to them by the United States. Whatever other responsibility the United States

may have incurred in this latter respect, the only violations of Nicaraguan airspace which the Court finds imputable to the United States on the basis of the evidence before it are first of all, the high-altitude reconnaissance flights, and secondly the low-altitude flights of 7 to 11 November 1984, complained of as causing "sonic booms".

* *

92. One other aspect of activity directly carried out by the United States in relation to Nicaragua has to be mentioned here, since Nicaragua has attached a certain significance to it. Nicaragua claims that the United States has on a number of occasions carried out military manoeuvres jointly with Honduras on Honduran territory near the Honduras/Nicaragua frontier ; it alleges that much of the military equipment flown in to Honduras for the joint manoeuvres was turned over to the *contras* when the manoeuvres ended, and that the manoeuvres themselves formed part of a general and sustained policy of force intended to intimidate the Government of Nicaragua into accepting the political demands of the United States Government. The manoeuvres in question are stated to have been carried out in autumn 1982 ; February 1983 ("Ahuas Tara I") ; August 1983 ("Ahuas Tara II"), during which American warships were, it is said, sent to patrol the waters off both Nicaragua's coasts ; November 1984, when there were troop movements in Honduras and deployment of warships off the Atlantic coast of Nicaragua ; February 1985 ("Ahuas Tara III") ; March 1985 ("Universal Trek '85") ; June 1985, paratrooper exercises. As evidence of these manoeuvres having taken place, Nicaragua has offered newspaper reports ; since there was no secrecy about the holding of the manoeuvres, the Court considers that it may treat the matter as one of public knowledge, and as such, sufficiently established.

* *

93. The Court must now examine in more detail the genesis, development and activities of the *contra* force, and the role of the United States in relation to it, in order to determine the legal significance of the conduct of the United States in this respect. According to Nicaragua, the United States "conceived, created and organized a mercenary army, the *contra* force". However, there is evidence to show that some armed opposition to the Government of Nicaragua existed in 1979-1980, even before any interference or support by the United States. Nicaragua dates the beginning of the activity of the United States to "shortly after" 9 March 1981, when, it was said, the President of the United States made a formal presidential finding authorizing the CIA to undertake "covert activities" directed against Nicaragua. According to the testimony of Commander

Carrión, who stated that the "organized military and paramilitary activities" began in December 1981, there were Nicaraguan "anti-government forces" prior to that date, consisting of

> "just a few small bands very poorly armed, scattered along the northern border of Nicaragua and . . . composed mainly of ex-members of the Somoza's National Guard. They did not have any military effectiveness and what they mainly did was rustling cattle and killing some civilians near the borderlines."

These bands had existed in one form or another since the fall of the Somoza government : the affidavit of Mr. Edgar Chamorro refers to "the ex-National Guardsmen who had fled to Honduras when the Somoza government fell and had been conducting sporadic raids on Nicaraguan border positions ever since". According to the Nicaraguan Memorial, the CIA initially conducted military and paramilitary activities against Nicaragua soon after the presidential finding of 9 March 1981, "through the existing armed bands" ; these activities consisted of "raids on civilian settlements, local militia outposts and army patrols". The weapons used were those of the former National Guard. In the absence of evidence, the Court is unable to assess the military effectiveness of these bands at that time ; but their existence is in effect admitted by the Nicaraguan Government.

94. According to the affidavit of Mr. Chamorro, there was also a political opposition to the Nicaraguan Government, established outside Nicaragua, from the end of 1979 onward, and in August 1981 this grouping merged with an armed opposition force called the 15th of September Legion, which had itself incorporated the previously disparate armed opposition bands, through mergers arranged by the CIA. It was thus that the FDN is said to have come into being. The other major armed opposition group, the ARDE, was formed in 1982 by Alfonso Robelo Callejas, a former member of the original 1979 Junta and Edén Pastora Gómez, a Sandinista military commander, leader of the FRS (Sandino Revolutionary Front) and later Vice-Minister in the Sandinista government. Nicaragua has not alleged that the United States was involved in the formation of this body. Even on the face of the evidence offered by the Applicant, therefore, the Court is unable to find that the United States created an armed opposition in Nicaragua. However, according to press articles citing official sources close to the United States Congress, the size of the *contra* force increased dramatically once United States financial and other assistance became available : from an initial body of 500 men (plus, according to some reports, 1,000 Miskito Indians) in December 1981, the force grew to 1,000 in February 1982, 1,500 in August 1982, 4,000 in December 1982, 5,500 in February 1983, 8,000 in June 1983 and 12,000 in November 1983. When (as explained below) United States aid other than "humanitarian

assistance" was cut off in September 1984, the size of the force was reported to be over 10,000 men.

95. The financing by the United States of the aid to the *contras* was initially undisclosed, but subsequently became the subject of specific legislative provisions and ultimately the stake in a conflict between the legislative and executive organs of the United States. Initial activities in 1981 seem to have been financed out of the funds available to the CIA for "covert" action ; according to subsequent press reports quoted by Nicaragua, $19.5 million was allocated to these activities. Subsequently, again according to press sources, a further $19 million was approved in late 1981 for the purpose of the CIA plan for military and paramilitary operations authorized by National Security Decision Directive 17. The budgetary arrangements for funding subsequent operations up to the end of 1983 have not been made clear, though a press report refers to the United States Congress as having approved "about $20 million" for the fiscal year to 30 September 1983, and from a Report of the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter called the "Intelligence Committee") it appears that the covert programme was funded by the Intelligence Authorization Act relating to that fiscal year, and by the Defense Appropriations Act, which had been amended by the House of Representatives so as to prohibit "assistance for the purpose of overthrowing the Government of Nicaragua". In May 1983, this Committee approved a proposal to amend the Act in question so as to prohibit United States support for military or paramilitary operations in Nicaragua. The proposal was designed to have substituted for these operations the provision of open security assistance to any friendly Central American country so as to prevent the transfer of military equipment from or through Cuba or Nicaragua. This proposal was adopted by the House of Representatives, but the Senate did not concur ; the executive in the meantime presented a request for $45 million for the operations in Nicaragua for the fiscal year to 30 September 1984. Again conflicting decisions emerged from the Senate and House of Representatives, but ultimately a compromise was reached. In November 1983, legislation was adopted, coming into force on 8 December 1983, containing the following provision :

> "During fiscal year 1984, not more than $24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or

> which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual." (Intelligence Authorization Act 1984, Section 108.)

96. In March 1984, the United States Congress was asked for a supplemental appropriation of $21 million "to continue certain activities of the Central Intelligence Agency which the President has determined are important to the national security of the United States", i.e., for further support for the *contras*. The Senate approved the supplemental appropriation, but the House of Representatives did not. In the Senate, two amendments which were proposed but not accepted were : to prohibit the funds appropriated from being provided to any individual or group known to have as one of its intentions the violent overthrow of any Central American government ; and to prohibit the funds being used for acts of terrorism in or against Nicaragua. In June 1984, the Senate took up consideration of the executive's request for $28 million for the activities in Nicaragua for the fiscal year 1985. When the Senate and the House of Representatives again reached conflicting decisions, a compromise provision was included in the Continuing Appropriations Act 1985 (Section 8066). While in principle prohibiting the use of funds during the fiscal year to 30 September 1985

> "for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual",

the Act provided $14 million for that purpose if the President submitted a report to Congress after 28 February 1985 justifying such an appropriation, and both Chambers of Congress voted affirmatively to approve it. Such a report was submitted on 10 April 1985 ; it defined United States objectives toward Nicaragua in the following terms :

> "United States policy toward Nicaragua since the Sandinistas' ascent to power has consistently sought to achieve changes in Nicaraguan government policy and behavior. We have not sought to overthrow the Nicaraguan Government nor to force on Nicaragua a specific system of government."

The changes sought were stated to be :

> "– termination of all forms of Nicaraguan support for insurgencies or subversion in neighboring countries ;

- reduction of Nicaragua's expanded military/security apparatus to restore military balance in the region ;

- severance of Nicaragua's military and security ties to the Soviet Bloc and Cuba and the return to those countries of their military and security advisers now in Nicaragua ; and

- implementation of Sandinista commitment to the Organization of American States to political pluralism, human rights, free elections, non-alignment, and a mixed economy."

At the same time the President of the United States, in a press conference, referred to an offer of a cease-fire in Nicaragua made by the opponents of the Nicaraguan Government on 1 March 1984, and pledged that the $14 million appropriation, if approved, would not be used for arms or munitions, but for "food, clothing and medicine and other support for survival" during the period "while the cease-fire offer is on the table". On 23 and 24 April 1985, the Senate voted for, and the House of Representatives against, the $14 million appropriation.

97. In June 1985, the United States Congress was asked to approve the appropriation of $38 million to fund military or paramilitary activities against Nicaragua during the fiscal years 1985 and 1986 (ending 30 September 1986). This appropriation was approved by the Senate on 7 June 1985. The House of Representatives, however, adopted a proposal for an appropriation of $27 million, but solely for humanitarian assistance to the *contras,* and administration of the funds was to be taken out of the hands of the CIA and the Department of Defense. The relevant legislation, as ultimately agreed by the Senate and House of Representatives after submission to a Conference Committee, provided

> "$27,000,000 for humanitarian assistance to the Nicaraguan democratic resistance. Such assistance shall be provided in such department or agency of the United States as the President shall designate, except the Central Intelligence Agency or the Department of Defense . . .
>
> As used in this subsection, the term 'humanitarian assistance' means the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death."

The Joint Explanatory Statement of the Conference Committee noted that while the legislation adopted

> "does proscribe these two agencies [CIA and DOD] from administering the funds and from providing any military training or advice to the democratic resistance . . . none of the prohibitions on the provision of military or paramilitary assistance to the democratic resistance prevents the sharing of intelligence information with the democratic resistance".

In the House of Representatives, it was stated that an assurance had been given by the National Security Council and the White House that

> "neither the [CIA] reserve for contingencies nor any other funds available [would] be used for any material assistance other than that authorized . . . for humanitarian assistance for the Nicaraguan democratic resistance, unless authorized by a future act of Congress".

Finance for supporting the military and paramilitary activities of the *contras* was thus available from the budget of the United States Government from some time in 1981 until 30 September 1984 ; and finance limited to "humanitarian assistance" has been available since that date from the same source and remains authorized until 30 September 1986.

98. It further appears, particularly since the restriction just mentioned was imposed, that financial and other assistance has been supplied from private sources in the United States, with the knowledge of the Government. So far as this was earmarked for "humanitarian assistance", it was actively encouraged by the United States President. According to press reports, the State Department made it known in September 1984 that the administration had decided "not to discourage" private American citizens and foreign governments from supporting the *contras.* The Court notes that this statement was prompted by an incident which indicated that some private assistance of a military nature was being provided.

99. The Court finds at all events that from 1981 until 30 September 1984 the United States Government was providing funds for military and paramilitary activities by the *contras* in Nicaragua, and thereafter for "humanitarian assistance". The most direct evidence of the specific purposes to which it was intended that these funds should be put was given by the oral testimony of a witness called by Nicaragua : Mr. David MacMichael, formerly in the employment of the CIA as a Senior Estimates Officer with the Analytic Group of the National Intelligence Council. He informed the Court that in 1981 he participated in that capacity in discussion of a plan relating to Nicaragua, excerpts from which were subsequently published in the *Washington Post,* and he confirmed that, with the exception of a detail (here omitted), these excerpts gave an accurate account of the plan, the purposes of which they described as follows :

"Covert operations under the CIA proposal, according to the NSC records, are intended to :

'Build popular support in Central America and Nicaragua for an opposition front that would be nationalistic, anti-Cuban and anti-Somoza.

Support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere.

Work primarily through non-Americans'

to achieve these covert objectives . . ."

100. Evidence of how the funds appropriated were spent, during the period up to autumn 1984, has been provided in the affidavit of the former FDN leader, Mr. Chamorro ; in that affidavit he gives considerable detail as to the assistance given to the FDN. The Court does not however possess any comparable direct evidence as to support for the ARDE, though press reports suggest that such suppport may have been given at some stages. Mr. Chamorro states that in 1981 former National Guardsmen in exile were offered regular salaries from the CIA, and that from then on arms (FAL and AK-47 assault rifles and mortars), ammunition, equipment and food were supplied by the CIA. When he worked full time for the FDN, he himself received a salary, as did the other FDN directors. There was also a budget from CIA funds for communications, assistance to Nicaraguan refugees or family members of FDN combatants, and a military and logistics budget ; however, the latter was not large since all arms, munitions and military equipment, including uniforms, boots and radio equipment, were acquired and delivered by the CIA.

101. According to Mr. Chamorro, training was at the outset provided by Argentine military officers, paid by the CIA, gradually replaced by CIA personnel. The training given was in

"guerrilla warfare, sabotage, demolitions, and in the use of a variety of weapons, including assault rifles, machine guns, mortars, grenade launchers, and explosives, such as Claymore mines . . . also . . . in field communications, and the CIA taught us how to use certain sophisticated codes that the Nicaraguan Government forces would not be able to decipher".

The CIA also supplied the FDN with intelligence, particularly as to Nicaraguan troop movements, derived from radio and telephonic interception, code-breaking, and surveillance by aircraft and satellites. Mr Chamorro also refers to aircraft being supplied by the CIA ; from press reports it appears that those were comparatively small aircraft suitable for reconnaissance and a certain amount of supply-dropping, not for offensive

operations. Helicopters with Nicaraguan crews are reported to have taken part in certain operations of the "UCLAs" (see paragraph 86 above), but there is nothing to show whether these belonged to the *contras* or were lent by United States agencies.

102. It appears to be recognized by Nicaragua that, with the exception of some of the operations listed in paragraph 81 above, operations on Nicaraguan territory were carried out by the *contras* alone, all United States trainers or advisers remaining on the other side of the frontier, or in international waters. It is however claimed by Nicaragua that the United States Government has devised the strategy and directed the tactics of the *contra* force, and provided direct combat support for its military operations.

103. In support of the claim that the United States devised the strategy and directed the tactics of the *contras,* counsel for Nicaragua referred to the successive stages of the United States legislative authorization for funding the *contras* (outlined in paragraphs 95 to 97 above), and observed that every offensive by the *contras* was preceded by a new infusion of funds from the United States. From this, it is argued, the conclusion follows that the timing of each of those offensives was determined by the United States. In the sense that an offensive could not be launched until the funds were available, that may well be so ; but, in the Court's view, it does not follow that each provision of funds by the United States was made in order to set in motion a particular offensive, and that that offensive was planned by the United States.

104. The evidence in support of the assertion that the United States devised the strategy and directed the tactics of the *contras* appears to the Court to be as follows. There is considerable material in press reports of statements by FDN officials indicating participation of CIA advisers in planning and the discussion of strategy or tactics, confirmed by the affidavit of Mr. Chamorro. Mr. Chamorro attributes virtually a power of command to the CIA operatives : he refers to them as having "ordered" or "instructed" the FDN to take various action. The specific instances of influence of United States agents on strategy or tactics which he gives are as follows : the CIA, he says, was at the end of 1982 "urging" the FDN to launch an offensive designed to take and hold Nicaraguan territory. After the failure of that offensive, the CIA told the FDN to move its men back into Nicaragua and keep fighting. The CIA in 1983 gave a tactical directive not to destroy farms and crops, and in 1984 gave a directive to the opposite effect. In 1983, the CIA again indicated that they wanted the FDN to launch an offensive to seize and hold Nicaraguan territory. In this respect, attention should also be drawn to the statement of Mr. Chamorro (paragraph 101 above) that the CIA supplied the FDN with intelligence, particularly as to Nicaraguan troop movements, and small aircraft suitable for reconnaissance and a certain amount of supply-dropping. Emphasis has been placed, by Mr. Chamorro, by Commander Carrión, and by counsel

for Nicaragua, on the impact on *contra* tactics of the availability of intelligence assistance and, still more important, supply aircraft.

105. It has been contended by Nicaragua that in 1983 a "new strategy" for *contra* operations in and against Nicaragua was adopted at the highest level of the United States Government. From the evidence offered in support of this, it appears to the Court however that there was, around this time, a change in *contra* strategy, and a new policy by the United States administration of more overt support for the *contras,* culminating in the express legislative authorization in the Department of Defense Appropriations Act, 1984, section 775, and the Intelligence Authorization Act for Fiscal Year 1984, section 108. The new *contra* strategy was said to be to attack "economic targets like electrical plants and storage facilities" and fighting in the cities.

106. In the light of the evidence and material available to it, the Court is not satisfied that all the operations launched by the *contra* force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States. However, it is in the Court's view established that the support of the United States authorities for the activities of the *contras* took various forms over the years, such as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc. The Court finds it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them, and on the basis of the intelligence and logistic support which the United States was able to offer, particularly the supply aircraft provided to the *contras* by the United States.

107. To sum up, despite the secrecy which surrounded it, at least initially, the financial support given by the Government of the United States to the military and paramilitary activities of the *contras* in Nicaragua is a fully established fact. The legislative and executive bodies of the respondent State have moreover, subsequent to the controversy which has been sparked off in the United States, openly admitted the nature, volume and frequency of this support. Indeed, they clearly take responsibility for it, this government aid having now become the major element of United States foreign policy in the region. As to the ways in which such financial support has been translated into practical assistance, the Court has been able to reach a general finding.

108. Despite the large quantity of documentary evidence and testimony which it has examined, the Court has not been able to satisfy itself that the respondent State "created" the *contra* force in Nicaragua. It seems certain

that members of the former Somoza National Guard, together with civilian opponents to the Sandinista régime, withdrew from Nicaragua soon after that régime was installed in Managua, and sought to continue their struggle against it, even if in a disorganized way and with limited and ineffectual resources, before the Respondent took advantage of the existence of these opponents and incorporated this fact into its policies vis-à-vis the régime of the Applicant. Nor does the evidence warrant a finding that the United States gave "direct and critical combat support", at least if that form of words is taken to mean that this support was tantamount to direct intervention by the United States combat forces, or that all *contra* operations reflected strategy and tactics wholly devised by the United States. On the other hand, the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN.

109. What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras,* for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. Here it is relevant to note that in May 1983 the assessment of the Intelligence Committee, in the Report referred to in paragraph 95 above, was that the *contras* "constitute[d] an independent force" and that the "only element of control that could be exercised by the United States" was "cessation of aid". Paradoxically this assessment serves to underline, *a contrario,* the potential for control inherent in the degree of the *contras'* dependence on aid. Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.

110. So far as the potential control constituted by the possibility of cessation of United States military aid is concerned, it may be noted that after 1 October 1984 such aid was no longer authorized, though the sharing of intelligence, and the provision of "humanitarian assistance" as defined in the above-cited legislation (paragraph 97) may continue. Yet, according to Nicaragua's own case, and according to press reports, *contra* activity has continued. In sum, the evidence available to the Court indicates that the various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid. On the other hand, it indicates that in the initial years of United States assistance the *contra* force was so dependent. However, whether the United States Government at any stage devised the strategy and directed the tactics of the *contras* depends on the extent to which the United States made use of the potential for control inherent in that dependence. The Court already indicated that it has insufficient evidence to reach a finding on this point. It is *a fortiori* unable to determine that the *contra* force may be equated for

legal purposes with the forces of the United States. This conclusion, however, does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the *contras*.

111. In the view of the Court it is established that the *contra* force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States. This finding is fundamental in the present case. Nevertheless, adequate direct proof that all or the great majority of *contra* activities during that period received this support has not been, and indeed probably could not be, advanced in every respect. It will suffice the Court to stress that a degree of control by the United States Government, as described above, is inherent in the position in which the *contra* force finds itself in relation to that Government.

112. To show the existence of this control, the Applicant argued before the Court that the political leaders of the *contra* force had been selected, installed and paid by the United States ; it also argued that the purpose herein was both to guarantee United States control over this force, and to excite sympathy for the Government's policy within Congress and among the public in the United States. According to the affidavit of Mr. Chamorro, who was directly concerned, when the FDN was formed "the name of the organization, the members of the political junta, and the members of the general staff were all chosen or approved by the CIA" ; later the CIA asked that a particular person be made head of the political directorate of the FDN, and this was done. However, the question of the selection, installation and payment of the leaders of the *contra* force is merely one aspect among others of the degree of dependency of that force. This partial dependency on the United States authorities, the exact extent of which the Court cannot establish, may certainly be inferred *inter alia* from the fact that the leaders were selected by the United States. But it may also be inferred from other factors, some of which have been examined by the Court, such as the organization, training and equipping of the force, the planning of operations, the choosing of targets and the operational support provided.

* *

113. The question of the degree of control of the *contras* by the United States Government is relevant to the claim of Nicaragua attributing responsibility to the United States for activities of the *contras* whereby the United States has, it is alleged, violated an obligation of international law not to kill, wound or kidnap citizens of Nicaragua. The activities in question are said to represent a tactic which includes "the spreading of terror and danger to non-combatants as an end in itself with no attempt to

observe humanitarian standards and no reference to the concept of military necessity". In support of this, Nicaragua has catalogued numerous incidents, attributed to "CIA-trained mercenaries" or "mercenary forces", of kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity. The declaration of Commander Carrión annexed to the Memorial lists the first such incident in December 1981, and continues up to the end of 1984. Two of the witnesses called by Nicaragua (Father Loison and Mr. Glennon) gave oral evidence as to events of this kind. By way of examples of evidence to provide "direct proof of the tactics adopted by the *contras* under United States guidance and control", the Memorial of Nicaragua offers a statement, reported in the press, by the ex-FDN leader Mr. Edgar Chamorro, repeated in the latter's affidavit, of assassinations in Nicaraguan villages ; the alleged existence of a classified Defence Intelligence Agency report of July 1982, reported in the *New York Times* on 21 October 1984, disclosing that the *contras* were carrying out assassinations ; and the preparation by the CIA in 1983 of a manual of psychological warfare. At the hearings, reliance was also placed on the affidavit of Mr. Chamorro.

114. In this respect, the Court notes that according to Nicaragua, the *contras* are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command. In the view of Nicaragua, "*stricto sensu,* the military and paramilitary attacks launched by the United States against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States." If such a finding of the imputability of the acts of the *contras* to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the *contras* to commit them.

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras,* the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United

States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

116. The Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*. What the Court has to investigate is not the complaints relating to alleged violations of humanitarian law by the *contras*, regarded by Nicaragua as imputable to the United States, but rather unlawful acts for which the United States may be responsible directly in connection with the activities of the *contras*. The lawfulness or otherwise of such acts of the United States is a question different from the violations of humanitarian law of which the *contras* may or may not have been guilty. It is for this reason that the Court does not have to determine whether the violations of humanitarian law attributed to the *contras* were in fact committed by them. At the same time, the question whether the United States Government was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the *contras* is relevant to an assessment of the lawfulness of the action of the United States. In this respect, the material facts are primarily those connected with the issue in 1983 of a manual of psychological operations.

117. Nicaragua has in fact produced in evidence before the Court two publications which it claims were prepared by the CIA and supplied to the *contras* in 1983. The first of these, in Spanish, is entitled *"Operaciones sicológicas en guerra de guerrillas"* (Psychological Operations in Guerrilla Warfare), by "Tayacán" ; the certified copy supplied to the Court carries no publisher's name or date. In its Preface, the publication is described as

> "a manual for the training of guerrillas in psychological operations, and its application to the concrete case of the Christian and democratic crusade being waged in Nicaragua by the Freedom Commandos".

The second is entitled the *Freedom Fighter's Manual*, with the subtitle "Practical guide to liberating Nicaragua from oppression and misery by paralyzing the military-industrial complex of the traitorous marxist state without having to use special tools and with minimal risk for the combatant". The text is printed in English and Spanish, and illustrated with simple drawings : it consists of guidance for elementary sabotage techniques. The only indications available to the Court of its authorship are reports in the *New York Times*, quoting a United States Congressman and

Mr. Edgar Chamorro as attributing the book to the CIA. Since the evidence linking the *Freedom Fighter's Manual* to the CIA is no more than newspaper reports the Court will not treat its publication as an act imputable to the United States Government for the purposes of the present case.

118. The Court will therefore concentrate its attention on the other manual, that on "Psychological Operations". That this latter manual was prepared by the CIA appears to be clearly established : a report published in January 1985 by the Intelligence Committee contains a specific statement to that effect. It appears from this report that the manual was printed in several editions ; only one has been produced and it is of that text that the Court will take account. The manual is devoted to techniques for winning the minds of the population, defined as including the guerrilla troops, the enemy troops and the civilian population. In general, such parts of the manual as are devoted to military rather than political and ideological matters are not in conflict with general humanitarian law ; but there are marked exceptions. A section on "Implicit and Explicit Terror", while emphasizing that "the guerrillas should be careful not to become an explicit terror, because this would result in a loss of popular support", and stressing the need for good conduct toward the population, also includes directions to destroy military or police installations, cut lines of communication, kidnap officials of the Sandinista government, etc. Reference is made to the possibility that "it should be necessary . . . to fire on a citizen who was trying to leave the town", to be justified by the risk of his informing the enemy. Furthermore, a section on "Selective Use of Violence for Propagandistic Effects" begins with the words :

> "It is possible to neutralize carefully selected and planned targets, such as court judges, *mesta* judges, police and State Security officials, CDS chiefs, etc. For psychological purposes it is necessary to take extreme precautions, and it is absolutely necessary to gather together the population affected, so that they will be present, take part in the act, and formulate accusations against the oppressor."

In a later section on "Control of mass concentrations and meetings", the following guidance is given *(inter alia)* :

> "If possible, professional criminals will be hired to carry out specific selective 'jobs'.
>
> . . . . . .
>
> Specific tasks will be assigned to others, in order to create a 'martyr' for the cause, taking the demonstrators to a confrontation with the authorities, in order to bring about uprisings or shootings, which will cause the death of one or more persons, who would become the martyrs, a situation that should be made use of immediately against the régime, in order to create greater conflicts."

119. According to the affidavit of Mr. Chamorro, about 2,000 copies of the manual were distributed to members of the FDN, but in those copies Mr. Chamorro had arranged for the pages containing the last two passages quoted above to be torn out and replaced by expurgated pages. According to some press reports, another edition of 3,000 copies was printed (though according to one report Mr. Chamorro said that he knew of no other edition), of which however only some 100 are said to have reached Nicaragua, attached to balloons. He was quoted in a press report as saying that the manual was used to train "dozens of guerrilla leaders" for some six months from December 1983 to May 1984. In another report he is quoted as saying that "people did not read it" and that most of the copies were used in a special course on psychological warfare for middle-level commanders. In his affidavit, Mr. Chamorro reports that the attitude of some unit commanders, in contrast to that recommended in the manual, was that "the best way to win the loyalty of the civilian population was to intimidate it" – by murders, mutilations, etc. – "and make it fearful of us".

120. A question examined by the Intelligence Committee was whether the preparation of the manual was a contravention of United States legislation and executive orders ; *inter alia,* it examined whether the advice on "neutralizing" local officials contravened Executive Order 12333. This Executive Order, re-enacting earlier directives, was issued by President Reagan in December 1981 ; it provides that

> "2.11. No person employed by or acting on behalf of the United States Government shall engage in or conspire to engage in, assassination.
>
> 2.12. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order." (*US Code, Congressional and Administrative News, 97th Congress, First Session,* 1981, p. B.114.)

The manual was written, according to press reports, by "a low-level contract employee" of the CIA ; the Report of the Intelligence Committee concluded :

> "The Committee believes that the manual has caused embarrassment to the United States and should never have been released in any of its various forms. Specific actions it describes are repugnant to American values.
>
> The original purpose of the manual was to provide training to moderate FDN behavior in the field. Yet, the Committee believes that the manual was written, edited, distributed and used without adequate supervision. No one but its author paid much attention

> to the manual. Most CIA officials learned about it from news accounts.
>
> The Committee was told that CIA officers should have reviewed the manual and did not. The Committee was told that all CIA officers should have known about the Executive Order's ban on assassination . . . but some did not. The entire publication and distribution of the manual was marked within the Agency by confusion about who had authority and responsibility for the manual. The incident of the manual illustrates once again to a majority of the Committee that the CIA did not have adequate command and control of the entire Nicaraguan covert action . . .
>
> CIA officials up the chain of command either never read the manual or were never made aware of it. Negligence, not intent to violate the law, marked the manual's history.
>
> The Committee concluded that there was no intentional violation of Executive Order 12333."

When the existence of the manual became known at the level of the United States Congress, according to one press report, "the CIA urged rebels to ignore all its recommendations and began trying to recall copies of the document".

121. When the Intelligence Committee investigated the publication of the psychological operations manual, the question of the behaviour of the *contras* in Nicaragua became of considerable public interest in the United States, and the subject of numerous press reports. Attention was thus drawn to allegations of terrorist behaviour or atrocities said to have been committed against civilians, which were later the subject of reports by various investigating teams, copies of which have been supplied to the Court by Nicaragua. According to the press, CIA officials presented to the Intelligence Committee in 1984 evidence of such activity, and stated that this was the reason why the manual was prepared, it being intended to "moderate the rebels' behaviour". This report is confirmed by the finding of the Intelligence Committee that "The original purpose of the manual was to provide training to moderate FDN behaviour in the field". At the time the manual was prepared, those responsible were aware of, at the least, allegations of behaviour by the *contras* inconsistent with humanitarian law.

122. The Court concludes that in 1983 an agency of the United States Government supplied to the FDN a manual on psychological guerrilla warfare which, while expressly discouraging indiscriminate violence against civilians, considered the possible necessity of shooting civilians who were attempting to leave a town ; and advised the "neutralization" for propaganda purposes of local judges, officials or notables after the sem-

blance of trial in the presence of the population. The text supplied to the *contras* also advised the use of professional criminals to perform unspecified "jobs", and the use of provocation at mass demonstrations to produce violence on the part of the authorities so as to make "martyrs".

* *

123. Nicaragua has complained to the Court of certain measures of an economic nature taken against it by the Government of the United States, beginning with the cessation of economic aid in April 1981, which it regards as an indirect form of intervention in its internal affairs. According to information published by the United States Government, it provided more than $100 million in economic aid to Nicaragua between July 1979 and January 1981 ; however, concern in the United States Congress about certain activities attributed to the Nicaraguan Government led to a requirement that, before disbursing assistance to Nicaragua, the President certify that Nicaragua was not "aiding, abetting or supporting acts of violence or terrorism in other countries" (Special Central American Assistance Act, 1979, Sec. 536 *(g)*). Such a certification was given in September 1980 (45 Federal Register 62779), to the effect that

> "on the basis of an evaluation of the available evidence, that the Government of Nicaragua 'has not co-operated with or harbors any international terrorist organization or is aiding, abetting or supporting acts of violence or terrorism in other countries' ".

An official White House press release of the same date stated that

> "The certification is based upon a careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field . . . Our intelligence agencies as well as our Embassies in Nicaragua and neighboring countries were fully consulted, and the diverse information and opinions from all sources were carefully weighed."

On 1 April 1981 however a determination was made to the effect that the United States could no longer certify that Nicaragua was not engaged in support for "terrorism" abroad, and economic assistance, which had been suspended in January 1981, was thereby terminated. According to the Nicaraguan Minister of Finance, this also affected loans previously contracted, and its economic impact was more than $36 million per annum. Nicaragua also claims that, at the multilateral level, the United States has

acted in the Bank for International Reconstruction and Development and the Inter-American Development Bank to oppose or block loans to Nicaragua.

124. On 23 September 1983, the President of the United States made a proclamation modifying the system of quotas for United States imports of sugar, the effect of which was to reduce the quota attributed to Nicaragua by 90 per cent. The Nicaraguan Finance Minister assessed the economic impact of the measure at between $15 and $18 million, due to the preferential system of prices that sugar has in the market of the United States.

125. On 1 May 1985, the President of the United States made an Executive Order, which contained a finding that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States" and declared a "national emergency". According to the President's message to Congress, this emergency situation had been created by "the Nicaraguan Government's aggressive activities in Central America". The Executive Order declared a total trade embargo on Nicaragua, prohibiting all imports from and exports to that country, barring Nicaraguan vessels from United States ports and excluding Nicaraguan aircraft from air transportation to and from the United States.

* * *

126. The Court has before it, in the Counter-Memorial on jurisdiction and admissibility filed by the United States, the assertion that the United States, pursuant to the inherent right of individual and collective self-defence, and in accordance with the Inter-American Treaty of Reciprocal Assistance, has responded to requests from El Salvador, Honduras and Costa Rica, for assistance in their self-defence against aggression by Nicaragua. The Court has therefore to ascertain, so far as possible, the facts on which this claim is or may be based, in order to determine whether collective self-defence constitutes a justification of the activities of the United States here complained of. Furthermore, it has been suggested that, as a result of certain assurances given by the Nicaraguan "Junta of the Government of National Reconstruction" in 1979, the Government of Nicaragua is bound by international obligations as regards matters which would otherwise be matters of purely domestic policy, that it is in breach of those obligations, and that such breach might justify the action of the United States. The Court will therefore examine the facts underlying this suggestion also.

127. Nicaragua claims that the references made by the United States to the justification of collective self-defence are merely "pretexts" for the activities of the United States. It has alleged that the true motive for the conduct of the United States is unrelated to the support which it accuses

Nicaragua of giving to the armed opposition in El Salvador, and that the real objectives of United States policy are to impose its will upon Nicaragua and force it to comply with United States demands. In the Court's view, however, if Nicaragua has been giving support to the armed opposition in El Salvador, and if this constitutes an armed attack on El Salvador and the other appropriate conditions are met, collective self-defence could be legally invoked by the United States, even though there may be the possibility of an additional motive, one perhaps even more decisive for the United States, drawn from the political orientation of the present Nicaraguan Government. The existence of an additional motive, other than that officially proclaimed by the United States, could not deprive the latter of its right to resort to collective self-defence. The conclusion to be drawn is that special caution is called for in considering the allegations of the United States concerning conduct by Nicaragua which may provide a sufficient basis for self-defence.

128. In its Counter-Memorial on jurisdiction and admissibility, the United States claims that Nicaragua has "promoted and supported guerrilla violence in neighboring countries", particularly in El Salvador ; and has openly conducted cross-border military attacks on its neighbours, Honduras and Costa Rica. In support of this, it annexed to the Counter-Memorial an affidavit by Secretary of State George P. Shultz. In his affidavit, Mr. Shultz declares, *inter alia*, that:

> "The United States has abundant evidence that the Government of Nicaragua has actively supported armed groups engaged in military and paramilitary activities in and against El Salvador, providing such groups with sites in Nicaragua for communications facilities, command and control headquarters, training and logistics support. The Government of Nicaragua is directly engaged with these armed groups in planning ongoing military and paramilitary activities conducted in and against El Salvador. The Government of Nicaragua also participates directly in the procurement, and transshipment through Nicaraguan territory, of large quantities of ammunition, supplies and weapons for the armed groups conducting military and paramilitary activities in and against El Salvador.
>
> In addition to this support for armed groups operating in and against El Salvador, the Government of Nicaragua has engaged in similar support, albeit on a smaller scale, for armed groups engaged, or which have sought to engage, in military or paramilitary activities in and against the Republic of Costa Rica, the Republic of Honduras, and the Republic of Guatemala. The regular military forces of Nicaragua have engaged in several direct attacks on Honduran and Costa Rican territory, causing casualties among the armed forces and civilian populations of those States."

In connection with this declaration, the Court would recall the observa-

tions it has already made (paragraphs 69 and 70) as to the evidential value of declarations by ministers of the government of a State engaged in litigation concerning an armed conflict.

129. In addition, the United States has quoted Presidents Magaña and Duarte of El Salvador, press reports, and United States Government publications. With reference to the claim as to cross-border military attacks, the United States has quoted a statement of the Permanent Representative of Honduras to the Security Council, and diplomatic protests by the Governments of Honduras and Costa Rica to the Government of Nicaragua. In the subsequent United States Government publication *"Revolution Beyond Our Borders"*, referred to in paragraph 73 above, these claims are brought up to date with further descriptive detail. Quoting "Honduran government records", this publication asserts that there were 35 border incursions by the Sandinista People's Army in 1981 and 68 in 1982.

130. In its pleading at the jurisdictional stage, the United States asserted the justification of collective self-defence in relation to alleged attacks on El Salvador, Honduras and Costa Rica. It is clear from the material laid before the Court by Nicaragua that, outside the context of the present judicial proceedings, the United States administration has laid the greatest stress on the question of arms supply and other forms of support to opponents of the Government in El Salvador. In 1983, on the proposal of the Intelligence Committee, the covert programme of assistance to the *contras* "was to be directed only at the interdiction of arms to El Salvador". Nicaragua's other neighbours have not been lost sight of, but the emphasis has continued to be on El Salvador : the United States Continuing Appropriations Act 1985, Section 8066 *(b)* (1) (A), provides for aid for the military or paramilitary activities in Nicaragua to be resumed if the President reports *inter alia* that

> "the Government of Nicaragua is providing material or monetary support to anti-government forces engaged in military or paramilitary operations in El Salvador or other Central American countries".

131. In the proceedings on the merits, Nicaragua has addressed itself primarily to refuting the claim that it has been supplying arms and other assistance to the opponents of the Government of El Salvador ; it has not specifically referred to the allegations of attacks on Honduras or Costa Rica. In this it is responding to what is, as noted above, the principal justification announced by the United States for its conduct. In ascertaining whether the conditions for the exercise by the United States of the right of collective self-defence are satisfied, the Court will accordingly first consider the activities of Nicaragua in relation to El Salvador, as established by the evidence and material available to the Court. It will then consider whether Nicaragua's conduct in relation to Honduras or Costa

Rica may justify the exercise of that right ; in that respect it will examine only the allegations of direct cross-border attacks, since the affidavit of Mr. Shultz claims only that there was support by the provision of arms and supplies for military and paramilitary activities "on a smaller scale" in those countries than in El Salvador.

132. In its Declaration of Intervention dated 15 August 1984, the Government of El Salvador stated that : "The reality is that we are the victims of aggression and armed attack from Nicaragua and have been since at least 1980." (Para. IV.) The statements of fact in that Declaration are backed by a declaration by the Acting Minister for Foreign Affairs of El Salvador, similar in form to the declarations by Nicaraguan Ministers annexed to its pleadings. The Declaration of Intervention asserts that "terrorists" seeking the overthrow of the Government of El Salvador were "directed, armed, supplied and trained by Nicaragua" (para. III) ; that Nicaragua provided "houses, hideouts and communication facilities" (para. VI), and training centres managed by Cuban and Nicaraguan military personnel (para. VII). On the question of arms supply, the Declaration states that

> "Although the quantities of arms and supplies, and the routes used, vary, there has been a continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country." (Para. VIII.)

133. In its observations, dated 10 September 1984, on the Declaration of Intervention of El Salvador, Nicaragua stated as follows :

> "The Declaration includes a series of paragraphs alleging activities by Nicaragua that El Salvador terms an 'armed attack'. The Court should know that this is the first time El Salvador has asserted it is under armed attack from Nicaragua. None of these allegations, which are properly addressed to the merits phase of the case, is supported by proof or evidence of any kind. Nicaragua denies each and every one of them, and stands behind the affidavit of its Foreign Minister, Father Miguel d'Escoto Brockmann, in which the Foreign Minister affirms that the Government of Nicaragua has not supplied arms or other materials of war to groups fighting against the Government of El Salvador or provided financial support, training or training facilities to such groups or their members."

134. Reference has also to be made to the testimony of one of the witnesses called by Nicaragua. Mr. David MacMichael (paragraph 99 above) said in evidence that he was in the full time employment of the CIA from March 1981 to April 1983, working for the most part on Inter-

American affairs. During his examination by counsel for Nicaragua, he stated as follows :

"*[Question :]* In your opinion, if the Government of Nicaragua was sending arms to rebels in El Salvador, could it do so without detection by United States intelligence-gathering capabilities ?

*[Answer :]* In any significant manner over this long period of time I do not believe they could have done so.

*Q. :* And there was in fact no such detection during the period that you served in the Central Intelligence Agency ?

*A. :* No.

*Q. :* In your opinion, if arms in significant quantities were being sent from Nicaraguan territory to the rebels in El Salvador – with or without the Government's knowledge or consent – could these shipments have been accomplished without detection by United States intelligence capabilities ?

*A. :* If you say in significant quantities over any reasonable period of time, no I do not believe so.

*Q. :* And there was in fact no such detection during your period of service with the Agency ?

*A. :* No.

*Q. :* Mr. MacMichael, up to this point we have been talking about the period when you were employed by the CIA – 6 March 1981 to 3 April 1983. Now let me ask you without limit of time : did you see any evidence of arms going to the Salvadorian rebels from Nicaragua at any time ?

*A. :* Yes, I did.

*Q. :* When was that ?

*A. :* Late 1980 to very early 1981."

Mr. MacMichael indicated the sources of the evidence he was referring to, and his examination continued :

"*[Question :]* Does the evidence establish that the Government of Nicaragua was involved during this period ?

*[Answer :]* No, it does not establish it, but I could not rule it out."

135. After counsel for Nicaragua had completed his examination of the witness, Mr. MacMichael was questioned from the bench, and in this context he stated *(inter alia)* as follows :

"*[Question :]* Thus if the Government of Nicaragua had shipped arms to El Salvador before March 1981, for example in 1980 and early 1981, in order to arm the big January offensive of the insurgents in El

Salvador, you would not be in a position to know that ; is that correct ?

*[Answer :]* I think I have testified, your honour, that I reviewed the immediate past intelligence material at that time, that dealt with that period, and I have stated today that there was credible evidence and that on the basis of my reading of it I could not rule out a finding that the Nicaraguan Government had been involved during that period.

*Q. :* Would you rule it 'in' ?

*A. :* I prefer to stay with my answer that I could not rule it out, but to answer you as directly as I can my inclination would be more towards ruling 'in' than ruling 'out'.

. . . . . .

*Q. :* I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980/early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadorian insurgency. Is that the conclusion I can draw from your remarks ?

*A. :* I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion."

In short, the Court notes that the evidence of a witness called by Nicaragua in order to negate the allegation of the United States that the Government of Nicaragua had been engaged in the supply of arms to the armed opposition in El Salvador only partly contradicted that allegation.

136. Some confirmation of the situation in 1981 is afforded by an internal Nicaraguan Government report, made available by the Government of Nicaragua in response to a request by the Court, of a meeting held in Managua on 12 August 1981 between Commander Ortega, Co-ordinator of the Junta of the Government of Nicaragua and Mr. Enders, Assistant Secretary of State for Inter-American Affairs of the United States. According to this report, the question of the flow of "arms, munitions and other forms of military aid" to El Salvador, was raised by Mr. Enders as one of the "major problems" *(problemas principales).* At one point he is reported to have said :

"On your part, you could take the necessary steps to ensure that the flow of arms to El Salvador is again halted as in March of this year. We do not seek to involve ourselves in deciding how and with whom this object should be achieved, but we may well monitor the results."

Later in the course of the discussion, the following exchange is recorded :

> "*[Ortega :]* As for the flow of arms to El Salvador, what must be stated is that as far as we have been informed by you, efforts have been made to stop it ; however, I want to make clear that there is a great desire here to collaborate with the Salvadorian people, also among members of our armed forces, although our Junta and the National Directorate have a decision that activities of this kind should not be permitted. We would ask you to give us reports about that flow to help us control it.
>
> *[Enders :]* You have succeeded in doing so in the past and I believe you can do so now. We are not in a position to supply you with intelligence reports. We would compromise our sources, and our nations have not yet reached the necessary level to exchange intelligence reports."

137. As regards the question, raised in this discussion, of the picture given by United States intelligence sources, further evidence is afforded by the 1983 Report of the Intelligence Committee (paragraphs 95, 109 above). In that Report, dated 13 May 1983, it was stated that

> "The Committee has regularly reviewed voluminous intelligence material on Nicaraguan and Cuban support for leftist insurgencies since the 1979 Sandinista victory in Nicaragua."

The Committee continued :

> "At the time of the filing of this report, the Committee believes that the intelligence available to it continues to support the following judgments with certainty :
>
> A major portion of the arms and other material sent by Cuba and other communist countries to the Salvadorian insurgents transits Nicaragua with the permission and assistance of the Sandinistas.
>
> The Salvadorian insurgents rely on the use of sites in Nicaragua, some of which are located in Managua itself, for communications, command-and-control, and for the logistics to conduct their financial, material and propaganda activities.
>
> The Sandinista leadership sanctions and directly facilitates all of the above functions.
>
> Nicaragua provides a range of other support activities, including secure transit of insurgents to and from Cuba, and assistance to the insurgents in planning their activities in El Salvador.
>
> In addition, Nicaragua and Cuba have provided – and appear to continue providing – training to the Salvadorian insurgents."

The Court is not aware of the contents of any analogous report of a body with access to United States intelligence material covering a more recent

period. It notes however that the Resolution adopted by the United States Congress on 29 July 1985 recorded the expectation of Congress from the Government of Nicaragua of :

> "the end to Sandinista support for insurgencies in other countries in the region, including the cessation of military supplies to the rebel forces fighting the democratically elected government in El Salvador".

138. In its Declaration of Intervention, El Salvador alleges that "Nicaraguan officials have publicly admitted their direct involvement in waging war on us" (para. IX). It asserts that the Foreign Minister of Nicaragua admitted such support at a meeting of the Foreign Ministers of the Contadora Group in July 1983. Setting this against the declaration by the Nicaraguan Foreign Minister annexed to the Nicaraguan Memorial, denying any involvement of the Nicaraguan Government in the provision of arms or other supplies to the opposition in El Salvador, and in view of the fact that the Court has not been informed of the exact words of the alleged admission, or with any corroborative testimony from others present at the meeting, the Court cannot regard as conclusive the assertion in the Declaration of Intervention. Similarly, the public statement attributed by the Declaration of Intervention (para. XIII) to Commander Ortega, referring to "the fact of continuing support to the Salvadorian guerrillas" cannot, even assuming it to be accurately quoted, be relied on as proof that that support (which, in the form of political support, is openly admitted by the Nicaraguan Government) takes any specific material form, such as the supply of arms.

139. The Court has taken note of four draft treaties prepared by Nicaragua in 1983, and submitted as an official proposal within the framework of the Contadora process, the text of which was supplied to the Court with the Nicaraguan Application. These treaties, intended to be "subscribed to by all nations that desire to contribute to the peaceful solution of the present armed conflict in the Republic of El Salvador" (p. 58), contained the following provisions :

> *"Article One*
>
> The High Contracting Parties promise to not offer and, should such be the case, to suspend military assistance and training and the supply and trafficking of arms, munitions and military equipment that may be made directly to the contending forces or indirectly through third States.
>
> *Article Two*
>
> The High Contracting Parties promise to adopt in their respective territories whatever measures may be necessary to impede all supply and trafficking of arms, munitions and military equipment and military assistance to and training of the contending forces in the Republic of El Salvador." (P. 60.)

In the Introduction to its proposal the Nicaraguan Government stated that it was ready to enter into an agreement of this kind immediately, even if only with the United States, "in order that the Government of that country cease justifying its interventionist policy in El Salvador on the basis of supposed actions by Nicaragua" (p. 58).

140. When filing its Counter-Memorial on the questions of jurisdiction and admissibility, the United States deposited a number of documents in the Registry of the Court, two of which are relevant to the questions here under examination. The first is a publication of the United States Department of State dated 23 February 1981, entitled *Communist Interference in El Salvador*, reproducing a number of documents (in Spanish with English translation) stated to have been among documents in "two particularly important document caches ... recovered from the Communist Party of El Salvador (PCS) in November 1980 and the People's Revolutionary Army (ERP) in January 1981". A summary of the documents is also to be found in an attachment to the 1983 Report of the Intelligence Committee, filed by Nicaragua. The second is a "Background Paper" published by the United States Department of State and Department of Defense in July 1984, entitled *Nicaragua's Military Build-Up and Support for Central American Subversion.*

141. The full significance of the documents reproduced in the first of these publications, which are "written using cryptic language and abbreviations", is not readily apparent, without further assistance from United States experts, who might have been called as witnesses had the United States appeared in the proceedings. For example, there are frequent references to "Lagos" which, according to the United States, is a code-name for Nicaragua ; but without such assistance the Court cannot judge whether this interpretation is correct. There is also however some specific reference in an undated document to aid to the armed opposition "which all would pass through Nicaragua" – no code-name being here employed – which the Court must take into account for what it is worth.

142. The second document, the Background Paper, is stated to be based on "Sandinista documents, press reports, and interviews with captured guerrillas and defectors" as well as information from "intelligence sources" ; specific intelligence reports are not cited "because of the potential consequences of revealing sources and methods". The only material evidence included is a number of aerial photographs (already referred to in paragraph 88 above), and a map said to have been captured in a guerrilla camp in El Salvador, showing arms transport routes ; this map does not appear of itself to indicate that arms enter El Salvador from Nicaraguan territory.

143. The Court's attention has also been drawn to various press reports of statements by diplomats, by leaders of the armed opposition in El Salvador, or defectors from it, supporting the view that Nicaragua was

involved in the arms supply. As the Court has already explained, it regards press reports not as evidence capable of proving facts, but considers that they can nevertheless contribute, in some circumstances, to corroborating the existence of a particular fact (paragraph 62 above). The press reports here referred to will therefore be taken into account only to that extent.

144. In an interview published in English in the *New York Times Magazine* on 28 April 1985, and in Spanish in *ABC*, Madrid, on 12 May 1985 given by Daniel Ortega Saavedra, President of the Junta of Nicaragua, he is reported to have said :

> "We've said that we're willing to send home the Cubans, the Russians, the rest of the advisers. *We're willing to stop the movement of military aid, or any other kind of aid, through Nicaragua to El Salvador*, and we're willing to accept international verification. In return, we're asking for one thing : that they don't attack us, that the United States stop arming and financing . . . the gangs that kill our people, burn our crops and force us to divert enormous human and economic resources into war when we desperately need them for development." ("Hemos dicho que estamos dispuestos a sacar a los cubanos, soviéticos y demás asesores ; *a suspender todo tránsito por nuestro territorio de ayuda militar u otra a los salvadoreños, bajo verificación internacional.* Hemos dicho que lo único que pedimos es que no nos agredan y que Estados Unidos no arme y financie . . . a las bandas que entran a matarnos, a quemar las cosechas, y que nos obligan a distraer enormes recursos humanos y económicos que nos hacen una falta angustiosa para el desarrollo.")

The Court has to consider whether this press report can be treated as evidence of an admission by the Nicaraguan Head of State that the Nicaraguan Government is in a position to stop the movement of military or other aid through Nicaraguan territory to El Salvador ; and whether it can be deduced from this (in conjunction with other material) that the Nicaraguan Government is responsible for the supply or transit of such aid.

145. Clearly the remarks attributed to President Ortega raise questions as to his meaning, namely as to what exactly the Nicaraguan Government was offering to stop. According to Nicaragua's own evidence, President Ortega had offered during the meeting of 12 August 1981 to stop the arms flow if the United States would supply the necessary information to enable the Nicaraguan Government to track it down ; it may in fact be the interview of 12 August 1981 that President Ortega was referring to when he spoke of what had been said to the United States Government. At all events, against the background of the firm denial by the Nicaraguan Government of complicity in an arms flow to El Salvador, the Court cannot regard remarks of this kind as an admission that that Government

was in fact doing what it had already officially denied and continued subsequently to deny publicly.

146. Reference was made during the hearings to the testimony of defectors from Nicaragua or from the armed opposition in El Salvador ; the Court has no such direct testimony before it. The only material available in this respect is press reports, some of which were annexed to the United States Counter-Memorial on the questions of jurisdiction and admissibility. With appropriate reservations, the Court has to consider what the weight is of such material, which includes allegations of arms supply and of the training of Salvadoreans at a base near Managua. While the Court is not prepared totally to discount this material, it cannot find that it is of any great weight in itself. Still less can statements attributed in the press to unidentified diplomats stationed in Managua be regarded as evidence that the Nicaraguan Government was continuing to supply aid to the opposition in El Salvador.

147. The evidence or material offered by Nicaragua in connection with the allegation of arms supply has to be assessed bearing in mind the fact that, in responding to that allegation, Nicaragua has to prove a negative. Annexed to the Memorial was a declaration dated 21 April 1984 of Miguel d'Escoto Brockmann, the Foreign Minister of Nicaragua. In this respect the Court has, as in the case of the affidavit of the United States Secretary of State, to recall the observations it has already made (paragraphs 69 and 70) as to the evidential value of such declarations. In the declaration, the Foreign Minister states that the allegations made by the United States, that the Nicaraguan Government "is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the Government of El Salvador, are false". He continues :

> "In truth, my government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador . . . Since my government came to power on July 19, 1979, its policy and practice has been to prevent our national territory from being used as a conduit for arms or other military supplies intended for other governments or rebel groups. In fact, on numerous occasions the security forces of my government have intercepted clandestine arms shipments, apparently destined for El Salvador, and confiscated them."

The Foreign Minister explains the geographical difficulty of patrolling Nicaragua's frontiers :

> "Nicaragua's frontier with Honduras, to the north, is 530 kilometers long. Most of it is characterized by rugged mountains, or remote and dense jungles. Most of this border area is inaccessible by motorized land transport and simply impossible to patrol. To the south, Nicaragua's border with Costa Rica extends for 220 kilometers. This area is also characterized by dense and remote jungles and is also virtually inaccessible by land transport. As a small underdeveloped country with extremely limited resources, and with no modern or sophisticated detection equipment, it is not easy for us to seal off our borders to all unwanted and illegal traffic."

He then points out the complication of the presence of the *contras* along the northern and southern borders, and describes efforts by Nicaragua to obtain verifiable international agreements for halting all arms traffic in the region.

148. Before turning to the evidence offered by Nicaragua at the hearings, the Court would note that the action of the United States Government itself, on the basis of its own intelligence reports, does not suggest that arms supply to El Salvador from the territory of Nicaragua was continuous from July 1979, when the new régime took power in Managua, and the early months of 1981. The presidential Determination of 12 September 1980, for the purposes of the Special Central American Assistance Act 1979, quoted in paragraph 123 above, officially certified that the Government of Nicaragua was not aiding, abetting or supporting acts of violence or terrorism in other countries, and the press release of the same date emphasized the "careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field" for the purposes of the Determination. The 1983 Report of the Intelligence Committee, on the other hand, referring to its regular review of intelligence since "the 1979 Sandinista victory in Nicaragua", found that the intelligence available to it in May 1983 supported "with certainty" the judgment that arms and material supplied to "the Salvadorian insurgents transits Nicaragua with the permission and assistance of the Sandinistas" (see paragraph 137 above).

149. During the oral proceedings Nicaragua offered the testimony of Mr. MacMichael, already reviewed above (paragraphs 134 and 135) from a different aspect. The witness, who was well placed to judge the situation from United States intelligence, stated that there was no detection by United States intelligence capabilities of arms traffic from Nicaraguan territory to El Salvador during the period of his service (March 1981 to April 1983). He was questioned also as to his opinion, in the light of official

statements and press reports, on the situation after he left the CIA and ceased to have access to intelligence material, but the Court considers it can attach little weight to statements of opinion of this kind (cf. paragraph 68 above).

150. In weighing up the evidence summarized above, the Court has to determine also the significance of the context of, or background to, certain statements or indications. That background includes, first, the ideological similarity between two movements, the Sandinista movement in Nicaragua and the armed opposition to the present government in El Salvador ; secondly the consequent political interest of Nicaragua in the weakening or overthrow of the government in power in El Salvador ; and finally, the sympathy displayed in Nicaragua, including among members of the army, towards the armed opposition in El Salvador. At the meeting of 12 August 1981 (paragraph 136 above), for example, Commander Ortega told the United States representative, Mr. Enders, that "we are interested in seeing the guerrillas in El Salvador and Guatemala triumph . . .", and that "there is a great desire here to collaborate with the Salvadorian people . . .". Against this background, various indications which, taken alone, cannot constitute either evidence or even a strong presumption of aid being given by Nicaragua to the armed opposition in El Salvador, do at least require to be examined meticulously on the basis that it is probable that they are significant.

151. It is in this light, for example, that one indirect piece of evidence acquires particular importance. From the record of the meeting of 12 August 1981 in Managua, mentioned in the preceding paragraph, it emerges that the Nicaraguan authorities may have immediately taken steps, at the request of the United States, to bring to a halt or prevent various forms of support to the armed opposition in El Salvador. The United States representative is there reported to have referred to steps taken by the Government of Nicaragua in March 1981 to halt the flow of arms to El Salvador, and his statement to that effect was not contradicted. According to a *New York Times* report (17 September 1985) Commander Ortega stated that around this time measures were taken to prevent an airstrip in Nicaragua from continuing to be used for these types of activities. This, in the Court's opinion, is an admission of certain facts, such as the existence of an airstrip designed to handle small aircraft, probably for the transport of weapons, the likely destination being El Salvador, even if the Court has not received concrete proof of such transport. The promptness with which the Nicaraguan authorities closed off this channel is a strong indication that it was in fact being used, or had been used for such a purpose.

152. The Court finds, in short, that support for the armed opposition in El Salvador from Nicaraguan territory was a fact up to the early months of 1981. While the Court does not possess full proof that there was aid, or as to its exact nature, its scale and its continuance until the early months of

1981, it cannot overlook a number of concordant indications, many of which were provided moreover by Nicaragua itself, from which it can reasonably infer the provision of a certain amount of aid from Nicaraguan territory. The Court has already explained (paragraphs 64, 69 and 70) the precise degree to which it intended to take account, as regards factual evidence, of statements by members of the governments of the States concerned, including those of Nicaragua. It will not return to this point.

153. After the early months of 1981, evidence of military aid from or through Nicaragua remains very weak. This is so despite the deployment by the United States in the region of extensive technical resources for tracking, monitoring and intercepting air, sea and land traffic, described in evidence by Mr. MacMichael and its use of a range of intelligence and information sources in a political context where, moreover, the Government had declared and recognized surveillance of Nicaragua as a "high priority". The Court cannot of course conclude from this that no transborder traffic in arms existed, although it does not seem particularly unreasonable to believe that traffic of this kind, had it been persistent and on a significant scale, must inevitably have been discovered, in view of the magnitude of the resources used for that purpose. The Court merely takes note that the allegations of arms-trafficking are not solidly established ; it has not, in any event, been able to satisfy itself that any continuing flow on a significant scale took place after the early months of 1981.

154. In this connection, it was claimed in the Declaration of Intervention by El Salvador that there was a "continuing flow of arms, ammunition, medicines, and clothing from Nicaragua to our country" (para. VIII), and El Salvador also affirmed the existence of "land infiltration routes between Nicaragua and El Salvador". Had evidence of this become available, it is not apparent why El Salvador, given full knowledge of an arms-flow and the routes used, could not have put an end to the traffic, either by itself or with the assistance of the United States, which has deployed such powerful resources. There is no doubt that the United States and El Salvador are making considerable effort to prevent any infiltration of weapons and any form of support to the armed opposition in El Salvador from the direction of Nicaragua. So far as the Court has been informed, however, they have not succeeded in tracing and intercepting this infiltration and these various forms of support. Consequently, it can only interpret the lack of evidence of the transborder arms-flow in one of the following two ways : either this flow exists, but is neither as frequent nor as considerable as alleged by the respondent State ; or it is being carried on without the knowledge, and against the will, of a government which would rather put a stop to it. If this latter conclusion is at all valid with regard to El Salvador and the United States it must therefore be at least equally valid with regard to Nicaragua.

155. Secondly, even supposing it well established that military aid is

reaching the armed opposition in El Salvador from the territory of Nicaragua, it still remains to be proved that this aid is imputable to the authorities of the latter country. Indeed, the applicant State has in no way sought to conceal the possibility of weapons en route to the armed opposition in El Salvador crossing its territory but it denies that this is the result of any deliberate official policy on its part. As the Court observed in 1949 :

> "it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof." (*Corfu Channel, I.C.J. Reports 1949,* p. 18.)

Here it is relevant to bear in mind that there is reportedly a strong will for collaboration and mutual support between important elements of the populations of both El Salvador and Nicaragua, not least among certain members of the armed forces in Nicaragua. The Court sees no reason to dismiss these considerations, especially since El Salvador itself recognizes the existence in Nicaraguan coastal areas of "traditional smugglers" (Declaration, para. VIII, H), because Nicaragua is accused not so much of delivering weapons itself as of allowing them to transit through its territory ; and finally because evidence has been provided, in the report of the meeting of 12 August 1981 referred to in paragraph 136 above, of a degree of co-operation between the United States and Nicaragua for the purpose of putting a stop to these arms deliveries. The continuation of this co-operation does not seem to have depended solely on the Government of Nicaragua, for the Government of the United States, which in 1981 again raised with it the question of this traffic, this time refused to provide the Nicaraguan authorities, as it had on previous occasions, with the specific information and details that would have enabled them to call a halt to it. Since the Government of the United States has justified its refusal by claiming that any disclosure would jeopardize its sources of information, the Court has no means of assessing the reality or cogency of the undivulged evidence which the United States claimed to possess.

156. In passing, the Court would remark that, if this evidence really existed, the United States could be expected to have taken advantage of it in order to forestall or disrupt the traffic observed ; it could presumably for example arrange for the deployment of a strong patrol force in El Salvador and Honduras, along the frontiers of these States with Nicaragua. It is difficult to accept that it should have continued to carry out military and paramilitary activities against Nicaragua if their only purpose was, as alleged, to serve as a riposte in the exercise of the right of collective self-defence. If, on the other hand, this evidence does not exist, that, as the Court has pointed out, implies that the arms traffic is so insignificant and

casual that it escapes detection even by the sophisticated techniques employed for the purpose, and that, *a fortiori,* it could also have been carried on unbeknown to the Government of Nicaragua, as that Government claims. These two conclusions mutually support each other.

157. This second hypothesis would provide the Court with a further reason for taking Nicaragua's affirmation into consideration, in that, if the flow of arms is in fact reaching El Salvador without either Honduras or El Salvador or the United States succeeding in preventing it, it would clearly be unreasonable to demand of the Government of Nicaragua a higher degree of diligence than is achieved by even the combined efforts of the other three States. In particular, when Nicaragua is blamed for allowing consignments of arms to cross its territory, this is tantamount, where El Salvador is concerned, to an admission of its inability to stem the flow. This is revealing as to the predicament of any government, including that of Nicaragua, faced with this arms traffic : its determination to put a stop to it would be likely to fail. More especially, to the extent that some of this aid is said to be successfully routed through Honduras, this accusation against Nicaragua would also signify that Honduras, which is not suspected of seeking to assist the armed opposition in El Salvador, is providing involuntary proof that it is by no means certain that Nicaragua can combat this clandestine traffic any better than Honduras. As the means at the disposal of the governments in the region are roughly comparable, the geographical obstacles, and the intrinsic character of any clandestine arms traffic, simply show that this traffic may be carried on successfully without any complicity from governmental authorities, and even when they seek to put a stop to it. Finally, if it is true that the exceptionally extensive resources deployed by the United States have been powerless to prevent this traffic from keeping the Salvadorian armed opposition supplied, this suggests even more clearly how powerless Nicaragua must be with the much smaller resources at its disposal for subduing this traffic if it takes place on its territory and the authorities endeavour to put a stop to it.

158. Confining itself to the regional States concerned, the Court accordingly considers that it is scarcely possible for Nicaragua's responsibility for an arms traffic taking place on its territory to be automatically assumed while the opposite assumption is adopted with regard to its neighbours in respect of similar traffic. Having regard to the circumstances characterizing this part of Central America, the Court considers it more realistic, and consistent with the probabilities, to recognize that an activity of that nature, if on a limited scale, may very well be pursued unbeknown to the territorial government.

159. It may be objected that the Nicaraguan authorities are alleged to have declared on various occasions that military assistance to the armed opposition in El Salvador was part of their official policy. The Court has already indicated that it is unable to give weight to alleged statements to that effect of which there is insufficient evidence. In the report of the diplomatic talks held on 12 August 1981 at Managua, Commander Ortega

did not in any sense promise to cease sending arms, but, on the contrary, said on the one hand that Nicaragua had taken immediate steps to put a stop to it once precise information had been given and, on the other hand, expressed inability to take such steps where Nicaragua was not provided with information enabling that traffic to be located. The Court would further observe that the four draft treaties submitted by Nicaragua within the Contadora process in 1983 (quoted in paragraph 139 above) do not constitute an admission by Nicaragua of the supply of assistance to the armed opposition in El Salvador, but simply make provision for the future in the context of the inter-American system, in which a State is prohibited from assisting the armed opposition within another State.

160. On the basis of the foregoing, the Court is satisfied that, between July 1979, the date of the fall of the Somoza régime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period.

* *

161. The Court therefore turns to the claim that Nicaragua has been responsible for cross-border military attacks on Honduras and Costa Rica. The United States annexed to its Counter-Memorial on jurisdiction, *inter alia*, a document entitled "Resumé of Sandinista Aggression in Honduran Territory in 1982" issued by the Press and Information Officer of the Honduran Ministry of Foreign Relations on 23 August 1982. That document listed 35 incidents said to involve violations of Honduran territory, territorial waters or airspace, attacks on and harassment of the Honduran population or Honduran patrols, between 30 January 1982 and 21 August 1982. Also attached to the Counter-Memorial were copies of diplomatic Notes from Honduras to Nicaragua protesting at other incidents stated to have occurred in June/July 1983 and July 1984. The Court has no information as to whether Nicaragua replied to these communications, and if so in what terms.

162. With regard to Costa Rica, the United States has supplied the text of diplomatic Notes of protest from Costa Rica to Nicaragua concerning incidents in September 1983, February 1984 and April 1984, and a Note from Costa Rica to the Foreign Ministers of Colombia, Mexico, Panama and Venezuela, referring to an incident of 29 April 1984, and requesting the sending of a mission of observers. Again, the Court has no information as

to the contemporary reaction of Nicaragua to these allegations ; from press reports it appears that the matter was later amicably settled.

163. As the Court has already observed (paragraphs 130 to 131 above), both the Parties have addressed themselves primarily to the question of aid by the Government of Nicaragua to the armed opposition in El Salvador, and the question of aggression directed against Honduras and Costa Rica has fallen somewhat into the background. Nevertheless the allegation that such aggression affords a basis for the exercise by the United States of the right of collective self-defence remains on the record ; and the Court has to note that Nicaragua has not taken the opportunity during the proceedings of expressly refuting the assertion that it has made cross-border military attacks on the territory of those two States. At the opening of the hearings in 1984 on the questions of jurisdiction and admissibility, the Agent of Nicaragua referred to the "supposed armed attacks of Nicaragua against its neighbours", and proceeded to "reiterate our denial of these accusations which in any case we will amply address in the merits phase of these proceedings". However, the declaration of the Nicaraguan Foreign Minister annexed to the Memorial on the merits filed on 30 April 1985, while repudiating the accusation of support for the armed opposition in El Salvador, did not refer at all to the allegation of border incidents involving Honduras and Costa Rica.

164. The Court, while not as fully informed on the question as it would wish to be, therefore considers as established the fact that certain trans-border military incursions into the territory of Honduras and Costa Rica are imputable to the Government of Nicaragua. The Court is also aware of the fact that the FDN operates along the Nicaraguan border with Honduras, and the ARDE operates along the border with Costa Rica.

* *

165. In view of the assertion by the United States that it has acted in exercise of the right of collective self-defence for the protection of El Salvador, Honduras and Costa Rica, the Court has also to consider the evidence available on the question whether those States, or any of them, made a request for such protection. In its Counter-Memorial on jurisdiction and admissibility, the United States informed the Court that

> "El Salvador, Honduras, and Costa Rica have each sought outside assistance, principally from the United States, in their self-defense against Nicaragua's aggression. Pursuant to the inherent right of individual and collective self-defense, and in accordance with the terms of the Inter-American Treaty of Reciprocal Assistance, the United States has responded to these requests."

No indication has however been given of the dates on which such requests for assistance were made. The affidavit of Mr. Shultz, Secretary of State,

dated 14 August 1984 and annexed to the United States Counter-Memorial on jurisdiction and admissibility, while asserting that the United States is acting in accord with the provisions of the United Nations Charter, and pursuant to the inherent right of self defence, makes no express mention of any request for assistance by the three States named. El Salvador, in its Declaration of Intervention in the present proceedings of 15 August 1984, stated that, faced with Nicaraguan aggression,

> "we have been called upon to defend ourselves, but our own economic and military capability is not sufficient to face any international apparatus that has unlimited resources at its disposal, and we have, therefore, requested support and assistance from abroad. It is our natural, inherent right under Article 51 of the Charter of the United Nations to have recourse to individual and collective acts of self-defence. It was with this in mind that President Duarte, during a recent visit to the United States and in discussions with United States congressmen, reiterated the importance of this assistance for our defence from the United States and the democratic nations of the world." (Para. XII.)

Again, no dates are given, but the Declaration continues "This was also done by the Revolutionary Junta of Government and the Government of President Magaña", i.e., between October 1979 and December 1980, and between April 1982 and June 1984.

166. The Court however notes that according to the report, supplied by the Agent of Nicaragua, of the meeting on 12 August 1981 between President Ortega of Nicaragua and Mr. Enders, the latter is reported to have referred to action which the United States might take

> "if the arms race in Central America is built up to such a point that some of your [sc. Nicaragua's] neighbours in Central America seek protection from us under the Inter-American Treaty [of Reciprocal Assistance]".

This remark might be thought to carry the implication that no such request had yet been made. Admittedly, the report of the meeting is a unilateral one, and its accuracy cannot be assumed as against the United States. In conjunction with the lack of direct evidence of a formal request for assistance from any of the three States concerned to the United States, the Court considers that this report is not entirely without significance.

* * *

167. Certain events which occurred at the time of the fall of the régime of President Somoza have next to be mentioned, since reliance has been placed on them to support a contention that the present Government of Nicaragua is in violation of certain alleged assurances given by its imme-

diate predecessor, the Government of National Reconstruction, in 1979. From the documents made available to the Court, at its request, by Nicaragua, it appears that what occurred was as follows. On 23 June 1979, the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States adopted by majority, over the negative vote of, *inter alios,* the representative of the Somoza government of Nicaragua, a resolution on the subject of Nicaragua. By that resolution after declaring that "the solution of the serious problem is exclusively within the jurisdiction of the people of Nicaragua", the Meeting of Consultation declared

> "That in the view of the Seventeenth Meeting of Consultation of Ministers of Foreign Affairs this solution should be arrived at on the basis of the following :
>
> 1. Immediate and definitive replacement of the Somoza régime.
> 2. Installation in Nicaraguan territory of a democratic government, the composition of which should include the principal representative groups which oppose the Somoza régime and which reflects the free will of the people of Nicaragua.
> 3. Guarantee of the respect for human rights of all Nicaraguans without exception.
> 4. The holding of free elections as soon as possible, that will lead to the establishment of a truly democratic government that guarantees peace, freedom, and justice."

On 12 July 1979, the five members of the Nicaraguan "Junta of the Government of National Reconstruction" sent from Costa Rica a telegram to the Secretary-General of the Organization of American States, communicating the "Plan of the Government of National Reconstruction to Secure Peace". The telegram explained that the plan had been developed on the basis of the Resolution of the Seventeenth Meeting of Consultation ; in connection with that plan, the Junta members stated that they wished to "ratify" *(ratificar)* some of the "goals that have inspired their government". These included, first

> "our firm intention to establish full observance of human rights in our country in accordance with the United Nations Universal Declaration of the Rights of Man *[sic]*, and the Charter on Human Rights of the Organization of American States" ;

the Inter-American Commission on Human Rights was invited "to visit our country as soon as we are installed in our national territory". A further goal was

> "the plan to call the first free elections our country has known in this century, so that Nicaraguans can elect their representatives to the city councils and to a constituent assembly, and later elect the country's highest authorities".

The Plan to Secure Peace provided for the Government of National Reconstruction, as soon as established, to decree a Fundamental Statute and an Organic Law, and implement the Program of the Government of National Reconstruction. Drafts of these texts were appended to the Plan ; they were enacted into law on 20 July 1979 and 21 August 1979.

168. In this connection, the Court notes that, since thus announcing its objectives in 1979, the Nicaraguan Government has in fact ratified a number of international instruments on human rights. At the invitation of the Government of Nicaragua, the Inter-American Commission on Human Rights visited Nicaragua and compiled two reports (OEA/Ser.L/V/11.53 and 62). A state of emergency was declared by the Nicaraguan Government (and notified to the United Nations Secretary-General) in July 1979, and was re-declared or extended on a number of subsequent occasions. On 4 November 1984, presidential and legislative elections were held, in the presence of foreign observers ; seven political parties took part in the election, while three parties abstained from taking part on the ground that the conditions were unsatisfactory.

169. The view of the United States as to the legal effect of these events is reflected in, for example, a Report submitted to Congress by President Reagan on 10 April 1985 in connection with finance for the *contras*. It was there stated that one of the changes which the United States was seeking from the Nicaraguan Government was :

> "implementation of Sandinista commitment to the Organization of American States to political pluralism, human rights, free elections, non-alignment, and a mixed economy".

A fuller statement of those views is contained in a formal finding by Congress on 29 July 1985, to the following effect :

> "(A) the Government of National Reconstruction of Nicaragua formally accepted the June 23, 1979, resolution as a basis for resolving the Nicaraguan conflict in its 'Plan to Achieve Peace' which was submitted to the Organization of American States on July 12, 1979 ;
>
> (B) the June 23, 1979, resolution and its acceptance by the Government of National Reconstruction of Nicaragua was the formal basis for the removal of the Somoza régime and the installation of the Government of National Reconstruction ;
>
> (C) the Government of National Reconstruction, now known as the Government of Nicaragua and controlled by the Frente Sandinista (the FSLN), has flagrantly violated the provisions of the June 23, 1979, resolution, the rights of the Nicaraguan people, and the security of the nations in the region, in that it –

(i) no longer includes the democratic members of the Government of National Reconstruction in the political process ;

(ii) is not a government freely elected under conditions of freedom of the press, assembly, and organization, and is not recognized as freely elected by its neighbors, Costa Rica, Honduras, and El Salvador ;

(iii) has taken significant steps towards establishing a totalitarian Communist dictatorship, including the formation of FSLN neighborhood watch committees and the enactment of laws that violate human rights and grant undue executive power ;

(iv) has committed atrocities against its citizens as documented in reports by the Inter-American Commission on Human Rights of the Organization of American States ;

(v) has aligned itself with the Soviet Union and Soviet allies, including the German Democratic Republic, Bulgaria, Libya, and the Palestine Liberation Organization ;

(vi) has committed and refuses to cease aggression in the form of armed subversion against its neighbors in violation of the Charter of the United Nations, the Charter of the Organization of American States, the Inter-American Treaty of Reciprocal Assistance, and the 1965 United Nations General Assembly Declaration on Intervention ; and

(vii) has built up an army beyond the needs of immediate self-defense, at the expense of the needs of the Nicaraguan people and about which the nations of the region have expressed deepest concern."

170. The resolution goes on to note the belief expressed by Costa Rica, El Salvador and Honduras that

> "their peace and freedom is not safe so long as the Government of Nicaragua excludes from power most of Nicaragua's political leadership and is controlled by a small sectarian party, without regard to the will of the majority of Nicaraguans"

and adds that

> "the United States, given its role in the installation of the current Government of Nicaragua, has a special responsibility regarding the implementation of the commitments made by that Government in 1979, especially to those who fought against Somoza to bring democracy to Nicaragua with United States support".

Among the findings as to the "Resolution of the Conflict" is the statement that the Congress

> "supports the Nicaraguan democratic resistance in its efforts to peacefully resolve the Nicaraguan conflict and to achieve the fulfillment of the Government of Nicaragua's solemn commitments to the Nicaraguan people, the United States, and the Organization of American States".

From the transcripts of speeches and press conferences supplied to the Court by Nicaragua, it is clear that the resolution of Congress expresses a view shared by the President of the United States, who is constitutionally responsible for the foreign policy of the United States.

171. The question whether the alleged violations by the Nicaraguan Government of the 1979 Resolution of the Organization of American States Meeting of Consultation, listed in paragraph 169, are relied on by the United States Government as legal justifications of its conduct towards Nicaragua, or merely as political arguments, will be examined later in the present Judgment. It may however be observed that the resolution clearly links United States support for the *contras* to the breaches of what the United States regards as the "solemn commitments" of the Government of Nicaragua.

* * * * *

172. The Court has now to turn its attention to the question of the law applicable to the present dispute. In formulating its view on the significance of the United States multilateral treaty reservation, the Court has reached the conclusion that it must refrain from applying the multilateral treaties invoked by Nicaragua in support of its claims, without prejudice either to other treaties or to the other sources of law enumerated in Article 38 of the Statute. The first stage in its determination of the law actually to be applied to this dispute is to ascertain the consequences of the exclusion of the applicability of the multilateral treaties for the definition of the content of the customary international law which remains applicable.

173. According to the United States, these consequences are extremely wide-ranging. The United States has argued that :

> "Just as Nicaragua's claims allegedly based on 'customary and general international law' cannot be determined without recourse to the United Nations Charter as the principal source of that law, they also cannot be determined without reference to the 'particular international law' established by multilateral conventions in force among the parties."

The United States contends that the only general and customary international law on which Nicaragua can base its claims is that of the Charter : in particular, the Court could not, it is said, consider the lawfulness of an alleged use of armed force without referring to the "principal source of the

relevant international law", namely, Article 2, paragraph 4, of the United Nations Charter. In brief, in a more general sense "the provisions of the United Nations Charter relevant here subsume and supervene related principles of customary and general international law". The United States concludes that "since the multilateral treaty reservation bars adjudication of claims based on those treaties, it bars all of Nicaragua's claims". Thus the effect of the reservation in question is not, it is said, merely to prevent the Court from deciding upon Nicaragua's claims by applying the multilateral treaties in question ; it further prevents it from applying in its decision any rule of customary international law the content of which is also the subject of a provision in those multilateral treaties.

174. In its Judgment of 26 November 1984, the Court has already commented briefly on this line of argument. Contrary to the views advanced by the United States, it affirmed that it

> "cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated." (*I.C.J. Reports 1984,* p. 424, para. 73.)

Now that the Court has reached the stage of a decision on the merits, it must develop and refine upon these initial remarks. The Court would observe that, according to the United States argument, it should refrain from applying the rules of customary international law because they have been "subsumed" and "supervened" by those of international treaty law, and especially those of the United Nations Charter. Thus the United States apparently takes the view that the existence of principles in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content.

175. The Court does not consider that, in the areas of law relevant to the present dispute, it can be claimed that all the customary rules which may be invoked have a content exactly identical to that of the rules contained in

the treaties which cannot be applied by virtue of the United States reservation. On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective.

176. As regards the suggestion that the areas covered by the two sources of law are identical, the Court observes that the United Nations Charter, the convention to which most of the United States argument is directed, by no means covers the whole area of the regulation of the use of force in international relations. On one essential point, this treaty itself refers to pre-existing customary international law ; this reference to customary law is contained in the actual text of Article 51, which mentions the "inherent right" (in the French text the "droit naturel") of individual or collective self-defence, which "nothing in the present Charter shall impair" and which applies in the event of an armed attack. The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a "natural" or "inherent" right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content. This could also be demonstrated for other subjects, in particular for the principle of non-intervention.

177. But as observed above (paragraph 175), even if the customary norm and the treaty norm were to have exactly the same content, this

would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm. The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the *North Sea Continental Shelf* cases. To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because it had influenced its subsequent adoption. The Court found that this identity of content in treaty law and in customary international law did not exist in the case of the rule invoked, which appeared in one article of the treaty, but did not suggest that such identity was debarred as a matter of principle : on the contrary, it considered it to be clear that certain other articles of the treaty in question "were . . . regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law" (*I.C.J. Reports 1969*, p. 39, para. 63). More generally, there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own.

178. There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability. In a legal dispute affecting two States, one of them may argue that the applicability of a treaty rule to its own conduct depends on the other State's conduct in respect of the application of other rules, on other subjects, also included in the same treaty. For example, if a State exercises its right to terminate or suspend the operation of a treaty on the ground of the violation by the other party of a "provision essential to the accomplishment of the object or purpose of the treaty" (in the words of Art. 60, para. 3 *(b)*, of the Vienna Convention on the Law of Treaties), it is exempted, vis-à-vis the other State, from a rule of treaty-law because of the breach by that other State of a different rule of treaty-law. But if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule. Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are

customary rules or treaty rules. The present dispute illustrates this point.

179. It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content. Consequently, in ascertaining the content of the customary international law applicable to the present dispute, the Court must satisfy itself that the Parties are bound by the customary rules in question ; but the Court is in no way bound to uphold these rules only in so far as they differ from the treaty rules which it is prevented by the United States reservation from applying in the present dispute.

180. The United States however presented a further argument, during the proceedings devoted to the question of jurisdiction and admissibility, in support of its contention that the multilateral treaty reservation debars the Court from considering the Nicaraguan claims based on customary international law. The United States observed that the multilateral treaties in question contain legal standards specifically agreed between the Parties to govern their mutual rights and obligations, and that the conduct of the Parties will continue to be governed by these treaties, irrespective of what the Court may decide on the customary law issue, because of the principle of *pacta sunt servanda.* Accordingly, in the contention of the United States, the Court cannot properly adjudicate the mutual rights and obligations of the two States when reference to their treaty rights and obligations is barred ; the Court would be adjudicating those rights and obligations by standards other than those to which the Parties have agreed to conduct themselves in their actual international relations.

181. The question raised by this argument is whether the provisions of the multilateral treaties in question, particularly the United Nations Charter, diverge from the relevant rules of customary international law to such an extent that a judgment of the Court as to the rights and obligations of the parties under customary law, disregarding the content of the multilateral treaties binding on the parties, would be a wholly academic exercise, and not "susceptible of any compliance or execution whatever" (*Northern Cameroons, I.C.J. Reports 1963,* p. 37). The Court does not consider that this is the case. As already noted, on the question of the use of force, the United States itself argues for a complete identity of the relevant rules of customary international law with the provisions of the Charter. The Court has not accepted this extreme contention, having found that on a number of points the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content (paragraph 174 above). However, so far from having constituted a marked departure from a customary international law which still exists unmodified, the Charter gave expression in this field to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter,

to such an extent that a number of rules contained in the Charter have acquired a status independent of it. The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution.

182. The Court concludes that it should exercise the jurisdiction conferred upon it by the United States declaration of acceptance under Article 36, paragraph 2, of the Statute, to determine the claims of Nicaragua based upon customary international law notwithstanding the exclusion from its jurisdiction of disputes "arising under" the United Nations and Organization of American States Charters.

* * *

183. In view of this conclusion, the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States ; as the Court recently observed,

> "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), I.C.J. Reports 1985,* pp. 29-30, para. 27.)

In this respect the Court must not lose sight of the Charter of the United Nations and that of the Organization of American States, notwithstanding the operation of the multilateral treaty reservation. Although the Court has no jurisdiction to determine whether the conduct of the United States constitutes a breach of those conventions, it can and must take them into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed.

184. The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention. This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States. Bound as it is by Article 38 of its Statute to apply, *inter alia,*

international custom "as evidence of a general practice accepted as law", the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them ; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.

185. In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways. It is therefore in the light of this "subjective element" – the expression used by the Court in its 1969 Judgment in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969,* p. 44) – that the Court has to appraise the relevant practice.

186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

* *

187. The Court must therefore determine, first, the substance of the customary rules relating to the use of force in international relations, applicable to the dispute submitted to it. The United States has argued that, on this crucial question of the lawfulness of the use of force in inter-State relations, the rules of general and customary international law, and those of the United Nations Charter, are in fact identical. In its view this identity is so complete that, as explained above (paragraph 173), it constitutes an argument to prevent the Court from applying this customary law, because it is indistinguishable from the multilateral treaty law which it may not apply. In its Counter-Memorial on jurisdiction and

admissibility the United States asserts that "Article 2 (4) of the Charter *is* customary and general international law". It quotes with approval an observation by the International Law Commission to the effect that

> "the great majority of international lawyers today unhesitatingly hold that Article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force" (*ILC Yearbook*, 1966, Vol. II, p. 247).

The United States points out that Nicaragua has endorsed this view, since one of its counsel asserted that "indeed it is generally considered by publicists that Article 2, paragraph 4, of the United Nations Charter is in this respect an embodiment of existing general principles of international law". And the United States concludes :

> "In sum, the provisions of Article 2 (4) with respect to the lawfulness of the use of force *are* 'modern customary law' (International Law Commission, *loc. cit.*) and the 'embodiment of general principles of international law' (counsel for Nicaragua, Hearing of 25 April 1984, morning, *loc. cit.*). There is no other 'customary and general international law' on which Nicaragua can rest its claims."

> "It is, in short, inconceivable that this Court could consider the lawfulness of an alleged use of armed force without referring to the principal source of the relevant international law – Article 2 (4) of the United Nations Charter."

As for Nicaragua, the only noteworthy shade of difference in its view lies in Nicaragua's belief that

> "in certain cases the rule of customary law will not necessarily be identical in content and mode of application to the conventional rule".

188. The Court thus finds that both Parties take the view that the principles as to the use of force incorporated in the United Nations Charter correspond, in essentials, to those found in customary international law. The Parties thus both take the view that the fundamental principle in this area is expressed in the terms employed in Article 2, paragraph 4, of the United Nations Charter. They therefore accept a treaty-law obligation to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced

from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. The principle of non-use of force, for example, may thus be regarded as a principle of customary international law, not as such conditioned by provisions relating to collective security, or to the facilities or armed contingents to be provided under Article 43 of the Charter. It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter.

189. As regards the United States in particular, the weight of an expression of *opinio juris* can similarly be attached to its support of the resolution of the Sixth International Conference of American States condemning aggression (18 February 1928) and ratification of the Montevideo Convention on Rights and Duties of States (26 December 1933), Article 11 of which imposes the obligation not to recognize territorial acquisitions or special advantages which have been obtained by force. Also significant is United States acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of States participating in the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), whereby the participating States undertake to "refrain in their mutual relations, *as well as in their international relations in general,*" (emphasis added) from the threat or use of force. Acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States prohibiting the use of force in international relations.

190. A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*" (paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, *ILC Yearbook*, 1966-II, p. 247). Nicaragua in its

Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2, paragraph 4, of the Charter of the United Nations "has come to be recognized as *jus cogens*". The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a "universal norm", a "universal international law", a "universally recognized principle of international law", and a "principle of *jus cogens*".

191. As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms. In determining the legal rule which applies to these latter forms, the Court can again draw on the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), referred to above). As already observed, the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question. Alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force. In particular, according to this resolution :

> "Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.
>
> . . . . . .
>
> States have a duty to refrain from acts of reprisal involving the use of force.
>
> . . . . . .
>
> Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence.
>
> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."

192. Moreover, in the part of this same resolution devoted to the principle of non-intervention in matters within the national jurisdiction of States, a very similar rule is found :

> "Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State."

In the context of the inter-American system, this approach can be traced back at least to 1928 (Convention on the Rights and Duties of States in the Event of Civil Strife, Art. 1 (1)) ; it was confirmed by resolution 78 adopted by the General Assembly of the Organization of American States on 21 April 1972. The operative part of this resolution reads as follows :

> *"The General Assembly Resolves :*
>
> 1. To reiterate solemnly the need for the member states of the Organization to observe strictly the principles of nonintervention and self-determination of peoples as a means of ensuring peaceful coexistence among them and to refrain from committing any direct or indirect act that might constitute a violation of those principles.
>
> 2. To reaffirm the obligation of those states to refrain from applying economic, political, or any other type of measures to coerce another state and obtain from it advantages of any kind.
>
> 3. Similarly, to reaffirm the obligation of these states to refrain from organizing, supporting, promoting, financing, instigating, or tolerating subversive, terrorist, or armed activities against another state and from intervening in a civil war in another state or in its internal struggles."

193. The general rule prohibiting force allows for certain exceptions. In view of the arguments advanced by the United States to justify the acts of which it is accused by Nicaragua, the Court must express a view on the content of the right of self-defence, and more particularly the right of collective self-defence. First, with regard to the existence of this right, it notes that in the language of Article 51 of the United Nations Charter, the inherent right (or "droit naturel") which any State possesses in the event of an armed attack, covers both collective and individual self-defence. Thus, the Charter itself testifies to the existence of the right of collective self-defence in customary international law. Moreover, just as the wording of certain General Assembly declarations adopted by States demonstrates their recognition of the principle of the prohibition of force as definitely a matter of customary international law, some of the wording in those declarations operates similarly in respect of the right of self-defence (both collective and individual). Thus, in the declaration quoted above on the

Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the reference to the prohibition of force is followed by a paragraph stating that :

> "nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful".

This resolution demonstrates that the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law.

194. With regard to the characteristics governing the right of self-defence, since the Parties consider the existence of this right to be established as a matter of customary international law, they have concentrated on the conditions governing its use. In view of the circumstances in which the dispute has arisen, reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised. Accordingly the Court expresses no view on that issue. The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence. Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred.

195. In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" *(inter alia)* an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph *(g)*, of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the

Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States. It is also clear that it is the State which is the victim of an armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.

196. The question remains whether the lawfulness of the use of collective self-defence by the third State for the benefit of the attacked State also depends on a request addressed by that State to the third State. A provision of the Charter of the Organization of American States is here in point : and while the Court has no jurisdiction to consider that instrument as applicable to the dispute, it may examine it to ascertain what light it throws on the content of customary international law. The Court notes that the Organization of American States Charter includes, in Article 3 *(f)*, the principle that : "an act of aggression against one American State is an act of aggression against all the other American States" and a provision in Article 27 that :

> "Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States."

197. Furthermore, by Article 3, paragraph 1, of the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947, the High-Contracting Parties

> "agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations" ;

and under paragraph 2 of that Article,

> "On the request of the State or States directly attacked and until the decision of the Organ of Consultation of the Inter-American System, each one of the Contracting Parties may determine the immediate

measures which it may individually take in fulfilment of the obligation contained in the preceding paragraph and in accordance with the principle of continental solidarity."

(The 1947 Rio Treaty was modified by the 1975 Protocol of San José, Costa Rica, but that Protocol is not yet in force.)

198. The Court observes that the Treaty of Rio de Janeiro provides that measures of collective self-defence taken by each State are decided "on the request of the State or States directly attacked". It is significant that this requirement of a request on the part of the attacked State appears in the treaty particularly devoted to these matters of mutual assistance ; it is not found in the more general text (the Charter of the Organization of American States), but Article 28 of that Charter provides for the application of the measures and procedures laid down in "the special treaties on the subject".

199. At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.

200. At this point, the Court may consider whether in customary international law there is any requirement corresponding to that found in the treaty law of the United Nations Charter, by which the State claiming to use the right of individual or collective self-defence must report to an international body, empowered to determine the conformity with international law of the measures which the State is seeking to justify on that basis. Thus Article 51 of the United Nations Charter requires that measures taken by States in exercise of this right of self-defence must be "immediately reported" to the Security Council. As the Court has observed above (paragraphs 178 and 188), a principle enshrined in a treaty, if reflected in customary international law, may well be so unencumbered with the conditions and modalities surrounding it in the treaty. Whatever influence the Charter may have had on customary international law in these matters, it is clear that in customary international law it is not a condition of the lawfulness of the use of force in self-defence that a procedure so closely dependent on the content of a treaty commitment and of the institutions established by it, should have been followed. On the other hand, if self-defence is advanced as a justification for measures which would otherwise be in breach both of the principle of customary international law and of that contained in the Charter, it is to be expected that the conditions of the Charter should be respected. Thus for the purpose of enquiry into the customary law position, the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence.

201. To justify certain activities involving the use of force, the United States has relied solely on the exercise of its right of collective self-defence. However the Court, having regard particularly to the non-participation of the United States in the merits phase, considers that it should enquire whether customary international law, applicable to the present dispute, may contain other rules which may exclude the unlawfulness of such activities. It does not, however, see any need to reopen the question of the conditions governing the exercise of the right of individual self-defence, which have already been examined in connection with collective self-defence. On the other hand, the Court must enquire whether there is any justification for the activities in question, to be found not in the right of collective self-defence against an armed attack, but in the right to take counter-measures in response to conduct of Nicaragua which is not alleged to constitute an armed attack. It will examine this point in connection with an analysis of the principle of non-intervention in customary international law.

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202. The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference ; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed : "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" (*I.C.J. Reports 1949*, p. 35), and international law requires political integrity also to be respected. Expressions of an *opinio juris* regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find. Of course, statements whereby States avow their recognition of the principles of international law set forth in the United Nations Charter cannot strictly be interpreted as applying to the principle of non-intervention by States in the internal and external affairs of other States, since this principle is not, as such, spelt out in the Charter. But it was never intended that the Charter should embody written confirmation of every essential principle of international law in force. The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States. A particular instance of this is General Assembly resolution 2625 (XXV), the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States. In the *Corfu Channel* case, when a State claimed a right of intervention in order to secure evidence in the territory of another State for submission to an international tribunal (*I.C.J. Reports 1949*, p. 34), the Court observed that :

> "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here ; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself." (*I.C.J. Reports 1949,* p. 35.)

203. The principle has since been reflected in numerous declarations adopted by international organizations and conferences in which the United States and Nicaragua have participated, e.g., General Assembly resolution 2131 (XX), the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It is true that the United States, while it voted in favour of General Assembly resolution 2131 (XX), also declared at the time of its adoption in the First Committee that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law" (*Official Records of the General Assembly, Twentieth Session,* First Committee, A/C.1/SR.1423, p. 436). However, the essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be "basic principles" of international law, and on the adoption of which no analogous statement was made by the United States representative.

204. As regards inter-American relations, attention may be drawn to, for example, the United States reservation to the Montevideo Convention on Rights and Duties of States (26 December 1933), declaring the opposition of the United States Government to "interference with the freedom, the sovereignty or other internal affairs, or processes of the Governments of other nations" ; or the ratification by the United States of the Additional Protocol relative to Non-Intervention (23 December 1936). Among more recent texts, mention may be made of resolutions AG/RES.78 and AG/RES.128 of the General Assembly of the Organization of American States. In a different context, the United States expressly accepted the principles set forth in the declaration, to which reference has already been made, appearing in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1 August 1975), including an elaborate statement of the principle of non-intervention ; while these principles were presented as applying to the mutual relations among the participating States, it can be inferred that the text testifies to the existence, and the acceptance by the United States, of a customary principle which has universal application.

205. Notwithstanding the multiplicity of declarations by States accepting the principle of non-intervention, there remain two questions : first,

what is the exact content of the principle so accepted, and secondly, is the practice sufficiently in conformity with it for this to be a rule of customary international law ? As regards the first problem – that of the content of the principle of non-intervention – the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above (paragraph 191), General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State "involve a threat or use of force". These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. In view of the nature of Nicaragua's complaints against the United States, and those expressed by the United States in regard to Nicaragua's conduct towards El Salvador, it is primarily acts of intervention of this kind with which the Court is concerned in the present case.

206. However, before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it. There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State. The Court is not here concerned with the process of decolonization ; this question is not in issue in the present case. It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

207. In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied

by the *opinio juris sive necessitatis.* Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is

> "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.*" (*I.C.J. Reports 1969,* p. 44, para. 77.)

The Court has no jurisdiction to rule upon the conformity with international law of any conduct of States not parties to the present dispute, or of conduct of the Parties unconnected with the dispute ; nor has it authority to ascribe to States legal views which they do not themselves advance. The significance for the Court of cases of State conduct prima facie inconsistent with the principle of non-intervention lies in the nature of the ground offered as justification. Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.

208. In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances. As mentioned above, the United States has, on the legal plane, justified its intervention expressly and solely by reference to the "classic" rules involved, namely, collective self-defence against an armed attack. Nicaragua, for its part, has often expressed its solidarity and sympathy with the opposition in various States, especially in El Salvador. But Nicaragua too has not argued that this was a legal basis for an intervention, let alone an intervention involving the use of force.

209. The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they

directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.

* *

210. When dealing with the rule of the prohibition of the use of force, the Court considered the exception to it constituted by the exercise of the right of collective self-defence in the event of armed attack. Similarly, it must now consider the following question : if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs ? A right to act in this way in the case of intervention would be analogous to the right of collective self-defence in the case of an armed attack, but both the act which gives rise to the reaction, and that reaction itself, would in principle be less grave. Since the Court is here dealing with a dispute in which a wrongful use of force is alleged, it has primarily to consider whether a State has a right to respond to intervention with intervention going so far as to justify a use of force in reaction to measures which do not constitute an armed attack but may nevertheless involve a use of force. The question is itself undeniably relevant from the theoretical viewpoint. However, since the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure. It might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of armed attack.

211. The Court has recalled above (paragraphs 193 to 195) that for one State to use force against another, on the ground that that State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today – whether customary international law or that of the United Nations system – States do not have a right of "collective" armed response to acts which do not constitute an "armed attack". Furthermore, the Court has to recall that the United States itself is relying on the "inherent right of self-defence" (paragraph 126 above), but apparently does not claim that any such right exists

as would, in respect of intervention, operate in the same way as the right of collective self-defence in respect of an armed attack. In the discharge of its duty under Article 53 of the Statute, the Court has nevertheless had to consider whether such a right might exist ; but in doing so it may take note of the absence of any such claim by the United States as an indication of *opinio juris.*

* *

212. The Court should now mention the principle of respect for State sovereignty, which in international law is of course closely linked with the principles of the prohibition of the use of force and of non-intervention. The basic legal concept of State sovereignty in customary international law, expressed in, *inter alia,* Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory. As to superjacent air space, the 1944 Chicago Convention on International Civil Aviation (Art. 1) reproduces the established principle of the complete and exclusive sovereignty of a State over the air space above its territory. That convention, in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law.

213. The duty of every State to respect the territorial sovereignty of others is to be considered for the appraisal to be made of the facts relating to the mining which occurred along Nicaragua's coasts. The legal rules in the light of which these acts of mining should be judged depend upon where they took place. The laying of mines within the ports of another State is governed by the law relating to internal waters, which are subject to the sovereignty of the coastal State. The position is similar as regards mines placed in the territorial sea. It is therefore the sovereignty of the coastal State which is affected in such cases. It is also by virtue of its sovereignty that the coastal State may regulate access to its ports.

214. On the other hand, it is true that in order to enjoy access to ports, foreign vessels possess a customary right of innocent passage in territorial waters for the purposes of entering or leaving internal waters ; Article 18, paragraph 1 *(b),* of the United Nations Convention on the Law of the Sea of 10 December 1982, does no more than codify customary international law on this point. Since freedom of navigation is guaranteed, first in the exclusive economic zones which may exist beyond territorial waters (Art. 58 of the Convention), and secondly, beyond territorial waters and on the high seas (Art. 87), it follows that any State which enjoys a right of access to ports for its ships also enjoys all the freedom necessary for

maritime navigation. It may therefore be said that, if this right of access to the port is hindered by the laying of mines by another State, what is infringed is the freedom of communications and of maritime commerce. At all events, it is certain that interference with navigation in these areas prejudices both the sovereignty of the coastal State over its internal waters, and the right of free access enjoyed by foreign ships.

* *

215. The Court has noted above (paragraph 77 *in fine*) that the United States did not issue any warning or notification of the presence of the mines which had been laid in or near the ports of Nicaragua. Yet even in time of war, the Convention relative to the laying of automatic submarine contact mines of 18 October 1907 (the Hague Convention No. VIII) provides that "every possible precaution must be taken for the security of peaceful shipping" and belligerents are bound

> "to notify the danger zones as soon as military exigencies permit, by a notice addressed to ship owners, which must also be communicated to the Governments through the diplomatic channel" (Art. 3).

Neutral Powers which lay mines off their own coasts must issue a similar notification, in advance (Art. 4). It has already been made clear above that in peacetime for one State to lay mines in the internal or territorial waters of another is an unlawful act ; but in addition, if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907. Those principles were expressed by the Court in the *Corfu Channel* case as follows :

> "certain general and well recognized principles, namely : elementary considerations of humanity, even more exacting in peace than in war" (*I.C.J. Reports 1949,* p. 22).

* *

216. This last consideration leads the Court on to examination of the international humanitarian law applicable to the dispute. Clearly, use of force may in some circumstances raise questions of such law. Nicaragua has in the present proceedings not expressly invoked the provisions of international humanitarian law as such, even though, as noted above (paragraph 113), it has complained of acts committed on its territory which

would appear to be breaches of the provisions of such law. In the submissions in its Application it has expressly charged

> "That the United States, in breach of its obligation under general and customary international law, has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua." (Application, 26 *(f)*.)

The Court has already indicated (paragraph 115) that the evidence available is insufficient for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua ; accordingly, this submission has to be rejected. The question however remains of the law applicable to the acts of the United States in relation to the activities of the *contras,* in particular the production and dissemination of the manual on psychological operations described in paragraphs 117 to 122 above ; as already explained (paragraph 116), this is a different question from that of the violations of humanitarian law of which the *contras* may or may not have been guilty.

217. The Court observes that Nicaragua, which has invoked a number of multilateral treaties, has refrained from making reference to the four Geneva Conventions of 12 August 1949, to which both Nicaragua and the United States are parties. Thus at the time when the Court was seised of the dispute, that dispute could be considered not to "arise", to use the wording of the United States multilateral treaty reservation, under any of these Geneva Conventions. The Court did not therefore have to consider whether that reservation might be a bar to the Court treating the relevant provisions of these Conventions as applicable. However, if the Court were on its own initiative to find it appropriate to apply these Conventions, as such, for the settlement of the dispute, it could be argued that the Court would be treating it as a dispute "arising" under them ; on that basis, it would have to consider whether any State party to those Conventions would be "affected" by the decision, for the purposes of the United States multilateral treaty reservation.

218. The Court however sees no need to take a position on that matter, since in its view the conduct of the United States may be judged according to the fundamental general principles of humanitarian law ; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles. It is significant in this respect that, according to the terms of the Conventions, the denunciation of one of them

> "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the

public conscience" (Convention I, Art. 63 ; Convention II, Art. 62 ; Convention III, Art. 142 ; Convention IV, Art. 158).

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts ; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22 ; paragraph 215 above). The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question.

219. The conflict between the *contras'* forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character ; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character.

220. The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions, which reads as follows :

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions :
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any

adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons :

*(a)* violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture ;

*(b)* taking of hostages ;

*(c)* outrages upon personal dignity, in particular, humiliating and degrading treatment ;

*(d)* the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for . . .

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention . . ."

* *

221. In its Judgment of 26 November 1984, the Court concluded that, in so far as the claims presented in Nicaragua's Application revealed the existence of a dispute as to the interpretation or application of the Articles of the 1956 Treaty of Friendship, Commerce and Navigation between the Parties mentioned in paragraph 82 of that Judgment (that is, Arts. XIX, XIV, XVII, XX, 1), it had jurisdiction to deal with them under Article XXIV, paragraph 2, of that Treaty. Having thus established its jurisdiction to entertain the dispute between the Parties in respect of the interpretation and application of the Treaty in question, the Court must determine the meaning of the various provisions which are relevant for its judgment. In this connection, the Court has in particular to ascertain the scope of Article XXI, paragraphs 1 *(c)* and 1 *(d)*, of the Treaty. According to that clause

"the present Treaty shall not preclude the application of measures :

. . . . . .

*(c)* regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment ;

*(d)* necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests".

In the Spanish text of the Treaty (equally authentic with the English text) the last phrase is rendered as "sus intereses esenciales y seguridad".

222. This article cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an article of the Treaty, it is covered by the provision in Article XXIV that any dispute about the "interpretation or application" of the Treaty lies within the Court's jurisdiction. Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXIV. That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such.

223. The Court will therefore determine the substantial nature of the two categories of measures contemplated by this Article and which are not barred by the Treaty. No comment is required at this stage on subparagraph 1 *(c)* of Article XXI. As to subparagraph 1 *(d)*, clearly "measures . . . necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security" must signify measures which the State in question must take in performance of an international commitment of which any evasion constitutes a breach. A commitment of this kind is accepted by Members of the United Nations in respect of Security Council decisions taken on the basis of Chapter VII of the United Nations Charter (Art. 25), or, for members of the Organization of American States, in respect of decisions taken by the Organ of Consultation of the Inter-American system, under Articles 3 and 20 of the Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, 1947). The Court does not

believe that this provision of the 1956 Treaty can apply to the eventuality of the exercise of the right of individual or collective self-defence.

224. On the other hand, action taken in self-defence, individual or collective, might be considered as part of the wider category of measures qualified in Article XXI as "necessary to protect" the "essential security interests" of a party. In its Counter-Memorial on jurisdiction and admissibility, the United States contended that : "Any possible doubts as to the applicability of the FCN Treaty to Nicaragua's claims is dispelled by Article XXI of the Treaty . . ." After quoting paragraph 1 *(d)* (set out in paragraph 221 above), the Counter-Memorial continues :

> "Article XXI has been described by the Senate Foreign Relations Committee as containing 'the usual exceptions relating . . . to traffic in arms, ammunition and implements of war and to measures for collective or individual self-defense'."

It is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests. But the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past. The Court has therefore to assess whether the risk run by these "essential security interests" is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but "necessary".

225. Since Article XXI of the 1956 Treaty contains a power for each of the parties to derogate from the other provisions of the Treaty, the possibility of invoking the clauses of that Article must be considered once it is apparent that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty. The appraisal of the conduct of the United States in the light of these relevant provisions of the Treaty pertains to the application of the law rather than to its interpretation, and the Court will therefore undertake this in the context of its general evaluation of the facts established in relation to the applicable law.

* * * * *

226. The Court, having outlined both the facts of the case as proved by the evidence before it, and the general rules of international law which appear to it to be in issue as a result of these facts, and the applicable treaty-law, has now to appraise the facts in relation to the legal rules applicable. In so far as acts of the Respondent may appear to constitute violations of the relevant rules of law, the Court will then have to determine

whether there are present any circumstances excluding unlawfulness, or whether such acts may be justified upon any other ground.

* * *

227. The Court will first appraise the facts in the light of the principle of the non-use of force, examined in paragraphs 187 to 200 above. What is unlawful, in accordance with that principle, is recourse to either the threat or the use of force against the territorial integrity or political independence of any State. For the most part, the complaints by Nicaragua are of the actual use of force against it by the United States. Of the acts which the Court has found imputable to the Government of the United States, the following are relevant in this respect :

- the laying of mines in Nicaraguan internal or territorial waters in early 1984 (paragraph 80 above) ;
- certain attacks on Nicaraguan ports, oil installations and a naval base (paragraphs 81 and 86 above).

These activities constitute infringements of the principle of the prohibition of the use of force, defined earlier, unless they are justified by circumstances which exclude their unlawfulness, a question now to be examined. The Court has also found (paragraph 92) the existence of military manoeuvres held by the United States near the Nicaraguan borders ; and Nicaragua has made some suggestion that this constituted a "threat of force", which is equally forbidden by the principle of non-use of force. The Court is however not satisfied that the manoeuvres complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force.

228. Nicaragua has also claimed that the United States has violated Article 2, paragraph 4, of the Charter, and has used force against Nicaragua in breach of its obligation under customary international law in as much as it has engaged in

> "recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua" (Application, para. 26 *(a)* and *(c)*).

So far as the claim concerns breach of the Charter, it is excluded from the Court's jurisdiction by the multilateral treaty reservation. As to the claim that United States activities in relation to the *contras* constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its

assistance to the *contras* in Nicaragua, by "organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another State", and "participating in acts of civil strife . . . in another State", in the terms of General Assembly resolution 2625 (XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to "involve a threat or use of force". In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force.

229. The Court must thus consider whether, as the Respondent claims, the acts in question of the United States are justified by the exercise of its right of collective self-defence against an armed attack. The Court must therefore establish whether the circumstances required for the exercise of this right of self-defence are present and, if so, whether the steps taken by the United States actually correspond to the requirements of international law. For the Court to conclude that the United States was lawfully exercising its right of collective self-defence, it must first find that Nicaragua engaged in an armed attack against El Salvador, Honduras or Costa Rica.

230. As regards El Salvador, the Court has found (paragraph 160 above) that it is satisfied that between July 1979 and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in that country. The Court was not however satisfied that assistance has reached the Salvadorian armed opposition, on a scale of any significance, since the early months of 1981, or that the Government of Nicaragua was responsible for any flow of arms at either period. Even assuming that the supply of arms to the opposition in El Salvador could be treated as imputable to the Government of Nicaragua, to justify invocation of the right of collective self-defence in customary international law, it would have to be equated with an armed attack by Nicaragua on El Salvador. As stated above, the Court is unable to consider that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government, that would not constitute such armed attack.

231. Turning to Honduras and Costa Rica, the Court has also stated (paragraph 164 above) that it should find established that certain trans-

border incursions into the territory of those two States, in 1982, 1983 and 1984, were imputable to the Government of Nicaragua. Very little information is however available to the Court as to the circumstances of these incursions or their possible motivations, which renders it difficult to decide whether they may be treated for legal purposes as amounting, singly or collectively, to an "armed attack" by Nicaragua on either or both States. The Court notes that during the Security Council debate in March/April 1984, the representative of Costa Rica made no accusation of an armed attack, emphasizing merely his country's neutrality and support for the Contadora process (S/PV.2529, pp. 13-23) ; the representative of Honduras however stated that

> "my country is the object of aggression made manifest through a number of incidents by Nicaragua against our territorial integrity and civilian population" (*ibid.*, p. 37).

There are however other considerations which justify the Court in finding that neither these incursions, nor the alleged supply of arms to the opposition in El Salvador, may be relied on as justifying the exercise of the right of collective self-defence.

232. The exercise of the right of collective self-defence presupposes that an armed attack has occurred ; and it is evident that it is the victim State, being the most directly aware of that fact, which is likely to draw general attention to its plight. It is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect. Thus in the present instance, the Court is entitled to take account, in judging the asserted justification of the exercise of collective self-defence by the United States, of the actual conduct of El Salvador, Honduras and Costa Rica at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack by Nicaragua, and of the making of a request by the victim State to the United States for help in the exercise of collective self-defence.

233. The Court has seen no evidence that the conduct of those States was consistent with such a situation, either at the time when the United States first embarked on the activities which were allegedly justified by self-defence, or indeed for a long period subsequently. So far as El Salvador is concerned, it appears to the Court that while El Salvador did in fact officially declare itself the victim of an armed attack, and did ask for the United States to exercise its right of collective self-defence, this occurred only on a date much later than the commencement of the United States activities which were allegedly justified by this request. The Court notes that on 3 April 1984, the representative of El Salvador before the United Nations Security Council, while complaining of the "open foreign intervention practised by Nicaragua in our internal affairs" (S/PV.2528, p. 58), refrained from stating that El Salvador had been subjected to armed

attack, and made no mention of the right of collective self-defence which it had supposedly asked the United States to exercise. Nor was this mentioned when El Salvador addressed a letter to the Court in April 1984, in connection with Nicaragua's complaint against the United States. It was only in its Declaration of Intervention filed on 15 August 1984, that El Salvador referred to requests addressed at various dates to the United States for the latter to exercise its right of collective self-defence (para. XII), asserting on this occasion that it had been the victim of aggression from Nicaragua "since at least 1980". In that Declaration, El Salvador affirmed that initially it had "not wanted to present any accusation or allegation [against Nicaragua] to any of the jurisdictions to which we have a right to apply", since it sought "a solution of understanding and mutual respect" (para. III).

234. As to Honduras and Costa Rica, they also were prompted by the institution of proceedings in this case to address communications to the Court ; in neither of these is there mention of armed attack or collective self-defence. As has already been noted (paragraph 231 above), Honduras in the Security Council in 1984 asserted that Nicaragua had engaged in aggression against it, but did not mention that a request had consequently been made to the United States for assistance by way of collective self-defence. On the contrary, the representative of Honduras emphasized that the matter before the Security Council "is a Central American problem, without exception, and it must be solved regionally" (S/PV.2529, p. 38), i.e., through the Contadora process. The representative of Costa Rica also made no reference to collective self-defence. Nor, it may be noted, did the representative of the United States assert during that debate that it had acted in response to requests for assistance in that context.

235. There is also an aspect of the conduct of the United States which the Court is entitled to take into account as indicative of the view of that State on the question of the existence of an armed attack. At no time, up to the present, has the United States Government addressed to the Security Council, in connection with the matters the subject of the present case, the report which is required by Article 51 of the United Nations Charter in respect of measures which a State believes itself bound to take when it exercises the right of individual or collective self-defence. The Court, whose decision has to be made on the basis of customary international law, has already observed that in the context of that law, the reporting obligation enshrined in Article 51 of the Charter of the United Nations does not exist. It does not therefore treat the absence of a report on the part of the United States as the breach of an undertaking forming part of the customary international law applicable to the present dispute. But the Court is justified in observing that this conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter. This fact is all the more noteworthy because, in the Security

Council, the United States has itself taken the view that failure to observe the requirement to make a report contradicted a State's claim to be acting on the basis of collective self-defence (S/PV.2187).

236. Similarly, while no strict legal conclusion may be drawn from the date of El Salvador's announcement that it was the victim of an armed attack, and the date of its official request addressed to the United States concerning the exercise of collective self-defence, those dates have a significance as evidence of El Salvador's view of the situation. The declaration and the request of El Salvador, made publicly for the first time in August 1984, do not support the contention that in 1981 there was an armed attack capable of serving as a legal foundation for United States activities which began in the second half of that year. The States concerned did not behave as though there were an armed attack at the time when the activities attributed by the United States to Nicaragua, without actually constituting such an attack, were nevertheless the most accentuated ; they did so behave only at a time when these facts fell furthest short of what would be required for the Court to take the view that an armed attack existed on the part of Nicaragua against El Salvador.

237. Since the Court has found that the condition *sine qua non* required for the exercise of the right of collective self-defence by the United States is not fulfilled in this case, the appraisal of the United States activities in relation to the criteria of necessity and proportionality takes on a different significance. As a result of this conclusion of the Court, even if the United States activities in question had been carried on in strict compliance with the canons of necessity and proportionality, they would not thereby become lawful. If however they were not, this may constitute an additional ground of wrongfulness. On the question of necessity, the Court observes that the United States measures taken in December 1981 (or, at the earliest, March of that year – paragraph 93 above) cannot be said to correspond to a "necessity" justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador. First, these measures were only taken, and began to produce their effects, several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed (January 1981), and the actions of the opposition considerably reduced in consequence. Thus it was possible to eliminate the main danger to the Salvadorian Government without the United States embarking on activities in and against Nicaragua. Accordingly, it cannot be held that these activities were undertaken in the light of necessity. Whether or not the assistance to the *contras* might meet the criterion of proportionality, the Court cannot regard the United States activities summarized in paragraphs 80, 81 and 86, i.e., those relating to the mining of the Nicaraguan ports and the attacks on ports, oil installations, etc., as satisfying that criterion. Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid. Finally on this point, the Court must also

observe that the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.

238. Accordingly, the Court concludes that the plea of collective self-defence against an alleged armed attack on El Salvador, Honduras or Costa Rica, advanced by the United States to justify its conduct toward Nicaragua, cannot be upheld ; and accordingly that the United States has violated the principle prohibiting recourse to the threat or use of force by the acts listed in paragraph 227 above, and by its assistance to the contras to the extent that this assistance "involve[s] a threat or use of force" (paragraph 228 above).

* *

239. The Court comes now to the application in this case of the principle of non-intervention in the internal affairs of States. It is argued by Nicaragua that the "military and paramilitary activities aimed at the government and people of Nicaragua" have two purposes :

> "*(a)* The actual overthrow of the existing lawful government of Nicaragua and its replacement by a government acceptable to the United States ; and
> *(b)* The substantial damaging of the economy, and the weakening of the political system, in order to coerce the government of Nicaragua into the acceptance of United States policies and political demands."

Nicaragua also contends that the various acts of an economic nature, summarized in paragraphs 123 to 125 above, constitute a form of "indirect" intervention in Nicaragua's internal affairs.

240. Nicaragua has laid much emphasis on the intentions it attributes to the Government of the United States in giving aid and support to the *contras*. It contends that the purpose of the policy of the United States and its actions against Nicaragua in pursuance of this policy was, from the beginning, to overthrow the Government of Nicaragua. In order to demonstrate this, it has drawn attention to numerous statements by high officials of the United States Government, in particular by President Reagan, expressing solidarity and support for the *contras*, described on occasion as "freedom fighters", and indicating that support for the *contras* would continue until the Nicaraguan Government took certain action, desired by the United States Government, amounting in effect to a surrender to the demands of the latter Government. The official Report of the

President of the United States to Congress of 10 April 1985, quoted in paragraph 96 above, states that : "We have not sought to overthrow the Nicaraguan Government nor to force on Nicaragua a specific system of government." But it indicates also quite openly that "United States policy toward Nicaragua" – which includes the support for the military and paramilitary activities of the *contras* which it was the purpose of the Report to continue – "has consistently sought to achieve changes in Nicaraguan government policy and behavior".

241. The Court however does not consider it necessary to seek to establish whether the intention of the United States to secure a change of governmental policies in Nicaragua went so far as to be equated with an endeavour to overthrow the Nicaraguan Government. It appears to the Court to be clearly established first, that the United States intended, by its support of the *contras,* to coerce the Government of Nicaragua in respect of matters in which each State is permitted, by the principle of State sovereignty, to decide freely (see paragraph 205 above) ; and secondly that the intention of the *contras* themselves was to overthrow the present Government of Nicaragua. The 1983 Report of the Intelligence Committee refers to the *contras'* "openly acknowledged goal of overthrowing the Sandinistas". Even if it be accepted, for the sake of argument, that the objective of the United States in assisting the *contras* was solely to interdict the supply of arms to the armed opposition in El Salvador, it strains belief to suppose that a body formed in armed opposition to the Government of Nicaragua, and calling itself the "Nicaraguan Democratic Force", intended only to check Nicaraguan interference in El Salvador and did not intend to achieve violent change of government in Nicaragua. The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far-reaching. It is for this reason that the Court has only examined the intentions of the United States Government so far as they bear on the question of self-defence.

242. The Court therefore finds that the support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention. The Court has however taken note that, with effect from the beginning of the United States governmental financial year 1985, namely 1 October 1984, the United States Congress has restricted the use of the funds appropriated for assistance to the *contras* to "humanitarian assistance" (paragraph 97 above). There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first

and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that

> "The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours – in its international and national capacity – to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples"

and that

> "It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress."

243. The United States legislation which limited aid to the *contras* to humanitarian assistance however also defined what was meant by such assistance, namely :

> "the provision of food, clothing, medicine, and other humanitarian assistance, and it does not include the provision of weapons, weapons systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death" (paragraph 97 above).

It is also to be noted that, while the United States Congress has directed that the CIA and Department of Defense are not to administer any of the funds voted, it was understood that intelligence information might be "shared" with the *contras.* Since the Court has no information as to the interpretation in fact given to the Congress decision, or as to whether intelligence information is in fact still being supplied to the *contras,* it will limit itself to a declaration as to how the law applies in this respect. An essential feature of truly humanitarian aid is that it is given "without discrimination" of any kind. In the view of the Court, if the provision of "humanitarian assistance" is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely "to prevent and alleviate human suffering", and "to protect life and health and to ensure respect for the human being" ; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.

* *

244. As already noted, Nicaragua has also asserted that the United States is responsible for an "indirect" form of intervention in its internal

affairs inasmuch as it has taken, to Nicaragua's disadvantage, certain action of an economic nature. The Court's attention has been drawn in particular to the cessation of economic aid in April 1981 ; the 90 per cent reduction in the sugar quota for United States imports from Nicaragua in April 1981 ; and the trade embargo adopted on 1 May 1985. While admitting in principle that some of these actions were not unlawful in themselves, counsel for Nicaragua argued that these measures of economic constraint add up to a systematic violation of the principle of non-intervention.

245. The Court does not here have to concern itself with possible breaches of such international economic instruments as the General Agreement on Tariffs and Trade, referred to in passing by counsel for Nicaragua ; any such breaches would appear to fall outside the Court's jurisdiction, particularly in view of the effect of the multilateral treaty reservation, nor has Nicaragua seised the Court of any complaint of such breaches. The question of the compatibility of the actions complained of with the 1956 Treaty of Friendship, Commerce and Navigation will be examined below, in the context of the Court's examination of the provisions of that Treaty. At this point, the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.

* *

246. Having concluded that the activities of the United States in relation to the activities of the *contras* in Nicaragua constitute prima facie acts of intervention, the Court must next consider whether they may nevertheless be justified on some legal ground. As the Court has stated, the principle of non-intervention derives from customary international law. It would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State – supposing such a request to have actually been made by an opposition to the régime in Nicaragua in this instance. Indeed, it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the internal affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.

247. The Court has already indicated (paragraph 238) its conclusion that the conduct of the United States towards Nicaragua cannot be justified by the right of collective self-defence in response to an alleged armed attack on one or other of Nicaragua's neighbours. So far as regards the allegations of supply of arms by Nicaragua to the armed opposition in El Salvador, the Court has indicated that while the concept of an armed

attack includes the despatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack. Nevertheless, such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack. The Court must therefore enquire now whether the activities of the United States towards Nicaragua might be justified as a response to an intervention by that State in the internal affairs of another State in Central America.

248. The United States admits that it is giving its support to the *contras* in Nicaragua, but justifies this by claiming that that State is adopting similar conduct by itself assisting the armed opposition in El Salvador, and to a lesser extent in Honduras and Costa Rica, and has committed trans-border attacks on those two States. The United States raises this justification as one of self-defence ; having rejected it on those terms, the Court has nevertheless to consider whether it may be valid as action by way of counter-measures in response to intervention. The Court has however to find that the applicable law does not warrant such a justification.

249. On the legal level the Court cannot regard response to an intervention by Nicaragua as such a justification. While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot, as the Court has already observed (paragraph 211 above), produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.

* *

250. In the Application, Nicaragua further claims :

> "That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by :
>
> – armed attacks against Nicaragua by air, land and sea ;
>
> – incursions into Nicaraguan territorial waters ;
> – aerial trespass into Nicaraguan airspace ;
> – efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua." (Para. 26 *(b)*.)

The Nicaraguan Memorial, however, enumerates under the heading of violations of sovereignty only attacks on Nicaraguan territory, incursions into its territorial sea, and overflights. The claim as to United States "efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua" was presented in the Memorial under the heading of the threat or use of force, which has already been dealt with above (paragraph 227). Accordingly, that aspect of Nicaragua's claim will not be pursued further.

251. The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention. Thus the assistance to the *contras,* as well as the direct attacks on Nicaraguan ports, oil installations, etc., referred to in paragraphs 81 to 86 above, not only amount to an unlawful use of force, but also constitute infringements of the territorial sovereignty of Nicaragua, and incursions into its territorial and internal waters. Similarly, the mining operations in the Nicaraguan ports not only constitute breaches of the principle of the non-use of force, but also affect Nicaragua's sovereignty over certain maritime expanses. The Court has in fact found that these operations were carried on in Nicaragua's territorial or internal waters or both (paragraph 80), and accordingly they constitute a violation of Nicaragua's sovereignty. The principle of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State. The Court has found above that such overflights were in fact made (paragraph 91 above).

252. These violations cannot be justified either by collective self-defence, for which, as the Court has recognized, the necessary circumstances are lacking, nor by any right of the United States to take countermeasures involving the use of force in the event of intervention by Nicaragua in El Salvador, since no such right exists under the applicable international law. They cannot be justified by the activities in El Salvador attributed to the Government of Nicaragua. The latter activities, assuming that they did in fact occur, do not bring into effect any right belonging to the United States which would justify the actions in question. Accordingly, such actions constitute violations of Nicaragua's sovereignty under customary international law.

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253. At this point it will be convenient to refer to another aspect of the legal implications of the mining of Nicaragua's ports. As the Court has indicated in paragraph 214 above, where the vessels of one State enjoy a right of access to ports of another State, if that right of access is hindered by

the laying of mines, this constitutes an infringement of the freedom of communications and of maritime commerce. This is clearly the case here. It is not for the Court to pass upon the rights of States which are not parties to the case before it ; but it is clear that interference with a right of access to the ports of Nicaragua is likely to have an adverse effect on Nicaragua's economy and its trading relations with any State whose vessels enjoy the right of access to its ports. Accordingly, the Court finds, in the context of the present proceedings between Nicaragua and the United States, that the laying of mines in or near Nicaraguan ports constituted an infringement, to Nicaragua's detriment, of the freedom of communications and of maritime commerce.

* *

254. The Court now turns to the question of the application of humanitarian law to the activities of the United States complained of in this case. Mention has already been made (paragraph 215 above) of the violations of customary international law by reason of the failure to give notice of the mining of the Nicaraguan ports, for which the Court has found the United States directly responsible. Except as regards the mines, Nicaragua has not however attributed any breach of humanitarian law to either United States personnel or the "UCLAs", as distinct from the *contras*. The Applicant has claimed that acts perpetrated by the *contras* constitute breaches of the "fundamental norms protecting human rights" ; it has not raised the question of the law applicable in the event of conflict such as that between the *contras* and the established Government. In effect, Nicaragua is accusing the *contras* of violations both of the law of human rights and humanitarian law, and is attributing responsibility for these acts to the United States. The Court has however found (paragraphs 115, 216) that this submission of Nicaragua cannot be upheld ; but it has also found the United States responsible for the publication and dissemination of the manual on "Psychological Operations in Guerrilla Warfare" referred to in paragraphs 118 to 122 above.

255. The Court has also found (paragraphs 219 and 220 above) that general principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not. By virtue of such general principles, the United States is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of 12 August 1949. The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement. The Court takes note of the advice given in the manual on psychological operations to "neutralize" certain "carefully selected and planned targets", including judges, police officers, State Security officials, etc., after the local population have been gathered

in order to "take part in the act and formulate accusations against the oppressor". In the view of the Court, this must be regarded as contrary to the prohibition in Article 3 of the Geneva Conventions, with respect to non-combatants, of

> "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples"

and probably also of the prohibition of "violence to life and person, in particular murder to all kinds, . . .".

256. It is also appropriate to recall the circumstances in which the manual of psychological operations was issued. When considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found (paragraph 121) that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law ; it was in fact even claimed by the CIA that the purpose of the manual was to "moderate" such behaviour. The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.

* *

257. The Court has noted above (paragraphs 169 and 170) the attitude of the United States, as expressed in the finding of the Congress of 29 July 1985, linking United States support to the *contras* with alleged breaches by the Government of Nicaragua of its "solemn commitments to the Nicaraguan people, the United States, and the Organization of American States". Those breaches were stated to involve questions such as the composition of the government, its political ideology and alignment, totalitarianism, human rights, militarization and aggression. So far as the question of "aggression in the form of armed subversion against its neighbours" is concerned, the Court has already dealt with the claimed justification of collective self-defence in response to armed attack, and will not return to that matter. It has also disposed of the suggestion of a right to collective counter-measures in face of an armed intervention. What is now in question is whether there is anything in the conduct of Nicaragua which might legally warrant counter-measures by the United States.

258. The questions as to which the Nicaraguan Government is said to

have entered into a commitment are questions of domestic policy. The Court would not therefore normally consider it appropriate to engage in a verification of the truth of assertions of this kind, even assuming that it was in a position to do so. A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems. Consequently, there would normally be no need to make any enquiries, in a matter outside the Court's jurisdiction, to ascertain in what sense and along what lines Nicaragua has actually exercised its right.

259. However, the assertion of a commitment raises the question of the possibility of a State binding itself by agreement in relation to a question of domestic policy, such as that relating to the holding of free elections on its territory. The Court cannot discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field. This is a conceivable situation for a State which is bound by institutional links to a confederation of States, or indeed to an international organization. Both Nicaragua and the United States are members of the Organization of American States. The Charter of that Organization however goes no further in the direction of an agreed limitation on sovereignty of this kind than the provision in Article 3 *(d)* that

> "The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy" ;

on the other hand, it provides for the right of every State "to organize itself as it sees fit" (Art. 12), and to "develop its cultural, political and economic life freely and naturally" (Art. 16).

260. The Court has set out above the facts as to the events of 1979, including the resolution of the XVIIth Meeting of Consultation of Ministers for Foreign Affairs of the Organization of American States, and the communications of 12 July 1979 from the Junta of the Government of National Reconstruction of Nicaragua to the Secretary-General of the Organization, accompanied by a "Plan to secure peace". The letter contained *inter alia* a list of the objectives of the Nicaraguan Junta and stated in particular its intention of installing the new régime by a peaceful, orderly transition and of respecting human rights under the supervision of the Inter-American Commission on Human Rights, which the Junta invited to visit Nicaragua "as soon as we are installed". In this way, before its installation in Managua, the new régime soothed apprehensions as desired and expressed its intention of governing the country democratically.

261. However, the Court is unable to find anything in these documents, whether the resolution or the communication accompanied by the "Plan to secure peace", from which it can be inferred that any legal undertaking was intended to exist. Moreover, the Junta made it plain in one of these documents that its invitation to the Organization of American States to supervise Nicaragua's political life should not be allowed to obscure the fact that it was the Nicaraguans themselves who were to decide upon and conduct the country's domestic policy. The resolution of 23 June 1979 also declares that the solution of their problems is a matter "exclusively" for the Nicaraguan people, while stating that that solution was to be based (in Spanish, *debería inspirarse*) on certain foundations which were put forward merely as recommendations to the future government. This part of the resolution is a mere statement which does not comprise any formal offer which if accepted would constitute a promise in law, and hence a legal obligation. Nor can the Court take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature. The Nicaraguan Junta of National Reconstruction planned the holding of free elections as part of its political programme of government, following the recommendation of the XVIIth Meeting of Consultation of Foreign Ministers of the Organization of American States. This was an essentially political pledge, made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries. But the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections. The Organization of American States Charter has already been mentioned, with its respect for the political independence of the member States ; in the field of domestic policy, it goes no further than to list the social standards to the application of which the Members "agree to dedicate every effort", including :

> "The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system." (Art. 43 *(f)*.)

It is evident that provisions of this kind are far from being a commitment as to the use of particular political mechanisms.

262. Moreover, even supposing that such a political pledge had had the force of a legal commitment, it could not have justified the United States insisting on the fulfilment of a commitment made not directly towards the United States, but towards the Organization, the latter being alone empowered to monitor its implementation. The Court can see no legal basis for the "special responsibility regarding the implementation of the

commitments made" by the Nicaraguan Government which the United States considers itself to have assumed in view of "its role in the installation of the current Government of Nicaragua" (see paragraph 170 above). Moreover, even supposing that the United States were entitled to act in lieu of the Organization, it could hardly make use for the purpose of methods which the Organization could not use itself ; in particular, it could not be authorized to use force in that event. Of its nature, a commitment like this is one of a category which, if violated, cannot justify the use of force against a sovereign State.

263. The finding of the United States Congress also expressed the view that the Nicaraguan Government had taken "significant steps towards establishing a totalitarian Communist dictatorship". However the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law ; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.

264. The Court has also emphasized the importance to be attached, in other respects, to a text such as the Helsinki Final Act, or, on another level, to General Assembly resolution 2625 (XXV) which, as its name indicates, is a declaration on "Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". Texts like these, in relation to which the Court has pointed to the customary content of certain provisions such as the principles of the non-use of force and non-intervention, envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies ; the United States not only voiced no objection to their adoption, but took an active part in bringing it about.

265. Similar considerations apply to the criticisms expressed by the United States of the external policies and alliances of Nicaragua. Whatever the impact of individual alliances on regional or international political-military balances, the Court is only competent to consider such questions from the standpoint of international law. From that aspect, it is sufficient to say that State sovereignty evidently extends to the area of its foreign policy, and that there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State.

266. The Court also notes that these justifications, advanced solely in a political context which it is naturally not for the Court to appraise, were not advanced as legal arguments. The respondent State has always confined itself to the classic argument of self-defence, and has not attempted to introduce a legal argument derived from a supposed rule of "ideological intervention", which would have been a striking innovation. The Court would recall that one of the accusations of the United States against Nicaragua is violation of "the 1965 General Assembly Declaration on Intervention" (paragraph 169 above), by its support for the armed opposition to the Government in El Salvador. It is not aware of the United States having officially abandoned reliance on this principle, substituting for it a new principle "of ideological intervention", the definition of which would be discretionary. As stated above (paragraph 29), the Court is not solely dependent for its decision on the argument of the Parties before it with respect to the applicable law : it is required to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute even if these rules have not been invoked by a party. The Court is however not entitled to ascribe to States legal views which they do not themselves formulate.

267. The Court also notes that Nicaragua is accused by the 1985 finding of the United States Congress of violating human rights. This particular point requires to be studied independently of the question of the existence of a "legal commitment" by Nicaragua towards the Organization of American States to respect these rights ; the absence of such a commitment would not mean that Nicaragua could with impunity violate human rights. However, where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves. The political pledge by Nicaragua was made in the context of the Organization of American States, the organs of which were consequently entitled to monitor its observance. The Court has noted above (paragraph 168) that the Nicaraguan Government has since 1979 ratified a number of international instruments on human rights, and one of these was the American Convention on Human Rights (the Pact of San José, Costa Rica). The mechanisms provided for therein have functioned. The Inter-American Commission on Human Rights in fact took action and compiled two reports (OEA/Ser.L/V/11.53 and 62) following visits by the Commission to Nicaragua at the Government's invitation. Consequently, the Organization was in a position, if it so wished, to take a decision on the basis of these reports.

268. In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of

ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.

269. The Court now turns to another factor which bears both upon domestic policy and foreign policy. This is the militarization of Nicaragua, which the United States deems excessive and such as to prove its aggressive intent, and in which it finds another argument to justify its activities with regard to Nicaragua. It is irrelevant and inappropriate, in the Court's opinion, to pass upon this allegation of the United States, since in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.

* * *

270. Having thus concluded its examination of the claims of Nicaragua based on customary international law, the Court must now consider its claims based on the Treaty of Friendship, Commerce and Navigation between the Parties, signed at Managua on 21 January 1956 ; Article XXIV, paragraph 2, of that Treaty provides for the jurisdiction of the Court for any dispute between the Parties as to its interpretation or application. The first claim which Nicaragua makes in relation to the Treaty is however one not based directly on a specific provision thereof. Nicaragua has argued that the United States, by its conduct in relation to Nicaragua, has deprived the Treaty of its object and purpose, and emptied it of real content. For this purpose, Nicaragua has relied on the existence of a legal obligation of States to refrain from acts which would impede the due performance of any treaties entered into by them. However, if there is a duty of a State not to impede the due performance of a treaty to which it is a party, that is not a duty imposed by the treaty itself. Nicaragua itself apparently contends that this is a duty arising under customary international law independently of the treaty, that it is implicit in the rule *pacta sunt servanda*. This claim therefore does not in fact fall under the heading of possible breach by the United States of the provisions of the 1956 Treaty, though it may involve the interpretation or application thereof.

271. In view of the Court's finding in its 1984 Judgment that the Court has jurisdiction both under the 1956 FCN Treaty and on the basis of the United States acceptance of jurisdiction under the Optional Clause of Article 36, paragraph 2, this poses no problem of jurisdiction in the present

case. It should however be emphasized that the Court does not consider that a compromissory clause of the kind included in Article XXIV, paragraph 2, of the 1956 FCN Treaty, providing for jurisdiction over disputes as to its interpretation or application, would enable the Court to entertain a claim alleging conduct depriving the treaty of its object and purpose. It is only because in the present case the Court has found that it has jurisdiction, apart from Article XXIV, over any legal dispute between the Parties concerning any of the matters enumerated in Article 36, paragraph 2, of the Statute, that it can proceed to examine Nicaragua's claim under this head. However, as indicated in paragraph 221 above, the Court has first to determine whether the actions of the United States complained of as breaches of the 1956 FCN Treaty have to be regarded as "measures . . . necessary to protect its essential security interests *[sus intereses esenciales y seguridad]*", since Article XXI of the Treaty provides that "the present Treaty shall not preclude the application of" such measures. The question thus arises whether Article XXI similarly affords a defence to a claim under customary international law based on allegation of conduct depriving the Treaty of its object and purpose if such conduct can be shown to be "measures . . . necessary to protect" essential security interests.

272. In the view of the Court, an act cannot be said to be one calculated to deprive a treaty of its object and purpose, or to impede its due performance, if the possibility of that act has been foreseen in the treaty itself, and it has been expressly agreed that the treaty "shall not preclude" the act, so that it will not constitute a breach of the express terms of the treaty. Accordingly, the Court cannot entertain either the claim of Nicaragua alleging conduct depriving the treaty of its object and purpose, or its claims of breach of specific articles of the treaty, unless it is first satisfied that the conduct complained of is not "measures . . . necessary to protect" the essential security interests of the United States. The Court will first proceed to examine whether the claims of Nicaragua in relation to the Treaty appear to be well founded, and then determine whether they are nevertheless justifiable by reference to Article XXI.

273. The argument that the United States has deprived the Treaty of its object and purpose has a scope which is not very clearly defined, but it appears that in Nicaragua's contention the Court could on this ground make a blanket condemnation of the United States for all the activities of which Nicaragua complains on more specific grounds. For Nicaragua, the Treaty is "without doubt a treaty of friendship which imposes on the Parties the obligation to conduct amicable relations with each other", and "Whatever the exact dimensions of the legal norm of 'friendship' there can be no doubt of a United States violation in this case". In other words, the Court is asked to rule that a State which enters into a treaty of friendship binds itself, for so long as the Treaty is in force, to abstain from any act

toward the other party which could be classified as an unfriendly act, even if such act is not in itself the breach of an international obligation. Such a duty might of course be expressly stipulated in a treaty, or might even emerge as a necessary implication from the text ; but as a matter of customary international law, it is not clear that the existence of such a far-reaching rule is evidenced in the practice of States. There must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty. That object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense.

274. The Court has in this respect to note that the Treaty itself provides in Article XXIV, paragraph 1, as follows :

> "Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty."

Nicaragua claims that the conduct of the United States is such as drastically to "affect the operation" of the Treaty ; but so far as the Court is informed, no representations on the specific question have been made. The Court has therefore first to be satisfied that a claim based on the 1956 FCN Treaty is admissible even though no attempt has been made to use the machinery of Article XXIV, paragraph 1, to resolve the dispute. In general, treaty rules being *lex specialis,* it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of such a claim. However, in the present case, the operation of Article XXIV, paragraph 1, if it had been invoked, would have been wholly artificial. While Nicaragua does allege that certain activities of the United States were in breach of the 1956 FCN Treaty, it has also claimed, and the Court has found, that they were violations of customary international law. In the Court's view, it would therefore be excessively formalistic to require Nicaragua first to exhaust the procedure of Article XXIV, paragraph 1, before bringing the matter to the Court. In its 1984 Judgment the Court has already dealt with the argument that Article XXIV, paragraph 2, of the Treaty required that the dispute be "one not satisfactorily adjusted by diplomacy", and that this was not the case in view of the absence of negotiations between the Parties. The Court held that :

> "it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty" (*I.C.J. Reports 1984,* p. 428).

The point now at issue is different, since the claim of conduct impeding the operation of the Treaty is not advanced on the basis of the compromissory clause in the Treaty. The Court nevertheless considers that neither paragraph of Article XXIV constitutes a bar to examination of Nicaragua's claims.

275. In respect of the claim that the United States activities have been such as to deprive the 1956 FCN Treaty of its object and purpose, the Court has to make a distinction. It is unable to regard all the acts complained of in that light ; but it does consider that there are certain activities of the United States which are such as to undermine the whole spirit of a bilateral agreement directed to sponsoring friendship between the two States parties to it. These are : the direct attacks on ports, oil installations, etc., referred to in paragraphs 81 to 86 above ; and the mining of Nicaraguan ports, mentioned in paragraph 80 above. Any action less calculated to serve the purpose of "strengthening the bonds of peace and friendship traditionally existing between" the Parties, stated in the Preamble of the Treaty, could hardly be imagined.

276. While the acts of economic pressure summarized in paragraphs 123 to 125 above are less flagrantly in contradiction with the purpose of the Treaty, the Court reaches a similar conclusion in respect of some of them. A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation ; but where there exists such a commitment, of the kind implied in a treaty of friendship and commerce, such an abrupt act of termination of commercial intercourse as the general trade embargo of 1 May 1985 will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty. The 90 per cent cut in the sugar import quota of 23 September 1983 does not on the other hand seem to the Court to go so far as to constitute an act calculated to defeat the object and purpose of the Treaty. The cessation of economic aid, the giving of which is more of a unilateral and voluntary nature, could be regarded as such a violation only in exceptional circumstances. The Court has also to note that, by the very terms of the legislation authorizing such aid (the Special Central American Assistance Act, 1979), of which the Government of Nicaragua must have been aware, the continuance of aid was made subject to the appreciation of Nicaragua's conduct by the President of the United States. As to the opposition to the grant of loans from international institutions, the Court cannot regard this as sufficiently linked with the 1956 FCN Treaty to constitute an act directed to defeating its object and purpose.

* *

277. Nicaragua claims that the United States is in breach of Article I of the 1956 FCN Treaty, which provides that each Party is to accord "equi-

table treatment" to the nationals of the other. Nicaragua suggests that whatever meaning given to the expression "equitable treatment"

> "it necessarily precludes the Government of the United States from . . . killing, wounding or kidnapping citizens of Nicaragua, and, more generally from threatening Nicaraguan citizens in the integrity of their persons or the safety of their property".

It is Nicaragua's claim that the treatment of Nicaraguan citizens complained of was inflicted by the United States or by forces controlled by the United States. The Court is however not satisfied that the evidence available demonstrates that the *contras* were "controlled" by the United States when committing such acts. As the Court has indicated (paragraph 110 above), the exact extent of the control resulting from the financial dependence of the *contras* on the United States authorities cannot be established ; and it has not been able to conclude that the *contras* are subject to the United States to such an extent that any acts they have committed are imputable to that State (paragraph 115 above). Even if the provision for "equitable treatment" in the Treaty is read as involving an obligation not to kill, wound or kidnap Nicaraguan citizens in Nicaragua – as to which the Court expresses no opinion – those acts of the *contras* performed in the course of their military or paramilitary activities in Nicaragua are not conduct attributable to the United States.

278. Secondly, Nicaragua claims that the United States has violated the provisions of the Treaty relating to freedom of communication and commerce. For the reasons indicated in paragraph 253 above, the Court must uphold the contention that the mining of the Nicaraguan ports by the United States is in manifest contradiction with the freedom of navigation and commerce guaranteed by Article XIX, paragraph 1, of the 1956 Treaty ; there remains the question whether such action can be justified under Article XXI (see paragraphs 280 to 282 below). In the commercial context of the Treaty, Nicaragua's claim is justified not only as to the physical damage to its vessels, but also the consequential damage to its trade and commerce. Nicaragua however also contended that all the activities of the United States in and against Nicaragua are "violative of the 1956 Treaty" :

> "Since the word 'commerce' in the 1956 Treaty must be understood in its broadest sense, all of the activities by which the United States has deliberately inflicted on Nicaragua physical damage and economic losses of all types, violate the principle of freedom of commerce which the Treaty establishes in very general terms."

It is clear that considerable economic loss and damage has been inflicted

on Nicaragua by the actions of the *contras* : apart from the economic impact of acts directly attributable to the United States, such as the loss of fishing boats blown up by mines, the Nicaraguan Minister of Finance estimated loss of production in 1981-1984 due to inability to collect crops, etc., at some US$ 300 million. However, as already noted (paragraph 277 above) the Court has not found the relationship between the *contras* and the United States Government to have been proved to be such that the United States is responsible for all acts of the *contras*.

279. The trade embargo declared by the United States Government on 1 May 1985 has already been referred to in the context of Nicaragua's contentions as to acts tending to defeat the object and purpose of the 1956 FCN Treaty. The question also arises of its compatibility with the letter and the spirit of Article XIX of the Treaty. That Article provides that "Between the territories of the two Parties there shall be freedom of commerce and navigation" (para. 1) and continues

> "3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation . . ."

By the Executive Order dated 1 May 1985 the President of the United States declared "I hereby prohibit vessels of Nicaraguan registry from entering into United States ports, and transactions relating thereto". The Court notes that on the same day the United States gave notice to Nicaragua to terminate the Treaty under Article XXV, paragraph 3, thereof ; but that Article requires "one year's written notice" for the termination to take effect. The freedom of Nicaraguan vessels, under Article XIX, paragraph 3, "to come with their cargoes to all ports, places and waters" of the United States could not therefore be interfered with during that period of notice, let alone terminated abruptly by the declaration of an embargo. The Court accordingly finds that the embargo constituted a measure in contradiction with Article XIX of the 1956 FCN Treaty.

280. The Court has thus found that the United States is in breach of a duty not to deprive the 1956 FCN Treaty of its object and purpose, and has committed acts which are in contradiction with the terms of the Treaty, subject to the question whether the exceptions in Article XXI, paragraphs 1 *(c)* and 1 *(d)*, concerning respectively "traffic in arms" and "measures . . . necessary to fulfill" obligations "for the maintenance or restoration of international peace and security" or necessary to protect the "essential security interests" of a party, may be invoked to justify the acts complained of. In its Counter-Memorial on jurisdiction and admissibility,

the United States relied on paragraph 1 *(c)* as showing the inapplicability of the 1956 FCN Treaty to Nicaragua's claims. This paragraph appears however to be relevant only in respect of the complaint of supply of arms to the *contras*, and since the Court does not find that arms supply to be a breach of the Treaty, or an act calculated to deprive it of its object and purpose, paragraph 1 *(c)* does not need to be considered further. There remains the question of the relationship of Article XXI, paragraph 1 *(d)*, to the direct attacks on ports, oil installations, etc. ; the mining of Nicaraguan ports ; and the general trade embargo of 1 May 1985 (paragraphs 275 to 276 above).

281. In approaching this question, the Court has first to bear in mind the chronological sequence of events. If the activities of the United States are to be covered by Article XXI of the Treaty, they must have been, at the time they were taken, measures necessary to protect its essential security interests. Thus the finding of the President of the United States on 1 May 1985 that "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States", even if it be taken as sufficient evidence that that was so, does not justify action by the United States previous to that date.

282. Secondly, the Court emphasizes the importance of the word "necessary" in Article XXI : the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be "necessary" for that purpose. Taking into account the whole situation of the United States in relation to Central America, so far as the Court is informed of it (and even assuming that the justification of self-defence, which the Court has rejected on the legal level, had some validity on the political level), the Court considers that the mining of Nicaraguan ports, and the direct attacks on ports and oil installations, cannot possibly be justified as "necessary" to protect the essential security interests of the United States. As to the trade embargo, the Court has to note the express justification for it given in the Presidential finding quoted in paragraph 125 above, and that the measure was one of an economic nature, thus one which fell within the sphere of relations contemplated by the Treaty. But by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized (paragraph 222 above), purely a question for the subjective judgment of the party ; the text does not refer to what the party "considers necessary" for that purpose. Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to "essential security interests" in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was "necessary" to protect those interests. Accordingly, Article XXI affords

no defence for the United States in respect of any of the actions here under consideration.

* * * * *

283. The third submission of Nicaragua in its Memorial on the merits, set out in paragraph 15 above, requests the Court to adjudge and declare that compensation is due to Nicaragua and

> "to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua".

The fourth submission requests the Court to award to Nicaragua the sum of 370,200,000 United States dollars, "which sum constitutes the minimum valuation of the direct damages" claimed by Nicaragua. In order to decide on these submissions, the Court must satisfy itself that it possesses jurisdiction to do so. In general, jurisdiction to determine the merits of a dispute entails jurisdiction to determine reparation. More specifically, the Court notes that in its declaration of acceptance of jurisdiction under the Optional Clause of 26 August 1946, the United States expressly accepted the Court's jurisdiction in respect of disputes concerning "the nature or extent of the reparation to be made for the breach of an international obligation". The corresponding declaration by which Nicaragua accepted the Court's jurisdiction contains no restriction of the powers of the Court under Article 36, paragraph 2 *(d)*, of its Statute ; Nicaragua has thus accepted the "same obligation". Under the 1956 FCN Treaty, the Court has jurisdiction to determine "any dispute between the Parties as to the interpretation or application of the present Treaty" (Art. XXIV, para. 2) ; and as the Permanent Court of International Justice stated in the case concerning the *Factory at Chorzów*,

> "Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application." (*Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21.)

284. The Court considers appropriate the request of Nicaragua for the nature and amount of the reparation due to it to be determined in a subsequent phase of the proceedings. While a certain amount of evidence has been provided, for example, in the testimony of the Nicaraguan Minister of Finance, of pecuniary loss sustained, this was based upon contentions as to the responsibility of the United States which were more far-reaching than the conclusions at which the Court has been able to arrive. The opportunity should be afforded Nicaragua to demonstrate and prove

exactly what injury was suffered as a result of each action of the United States which the Court has found contrary to international law. Nor should it be overlooked that, while the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes. On the contrary, the principle of the equality of the Parties requires that it be given that opportunity. It goes without saying, however, that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become *res judicata*.

285. There remains the request of Nicaragua (paragraph 15 above) for an award, at the present stage of the proceedings, of $370,200,000 as the "minimum (and in that sense provisional) valuation of direct damages". There is no provision in the Statute of the Court either specifically empowering the Court to make an interim award of this kind, or indeed debarring it from doing so. In view of the final and binding character of the Court's judgments, under Articles 59 and 60 of the Statute, it would however only be appropriate to make an award of this kind, assuming that the Court possesses the power to do so, in exceptional circumstances, and where the entitlement of the State making the claim was already established with certainty and precision. Furthermore, in a case in which the respondent State is not appearing, so that its views on the matter are not known to the Court, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. It bears repeating that

> "the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement . . ." (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13).

Accordingly, the Court does not consider that it can accede at this stage to the request made in the Fourth Submission of Nicaragua.

* *

286. By its Order of 10 May 1984, the Court indicated, pursuant to Article 41 of the Statute of the Court, the provisional measures which in its view "ought to be taken to preserve the respective rights of either party", pending the final decision in the present case. In connection with the first such measure, namely that

> "The United States of America should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines",

the Court notes that no complaint has been made that any further action of this kind has been taken.

287. On 25 June 1984, the Government of Nicaragua addressed a communication to the Court referring to the Order indicating provisional measures, informing the Court of what Nicaragua regarded as "the failure of the United States to comply with that Order", and requesting the indication of further measures. The action by the United States complained of consisted in the fact that the United States was continuing "to sponsor and carry out military and paramilitary activities in and against Nicaragua". By a letter of 16 July 1984, the President of the Court informed the Agent of Nicaragua that the Court considered that that request should await the outcome of the proceedings on jurisdiction which were then pending before the Court. The Government of Nicaragua has not reverted to the question.

288. The Court considers that it should re-emphasize, in the light of its present findings, what was indicated in the Order of 10 May 1984 :

> "The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of American States."

289. Furthermore, the Court would draw attention to the further measures indicated in its Order, namely that the Parties "should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court" and

> "should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case".

When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law.

* *

290. In the present Judgment, the Court has found that the Respondent has, by its activities in relation to the Applicant, violated a number of principles of customary international law. The Court has however also to recall a further principle of international law, one which is complementary to the principles of a prohibitive nature examined above, and respect for which is essential in the world of today : the principle that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means. Enshrined in Article 33 of the United Nations Charter, which also indicates a number of peaceful means which are available, this principle has also the status of customary law. In the present case, the Court has already taken note, in its Order indicating provisional measures and in its Judgment on jurisdiction and admissibility (*I.C.J. Reports 1984*, pp. 183-184, paras. 34 ff., pp. 438-441, paras. 102 ff.) of the diplomatic negotiation known as the Contadora Process, which appears to the Court to correspond closely to the spirit of the principle which the Court has here recalled.

291. In its Order indicating provisional measures, the Court took note of the Contadora Process, and of the fact that it had been endorsed by the United Nations Security Council and General Assembly (*I.C.J. Reports 1984*, pp. 183-184, para. 34). During that phase of the proceedings as during the phase devoted to jurisdiction and admissibility, both Nicaragua and the United States have expressed full support for the Contadora Process, and praised the results achieved so far. Therefore, the Court could not but take cognizance of this effort, which merits full respect and consideration as a unique contribution to the solution of the difficult situation in the region. The Court is aware that considerable progress has been achieved on the main objective of the process, namely agreement on texts relating to arms control and reduction, exclusion of foreign military bases or military interference and withdrawal of foreign advisers, prevention of arms traffic, stopping the support of groups aiming at the destabilization of any of the Governments concerned, guarantee of human rights and enforcement of democratic processes, as well as on co-operation for the creation of a mechanism for the verification of the agreements concerned. The work of the Contadora Group may facilitate the delicate and difficult negotiations, in accord with the letter and spirit of the United Nations Charter, that are now required. The Court recalls to both Parties to the present case the need to co-operate with the Contadora efforts in seeking a definitive and lasting peace in Central America, in accordance with the principle of customary international law that prescribes the peaceful settlement of international disputes.

* * * * *

292. For these reasons,

THE COURT

(1) By eleven votes to four,

*Decides* that in adjudicating the dispute brought before it by the Application filed by the Republic of Nicaragua on 9 April 1984, the Court is required to apply the "multilateral treaty reservation" contained in proviso *(c)* to the declaration of acceptance of jurisdiction made under Article 36, paragraph 2, of the Statute of the Court by the Government of the United States of America deposited on 26 August 1946 ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Oda, Ago, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Ruda, Elias, Sette-Camara and Ni.

(2) By twelve votes to three,

*Rejects* the justification of collective self-defence maintained by the United States of America in connection with the military and paramilitary activities in and against Nicaragua the subject of this case ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(3) By twelve votes to three,

*Decides* that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(4) By twelve votes to three,

*Decides* that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983 ; an attack on Corinto on 10 October 1983 ; an attack on Potosí Naval Base on 4/5 January 1984 ; an attack on San Juan del Sur on 7 March 1984 ; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984 ; and an attack on San Juan del Norte on 9 April 1984 ; and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against

the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(5) By twelve votes to three,

*Decides* that the United States of America, by directing or authorizing overflights of Nicaraguan territory, and by the acts imputable to the United States referred to in subparagraph (4) hereof, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to violate the sovereignty of another State ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(6) By twelve votes to three,

*Decides* that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(7) By fourteen votes to one,

*Decides* that, by the acts referred to in subparagraph (6) hereof, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua signed at Managua on 21 January 1956 ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judge* Schwebel.

(8) By fourteen votes to one,

*Decides* that the United States of America, by failing to make known the existence and location of the mines laid by it, referred to in subparagraph

(6) hereof, has acted in breach of its obligations under customary international law in this respect ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judge* Oda.

(9) By fourteen votes to one,

*Finds* that the United States of America, by producing in 1983 a manual entitled *Operaciones sicológicas en guerra de guerrillas,* and disseminating it to *contra* forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law ; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Schwebel, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judge* Oda.

(10) By twelve votes to three,

*Decides* that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has committed acts calculated to deprive of its object and purpose the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(11) By twelve votes to three,

*Decides* that the United States of America, by the attacks on Nicaraguan territory referred to in subparagraph (4) hereof, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(12) By twelve votes to three,

*Decides* that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(13) By twelve votes to three,

*Decides* that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Ago, Sette-Camara, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judges* Oda, Schwebel and Sir Robert Jennings.

(14) By fourteen votes to one,

*Decides* that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judge* Schwebel.

(15) By fourteen votes to one,

*Decides* that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case ;

IN FAVOUR : *President* Nagendra Singh ; *Vice-President* de Lacharrière ; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Sir Robert Jennings, Mbaye, Bedjaoui, Ni and Evensen ; *Judge* ad hoc Colliard ;

AGAINST : *Judge* Schwebel.

(16) Unanimously,

*Recalls* to both Parties their obligation to seek a solution to their disputes by peaceful means in accordance with international law.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of June, one thousand nine hundred and eighty-six, in three copies, one of which will be placed in the archives of the Court and the others will be transmitted to the Government of the Republic of Nicaragua and to the Government of the United States of America, respectively.

*(Signed)* NAGENDRA SINGH,
President.

*(Signed)* Santiago TORRES BERNÁRDEZ,
Registrar.

President NAGENDRA SINGH, Judges LACHS, RUDA, ELIAS, AGO, SETTE-CAMARA and NI append separate opinions to the Judgment of the Court.

Judges ODA, SCHWEBEL and Sir Robert JENNINGS append dissenting opinions to the Judgment of the Court.

*(Initialled)* N.S.
*(Initialled)* S.T.B.

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# Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict

The Parties,

**Conscious** of the need to improve the protection of cultural property in the event of armed conflict and to establish an enhanced system of protection for specifically designated cultural property;

**Reaffirming** the importance of the provisions of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at the Hague on 14 May 1954, and emphasizing the necessity to supplement these provisions through measures to reinforce their implementation;

**Desiring** to provide the High Contracting Parties to the Convention with a means of being more closely involved in the protection of cultural property in the event of armed conflict by establishing appropriate procedures therefor;

**Considering** that the rules governing the protection of cultural property in the event of armed conflict should reflect developments in international law;

**Affirming** that the rules of customary international law will continue to govern questions not regulated by the provisions of this Protocol;

Have agreed as follows:

# Chapter 1. Introduction

## Article 1 – Definitions

For the purposes of this Protocol:

(a) "Party" means a State Party to this Protocol;

(b) "cultural property" means cultural property as defined in Article 1 of the Convention;

(c) "Convention" means the Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague on 14 May 1954;

(d) "High Contracting Party" means a State Party to the Convention;

(e) "enhanced protection" means the system of enhanced protection established by Articles 10 and 11;

(f) "military objective" means an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage;

(g) "illicit" means under compulsion or otherwise in violation of the applicable rules of the domestic law of the occupied territory or of international law.

(h) "List" means the International List of Cultural Property under Enhanced Protection established in accordance with Article 27, sub-paragraph 1(b);

(i) "Director-General" means the Director-General of UNESCO;

(j) "UNESCO" means the United Nations Educational, Scientific and Cultural Organization;

(k) "First Protocol" means the Protocol for the Protection of Cultural Property in the Event of Armed Conflict done at The Hague on 14 May 1954;

## Article 2 – Relation to the Convention

This Protocol supplements the Convention in relations between the Parties.

## Article 3 – Scope of application

1. In addition to the provisions which shall apply in time of peace, this Protocol shall apply in situations referred to in Article 18 paragraphs 1 and 2 of the Convention and in Article 22 paragraph 1.

2. When one of the parties to an armed conflict is not bound by this Protocol, the Parties to this Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to a State party to the conflict which is not bound by it, if the latter accepts the provisions of this Protocol and so long as it applies them.

### Article 4 – Relationship between Chapter 3 and other provisions of the Convention and this Protocol

The application of the provisions of Chapter 3 of this Protocol is without prejudice to:

(a) the application of the provisions of Chapter I of the Convention and of Chapter 2 of this Protocol;

(b) the application of the provisions of Chapter II of the Convention save that, as between Parties to this Protocol or as between a Party and a State which accepts and applies this Protocol in accordance with Article 3 paragraph 2, where cultural property has been granted both special protection and enhanced protection, only the provisions of enhanced protection shall apply.

## Chapter 2. General provisions regarding protection

### Article 5 – Safeguarding of cultural property

Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate in situ protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property.

### Article 6 – Respect for cultural property

With the goal of ensuring respect for cultural property in accordance with Article 4 of the Convention:

(a) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:

(i) that cultural property has, by its function, been made into a military objective; and

(ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;

(b) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage;

(c) the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;

(d) in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.

## Article 7 – Precautions in attack

Without prejudice to other precautions required by international humanitarian law in the conduct of military operations, each Party to the conflict shall:

(a) do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention;

(b) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention;

(c) refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and

(d) cancel or suspend an attack if it becomes apparent:

(i) that the objective is cultural property protected under Article 4 of the Convention;

(ii) that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.

### Article 8 – Precautions against the effects of hostilities

The Parties to the conflict shall, to the maximum extent feasible:

(a) remove movable cultural property from the vicinity of military objectives or provide for adequate in situ protection;

(b) avoid locating military objectives near cultural property.

### Article 9 – Protection of cultural property in occupied territory

1. Without prejudice to the provisions of Articles 4 and 5 of the Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:

   (a) any illicit export, other removal or transfer of ownership of cultural property;

   (b) any archaeological excavation, save where this is strictly required to safeguard, record or preserve cultural property;

   (c) any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical or scientific evidence.

2. Any archaeological excavation of, alteration to, or change of use of, cultural property in occupied territory shall, unless circumstances do not permit, be carried out in close co-operation with the competent national authorities of the occupied territory.

## Chapter 3. Enhanced Protection

### Article10 – Enhanced protection

Cultural property may be placed under enhanced protection provided that it meets the following three conditions:

(a) it is cultural heritage of the greatest importance for humanity;

(b) it is protected by adequate domestic legal and administrative measures recognising its exceptional cultural and historic value and ensuring the highest level of protection;

(c) it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

## Article 11 – The granting of enhanced protection

1. Each Party should submit to the Committee a list of cultural property for which it intends to request the granting of enhanced protection.

2. The Party which has jurisdiction or control over the cultural property may request that it be included in the List to be established in accordance with Article 27 sub-paragraph 1(b). This request shall include all necessary information related to the criteria mentioned in Article 10. The Committee may invite a Party to request that cultural property be included in the List.

3. Other Parties, the International Committee of the Blue Shield and other non-governmental organizations with relevant expertise may recommend specific cultural property to the Committee. In such cases, the Committee may decide to invite a Party to request inclusion of that cultural property in the List.

4. Neither the request for inclusion of cultural property situated in a territory, sovereignty or jurisdiction over which is claimed by more than one State, nor its inclusion, shall in any way prejudice the rights of the parties to the dispute.

5. Upon receipt of a request for inclusion in the List, the Committee shall inform all Parties of the request. Parties may submit representations regarding such a request to the Committee within sixty days. These representations shall be made only on the basis of the criteria mentioned in Article 10. They shall be specific and related to facts. The Committee shall consider the representations, providing the Party requesting inclusion with a reasonable opportunity to respond before taking the decision. When such representations are before the Committee, decisions for inclusion in the List shall be taken, notwithstanding Article 26, by a majority of four-fifths of its members present and voting.

6. In deciding upon a request, the Committee should ask the advice of governmental and non-governmental organizations, as well as of individual experts.

7. A decision to grant or deny enhanced protection may only be made on the basis of the criteria mentioned in Article 10.

8. In exceptional cases, when the Committee has concluded that the Party requesting inclusion of cultural property in the List cannot fulfil the criteria of Article 10 sub-paragraph (b), the Committee may decide to grant enhanced protection, provided that the requesting Party submits a request for international assistance under Article 32.

9. Upon the outbreak of hostilities, a Party to the conflict may request, on an emergency basis, enhanced protection of cultural property under its jurisdiction or control by communicating this request to the Committee. The Committee shall transmit this request immediately to all Parties to the conflict. In such cases the Committee will consider representations from the Parties concerned on an expedited basis. The

decision to grant provisional enhanced protection shall be taken as soon as possible and, notwithstanding Article 26, by a majority of four-fifths of its members present and voting. Provisional enhanced protection may be granted by the Committee pending the outcome of the regular procedure for the granting of enhanced protection, provided that the provisions of Article 10 sub-paragraphs (a) and (c) are met.

10. Enhanced protection shall be granted to cultural property by the Committee from the moment of its entry in the List.

11. The Director-General shall, without delay, send to the Secretary-General of the United Nations and to all Parties notification of any decision of the Committee to include cultural property on the List.

## Article 12 – Immunity of cultural property under enhanced protection

The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack or from any use of the property or its immediate surroundings in support of military action.

## Article 13 – Loss of enhanced protection

1. Cultural property under enhanced protection shall only lose such protection:

   (a) if such protection is suspended or cancelled in accordance with Article 14; or

   (b) if, and for as long as, the property has, by its use, become a military objective.

2. In the circumstances of sub-paragraph 1(b), such property may only be the object of attack if:

   (a) the attack is the only feasible means of terminating the use of the property referred to in sub-paragraph 1(b);

   (b) all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to the cultural property;

   (c) unless circumstances do not permit, due to requirements of immediate self-defence:

      (i) the attack is ordered at the highest operational level of command;

      (ii) effective advance warning is issued to the opposing forces requiring the termination of the use referred to in sub-paragraph 1(b); and

      (iii) Reasonable time is given to the opposing forces to redress the situation.

### Article 14 – Suspension and cancellation of enhanced protection

1. Where cultural property no longer meets any one of the criteria in Article 10 of this Protocol, the Committee may suspend its enhanced protection status or cancel that status by removing that cultural property from the List.

2. In the case of a serious violation of Article 12 in relation to cultural property under enhanced protection arising from its use in support of military action, the Committee may suspend its enhanced protection status. Where such violations are continuous, the Committee may exceptionally cancel the enhanced protection status by removing the cultural property from the List.

3. The Director-General shall, without delay, send to the Secretary-General of the United Nations and to all Parties to this Protocol notification of any decision of the Committee to suspend or cancel the enhanced protection of cultural property.

4. Before taking such a decision, the Committee shall afford an opportunity to the Parties to make their views known.

## Chapter 4. Criminal responsibility and jurisdiction

### Article 15 – Serious violations of this Protocol

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:

   (a) making cultural property under enhanced protection the object of attack;

   (b) using cultural property under enhanced protection or its immediate surroundings in support of military action;

   (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;

   (d) making cultural property protected under the Convention and this Protocol the object of attack;

   (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply

with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

## Article 16 – Jurisdiction

1. Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases:

   (a) when such an offence is committed in the territory of that State;

   (b) when the alleged offender is a national of that State;

   (c) in the case of offences set forth in sub-paragraphs (a) to (c) of the first paragraph of Article 15, when the alleged offender is present in its territory.

2. With respect to the exercise of jurisdiction and without prejudice to Article 28 of the Convention:

   (a) this Protocol does not preclude the incurring of individual criminal responsibility or the exercise of jurisdiction under national and international law that may be applicable, or affect the exercise of jurisdiction under customary international law;

   (b) except in so far as a State which is not Party to this Protocol may accept and apply its provisions in accordance with Article 3 paragraph 2, members of the armed forces and nationals of a State which is not Party to this Protocol, except for those nationals serving in the armed forces of a State which is a Party to this Protocol, do not incur individual criminal responsibility by virtue of this Protocol, nor does this Protocol impose an obligation to establish jurisdiction over such persons or to extradite them.

## Article 17 – Prosecution

1. The Party in whose territory the alleged offender of an offence set forth in Article 15 sub-paragraphs 1 (a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.

2. Without prejudice to, if applicable, the relevant rules of international law, any person regarding whom proceedings are being carried out in connection with the Convention or this Protocol shall be guaranteed fair treatment and a fair trial in accordance with

domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favorable to such person than those provided by international law.

## Article 18 – Extradition

1. The offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Protocol. Parties undertake to include such offences in every extradition treaty to be subsequently concluded between them.

2. When a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, the requested Party may, at its option, consider the present Protocol as the legal basis for extradition in respect of offences as set forth in Article 15 sub-paragraphs 1 (a) to (c).

3. Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences set forth in Article 15 sub-paragraphs 1 (a) to (c) as extraditable offences between them, subject to the conditions provided by the law of the requested Party.

4. If necessary, offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be treated, for the purposes of extradition between Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the Parties that have established jurisdiction in accordance with Article 16 paragraph 1.

## Article 19 – Mutual legal assistance

1. Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 15, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, Parties shall afford one another assistance in accordance with their domestic law.

## Article 20 – Grounds for refusal

1. For the purpose of extradition, offences set forth in Article 15 sub-paragraphs 1 (a) to (c), and for the purpose of mutual legal assistance, offences set forth in Article 15

shall not be regarded as political offences nor as offences connected with political offences nor as offences inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such offences may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

2. Nothing in this Protocol shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested Party has substantial grounds for believing that the request for extradition for offences set forth in Article 15 sub-paragraphs 1 (a) to (c) or for mutual legal assistance with respect to offences set forth in Article 15 has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

### Article 21 – Measures regarding other violations

Without prejudice to Article 28 of the Convention, each Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

(a) any use of cultural property in violation of the Convention or this Protocol;

(b) any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol.

## Chapter 5. The protection of cultural property in armed conflicts not of an international character

### Article 22 – Armed conflicts not of an international character

1. This Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

3. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

4. Nothing in this Protocol shall prejudice the primary jurisdiction of a Party in whose territory an armed conflict not of an international character occurs over the violations set forth in Article 15.

5. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the Party in the territory of which that conflict occurs.

6. The application of this Protocol to the situation referred to in paragraph 1 shall not affect the legal status of the parties to the conflict.

7. UNESCO may offer its services to the parties to the conflict.

# Chapter 6. Institutional Issues

## Article 23 – Meeting of the Parties

1. The Meeting of the Parties shall be convened at the same time as the General Conference of UNESCO, and in co-ordination with the Meeting of the High Contracting Parties, if such a meeting has been called by the Director-General.

2. The Meeting of the Parties shall adopt its Rules of Procedure.

3. The Meeting of the Parties shall have the following functions:

   (a) to elect the Members of the Committee, in accordance with Article 24 paragraph 1;

   (b) to endorse the Guidelines developed by the Committee in accordance with Article 27 sub-paragraph 1(a);

   (c) to provide guidelines for, and to supervise the use of the Fund by the Committee;

   (d) to consider the report submitted by the Committee in accordance with Article 27 sub-paragraph 1(d);

   (e) to discuss any problem related to the application of this Protocol, and to make recommendations, as appropriate.

4. At the request of at least one-fifth of the Parties, the Director-General shall convene an Extraordinary Meeting of the Parties.

## Article 24 – Committee for the Protection of Cultural Property in the Event of Armed Conflict

1. The Committee for the Protection of Cultural Property in the Event of Armed Conflict is hereby established. It shall be composed of twelve Parties which shall be elected by the Meeting of the Parties.

2. The Committee shall meet once a year in ordinary session and in extra-ordinary sessions whenever it deems necessary.

3. In determining membership of the Committee, Parties shall seek to ensure an equitable representation of the different regions and cultures of the world.

4. Parties members of the Committee shall choose as their representatives persons qualified in the fields of cultural heritage, defence or international law, and they shall endeavour, in consultation with one another, to ensure that the Committee as a whole contains adequate expertise in all these fields.

## Article 25 – Term of office

1. A Party shall be elected to the Committee for four years and shall be eligible for immediate re-election only once.

2. Notwithstanding the provisions of paragraph 1, the term of office of half of the members chosen at the time of the first election shall cease at the end of the first ordinary session of the Meeting of the Parties following that at which they were elected. These members shall be chosen by lot by the President of this Meeting after the first election.

## Article 26 – Rules of procedure

1. The Committee shall adopt its Rules of Procedure.

2. A majority of the members shall constitute a quorum. Decisions of the Committee shall be taken by a majority of two-thirds of its members voting.

3. Members shall not participate in the voting on any decisions relating to cultural property affected by an armed conflict to which they are parties.

## Article 27 – Functions

1. The Committee shall have the following functions:

   (a) to develop Guidelines for the implementation of this Protocol;

(b) to grant, suspend or cancel enhanced protection for cultural property and to establish, maintain and promote the International List of Cultural Property under Enhanced Protection;

(c) to monitor and supervise the implementation of this Protocol and promote the identification of cultural property under enhanced protection;

(d) to consider and comment on reports of the Parties, to seek clarifications as required, and prepare its own report on the implementation of this Protocol for the Meeting of the Parties;

(e) to receive and consider requests for international assistance under Article 32;

(f) to determine the use of the Fund;

(g) to perform any other function which may be assigned to it by the Meeting of the Parties.

2. The functions of the Committee shall be performed in co-operation with the Director-General.

3. The Committee shall co-operate with international and national governmental and non-governmental organizations having objectives similar to those of the Convention, its First Protocol and this Protocol. To assist in the implementation of its functions, the Committee may invite to its meetings, in an advisory capacity, eminent professional organizations such as those which have formal relations with UNESCO, including the International Committee of the Blue Shield (ICBS) and its constituent bodies. Representatives of the International Centre for the Study of the Preservation and Restoration of Cultural Property (Rome Centre) (ICCROM) and of the International Committee of the Red Cross (ICRC) may also be invited to attend in an advisory capacity.

## Article 28 – Secretariat

The Committee shall be assisted by the Secretariat of UNESCO which shall prepare the Committee's documentation and the agenda for its meetings and shall have the responsibility for the implementation of its decisions.

## Article 29 – The Fund for the Protection of Cultural Property in the Event of Armed Conflict

1. A Fund is hereby established for the following purposes:

   (a) to provide financial or other assistance in support of preparatory or other measures to be taken in peacetime in accordance with, inter alia, Article 5, Article 10 sub-paragraph (b) and Article 30; and

   (b) to provide financial or other assistance in relation to emergency, provisional or other measures to be taken in order to protect cultural property during periods of armed conflict or of immediate recovery after the end of hostilities in accordance with, inter alia, Article 8 sub-paragraph (a).

2. The Fund shall constitute a trust fund, in conformity with the provisions of the financial regulations of UNESCO.

3. Disbursements from the Fund shall be used only for such purposes as the Committee shall decide in accordance with the guidelines as defined in Article 23 sub-paragraph 3(c). The Committee may accept contributions to be used only for a certain programme or project, provided that the Committee shall have decided on the implementation of such programme or project.

4. The resources of the Fund shall consist of:

   (a) voluntary contributions made by the Parties;

   (b) contributions, gifts or bequests made by:

      (i) other States;

      (ii) UNESCO or other organizations of the United Nations system;

      (iii) other intergovernmental or non-governmental organizations; and

      (iv) public or private bodies or individuals;

   (c) any interest accruing on the Fund;

   (d) funds raised by collections and receipts from events organized for the benefit of the Fund; and

   (e) all other resources authorized by the guidelines applicable to the Fund.

# Chapter 7. Dissemination of Information and International Assistance

## Article 30 – Dissemination

1. The Parties shall endeavour by appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect for cultural property by their entire population.

2. The Parties shall disseminate this Protocol as widely as possible, both in time of peace and in time of armed conflict.

3. Any military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to the application of this Protocol, shall be fully acquainted with the text thereof. To this end the Parties shall, as appropriate:

   (a) incorporate guidelines and instructions on the protection of cultural property in their military regulations;

   (b) develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes;

   (c) communicate to one another, through the Director-General, information on the laws, administrative provisions and measures taken under sub-paragraphs (a) and (b);

   (d) communicate to one another, as soon as possible, through the Director-General, the laws and administrative provisions which they may adopt to ensure the application of this Protocol.

## Article 31 – International cooperation

In situations of serious violations of this Protocol, the Parties undertake to act, jointly through the Committee, or individually, in cooperation with UNESCO and the United Nations and in conformity with the Charter of the United Nations.

## Article 32 – International assistance

1. A Party may request from the Committee international assistance for cultural property under enhanced protection as well as assistance with respect to the preparation, development or implementation of the laws, administrative provisions and measures referred to in Article 10.

2. A party to the conflict, which is not a Party to this Protocol but which accepts and applies provisions in accordance with Article 3, paragraph 2, may request appropriate international assistance from the Committee.

3. The Committee shall adopt rules for the submission of requests for international assistance and shall define the forms the international assistance may take.

4. Parties are encouraged to give technical assistance of all kinds, through the Committee, to those Parties or parties to the conflict who request it.

### Article 33 – Assistance of UNESCO

1. A Party may call upon UNESCO for technical assistance in organizing the protection of its cultural property, such as preparatory action to safeguard cultural property, preventive and organizational measures for emergency situations and compilation of national inventories of cultural property, or in connection with any other problem arising out of the application of this Protocol. UNESCO shall accord such assistance within the limits fixed by its programme and by its resources.

2. Parties are encouraged to provide technical assistance at bilateral or multilateral level.

3. UNESCO is authorized to make, on its own initiative, proposals on these matters to the Parties.

## Chapter 8. Execution of this Protocol

### Article 34 – Protecting Powers

This Protocol shall be applied with the co-operation of the Protecting Powers responsible for safeguarding the interests of the Parties to the conflict.

### Article 35 – Conciliation procedure

1. The Protecting Powers shall lend their good offices in all cases where they may deem it useful in the interests of cultural property, particularly if there is disagreement between the Parties to the conflict as to the application or interpretation of the provisions of this Protocol.

2. For this purpose, each of the Protecting Powers may, either at the invitation of one Party, of the Director-General, or on its own initiative, propose to the Parties to

the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate, on the territory of a State not party to the conflict. The Parties to the conflict shall be bound to give effect to the proposals for meeting made to them. The Protecting Powers shall propose for approval by the Parties to the conflict a person belonging to a State not party to the conflict or a person presented by the Director-General, which person shall be invited to take part in such a meeting in the capacity of Chairman.

### Article 36 – Conciliation in absence of Protecting Powers

1. In a conflict where no Protecting Powers are appointed the Director-General may lend good offices or act by any other form of conciliation or mediation, with a view to settling the disagreement.

2. At the invitation of one Party or of the Director-General, the Chairman of the Committee may propose to the Parties to the conflict a meeting of their representatives, and in particular of the authorities responsible for the protection of cultural property, if considered appropriate, on the territory of a State not party to the conflict.

### Article 37 – Translations and reports

1. The Parties shall translate this Protocol into their official languages and shall communicate these official translations to the Director-General.

2. The Parties shall submit to the Committee, every four years, a report on the implementation of this Protocol.

### Article 38 – State responsibility

No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation.

## Chapter 9. Final Clauses

### Article 39 – Languages

This Protocol is drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authentic.

## Article 40 – Signature

This Protocol shall bear the date of 26 March 1999. It shall be opened for signature by all High Contracting Parties at The Hague from 17 May 1999 until 31 December 1999.

## Article 41 – Ratification, acceptance or approval

1. This Protocol shall be subject to ratification, acceptance or approval by High Contracting Parties which have signed this Protocol, in accordance with their respective constitutional procedures.

2. The instruments of ratification, acceptance or approval shall be deposited with the Director-General.

## Article 42 – Accession

1. This Protocol shall be open for accession by other High Contracting Parties from 1 January 2000.

2. Accession shall be effected by the deposit of an instrument of accession with the Director-General.

## Article 43 – Entry into force

1. This Protocol shall enter into force three months after twenty instruments of ratification, acceptance, approval or accession have been deposited.

2. Thereafter, it shall enter into force, for each Party, three months after the deposit of its instrument of ratification, acceptance, approval or accession.

## Article 44 – Entry into force in situations of armed conflict

The situations referred to in Articles 18 and 19 of the Convention shall give immediate effect to ratifications, acceptances or approvals of or accessions to this Protocol deposited by the parties to the conflict either before or after the beginning of hostilities or occupation. In such cases the Director-General shall transmit the communications referred to in Article 46 by the speediest method.

## Article 45 – Denunciation

1. Each Party may denounce this Protocol.

2. The denunciation shall be notified by an instrument in writing, deposited with the Director-General.

3. The denunciation shall take effect one year after the receipt of the instrument of denunciation. However, if, on the expiry of this period, the denouncing Party is involved in an armed conflict, the denunciation shall not take effect until the end of hostilities, or until the operations of repatriating cultural property are completed, whichever is the later.

## Article 46 – Notifications

The Director-General shall inform all High Contracting Parties as well as the United Nations, of the deposit of all the instruments of ratification, acceptance, approval or accession provided for in Articles 41 and 42 and of denunciations provided for Article 45.

## Article 47 – Registration with the United Nations

In conformity with Article 102 of the Charter of the United Nations, this Protocol shall be registered with the Secretariat of the United Nations at the request of the Director-General.

In faith whereof the undersigned, duly authorized, have signed the present Protocol.

Done at The Hague, this twenty-sixth day of March 1999, in a single copy which shall be deposited in the archives of the UNESCO, and certified true copies of which shall be delivered to all the High Contracting Parties.

# Draft articles on
# Responsibility of States for Internationally Wrongful Acts, with commentaries

**2001**

Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, as corrected.

## RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

*General commentary*

(1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.

(2) Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying:

> the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility … [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation.[32]

(3) Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

(*a*) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful;

(*b*) Determining in what circumstances conduct is to be attributed to the State as a subject of international law;

(*c*) Specifying when and for what period of time there is or has been a breach of an international obligation by a State;

(*d*) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;

(*e*) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;

(*f*) Specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;

(*g*) Determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost;

(*h*) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.

This is the province of the secondary rules of State responsibility.

(4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

(*a*) As already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other "sources" of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

(*b*) The consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such.[33] No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the 1969 Vienna Convention). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

(*c*) The articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the *status quo ante* after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the *status*

[32] *Yearbook ... 1970*, vol. II, p. 306, document A/8010/Rev.l, para. 66 (*c*).

[33] For the purposes of the articles, the term "internationally wrongful act" includes an omission and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See paragraph (1) of the commentary to article 1.

*quo* which would engage the international responsibility of the State concerned. Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

(*d*) The articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or of other non-State entities (see articles 57 and 58).

(5) On the other hand, the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole. Being general in character, they are also for the most part residual. In principle, States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. This is made clear by article 55.

(6) The present articles are divided into four parts. Part One is entitled "The internationally wrongful act of a State". It deals with the requirements for the international responsibility of a State to arise. Part Two, "Content of the international responsibility of a State", deals with the legal consequences for the responsible State of its internationally wrongful act, in particular as they concern cessation and reparation. Part Three is entitled "The implementation of the international responsibility of a State". It identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done, including, in certain circumstances, by the taking of countermeasures as necessary to ensure cessation of the wrongful act and reparation for its consequences. Part Four contains certain general provisions applicable to the articles as a whole.

## PART ONE

## THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Part One defines the general conditions necessary for State responsibility to arise. Chapter I lays down three basic principles for responsibility from which the articles as a whole proceed. Chapter II defines the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned. Chapter IV deals with certain exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter. Chapter V defines the circumstances precluding the wrongfulness for conduct not in conformity with the international obligations of a State.

### CHAPTER I

### GENERAL PRINCIPLES

#### *Article 1. Responsibility of a State for its internationally wrongful acts*

**Every internationally wrongful act of a State entails the international responsibility of that State.**

*Commentary*

(1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term "international responsibility" covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

(2) PCIJ applied the principle set out in article 1 in a number of cases. For example, in the *Phosphates in Morocco* case, PCIJ affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States".[34] ICJ has applied the principle on several occasions, for example in the *Corfu Channel* case,[35] in the *Military and Paramilitary Activities in and against Nicaragua* case,[36] and in the *Gabčíkovo-Nagymaros Project* case.[37] The Court also referred to the principle in its advisory opinions on *Reparation for Injuries*,[38] and on the *Interpretation of Peace Treaties (Second Phase)*,[39] in which it stated that "refusal to fulfil a treaty obligation involves international responsibility".[40] Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Nationals Resident in Peru* cases,[41] in

[34] *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28. See also *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 15, at p. 30; *Factory at Chorzów, Jurisdiction*, *Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; and *ibid., Merits*, *Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29.

[35] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 23.

[36] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 142, para. 283, and p. 149, para. 292.

[37] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), at p. 38, para. 47.

[38] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 184.

[39] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 221.

[40] *Ibid.*, p. 228.

[41] Seven of these awards rendered in 1901 reiterated that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents" (UNRIAA, vol. XV (Sales No. 66.V.3), pp. 399 (Chiessa claim), 401 (Sessarego claim), 404 (Sanguinetti claim), 407 (Vercelli claim), 408 (Queirolo claim), 409 (Roggero claim), and 411 (Miglia claim)).

the *Dickson Car Wheel Company* case,[42] in the *International Fisheries Company* case,[43] in the *British Claims in the Spanish Zone of Morocco* case[44] and in the *Armstrong Cork Company* case.[45] In the *"Rainbow Warrior"* case,[46] the arbitral tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[47]

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before[48] and since[49] article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the "subjective" right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authorization accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the wrongful act.[50] According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidiary, a way by which the responsible State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a "sanction".[51] In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e. concerned only the relations of the responsible State and the injured State *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by ICJ in the *Barcelona Traction* case when it noted that:

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[52]

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these the Court instanced "the outlawing of acts of aggression, and of genocide, as also … the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[53] In later cases the Court has reaffirmed this idea.[54] The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

(5) Thus the term "international responsibility" in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same

[42] *Dickson Car Wheel Company (U.S.A.)* v. *United Mexican States*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 669, at p. 678 (1931).

[43] *International Fisheries Company (U.S.A.)* v. *United Mexican States*, *ibid.*, p. 691, at p. 701 (1931).

[44] According to the arbitrator, Max Huber, it is an indisputable principle that "responsibility is the necessary corollary of rights. All international rights entail international responsibility", UNRIAA, vol. II (Sales No. 1949.V.1), p. 615, at p. 641 (1925).

[45] According to the Italian-United States Conciliation Commission, no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law", UNRIAA, vol. XIV (Sales No. 65.V.4), p. 159, at p. 163 (1953).

[46] Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990).

[47] *Ibid.*, p. 251, para. 75.

[48] See, e.g., D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955) vol. I, p. 385; W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 499; G. I. Tunkin, *Teoria mezhdunarodnogo prava* (Moscow, Mezhdunarodnye otnoshenia, 1970), p. 470, trans. W. E. Butler, *Theory of International Law* (London, George Allen and Unwin, 1974), p. 415; and E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), p. 533.

[49] See, e.g., I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford University Press, 1998), p. 435; B. Conforti, *Diritto internazionale*, 4th ed. (Milan, Editoriale Scientifica, 1995), p. 332; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, 6th ed. (Paris, Librairie générale de droit et de jurisprudence, 1999), p. 742; P.-M. Dupuy, *Droit international public*, 4th ed. (Paris, Dalloz, 1998), p. 414; and R. Wolfrum, "Internationally wrongful acts", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, North-Holland, 1995), vol. II, p. 1398.

[50] See H. Kelsen, *Principles of International Law*, 2nd ed., R. W. Tucker, ed. (New York, Holt, Rinehart and Winston, 1966), p. 22.

[51] See, e.g., R. Ago, "Le délit international", *Recueil des cours..., 1939–II* (Paris, Sirey, 1947), vol. 68, p. 415, at pp. 430–440; and L. Oppenheim, *International Law: A Treatise*, vol. I, *Peace*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co., 1955), pp. 352–354.

[52] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[53] *Ibid.*, para. 34.

[54] See *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595, at pp. 615–616, paras. 31–32.

conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

(7) The articles deal only with the responsibility of States. Of course, as ICJ affirmed in the *Reparation for Injuries* case, the United Nations "is a subject of international law and capable of possessing international rights and duties … it has capacity to maintain its rights by bringing international claims".[55] The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.[56] It may be that the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless, special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.[57]

(8) As to terminology, the French term *fait internationalement illicite* is preferable to *délit* or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as "tort", "delict" or "delinquency", or in Spanish the term *delito*. The French term *fait internationalement illicite* is better than *acte internationalement illicite*, since wrongfulness often results from omissions which are hardly indicated by the term *acte*. Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term *hecho internacionalmente ilícito* is adopted in the Spanish text. In the English text, it is necessary to maintain the expression "internationally wrongful act", since the French *fait* has no exact equivalent; nonetheless, the term "act" is intended to encompass omissions, and this is made clear in article 2.

### *Article 2. Elements of an internationally wrongful act of a State*

**There is an internationally wrongful act of a State when conduct consisting of an action or omission:**

**(*a*) is attributable to the State under international law; and**

**(*b*) constitutes a breach of an international obligation of the State.**

*Commentary*

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

(2) These two elements were specified, for example, by PCIJ in the *Phosphates in Morocco* case. The Court explicitly linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".[58] ICJ has also referred to the two elements on several occasions. In the *United States Diplomatic and Consular Staff in Tehran* case, it pointed out that, in order to establish the responsibility of the Islamic Republic of Iran:

> [f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[59]

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is "that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard".[60]

(3) The element of attribution has sometimes been described as "subjective" and the element of breach as "objective", but the articles avoid such terminology.[61] Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be "subjective". For example, article II of the Convention on the Prevention and Punishment of the Crime of Genocide states that: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such …" In other cases, the standard for breach of an obligation may be "objective", in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different

[55] *Reparation for Injuries* (see footnote 38 above), p. 179.

[56] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at pp. 88–89, para. 66.

[57] For the position of international organizations, see article 57 and commentary.

[58] See footnote 34 above.

[59] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at p. 29, para. 56. Cf. page 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 117–118, para. 226; and *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 54, para. 78.

[60] See footnote 42 above.

[61] Cf. *Yearbook ... 1973*, vol. II, p. 179, document A/9010/Rev.1, paragraph (1) of the commentary to article 3.

possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover, it may be difficult to isolate an "omission" from the surrounding circumstances which are relevant to the determination of responsibility. For example, in the *Corfu Channel* case, ICJ held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.[62] In the *United States Diplomatic and Consular Staff in Tehran* case, the Court concluded that the responsibility of the Islamic Republic of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for.[63] In other cases it may be the combination of an action and an omission which is the basis for responsibility.[64]

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An "act of the State" must involve some action or omission by a human being or group: "States can act only by and through their agents and representatives."[65] The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an "act of the State" for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the *Factory at Chorzów* case, PCIJ used the words "breach of an engagement".[66] It employed the same expression in its subsequent judgment on the merits.[67] ICJ referred explicitly to these words in the *Reparation for Injuries* case.[68] The arbitral tribunal in the *"Rainbow Warrior"* affair referred to "any violation by a State of any obligation".[69] In practice, terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation" or "breach of an engagement" are also used.[70] All these formulations have essentially the same meaning. The phrase preferred in the articles is "breach of an international obligation" corresponding as it does to the language of Article 36, paragraph 2 (*c*), of the ICJ Statute.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. PCIJ spoke of an act "contrary to the treaty right[s] of another State" in its judgment in the *Phosphates in Morocco* case.[71] That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.[72]

[62] *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

[63] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–32, paras. 63 and 67. See also *Velásquez Rodríguez* v. *Honduras* case, Inter-American Court of Human Rights, Series C, No. 4, para. 170 (1988): "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions"; and *Affaire relative à l'acquisition de la nationalité polonaise*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 401, at p. 425 (1924).

[64] For example, under article 4 of the Convention relative to the Laying of Automatic Submarine Contact Mines (Hague Convention VIII of 18 October 1907), a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly.

[65] *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, p. 22.

[66] *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

[67] *Factory at Chorzów, Merits* (*ibid.*).

[68] *Reparation for Injuries* (see footnote 38 above), p. 184.

[69] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75.

[70] At the Conference for the Codification of International Law, held at The Hague in 1930, the term "any failure ... to carry out the international obligations of the State" was adopted (see *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3, article 1).

[71] See footnote 34 above.

[72] See also article 33, paragraph 2, and commentary.

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.[73]

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (*a*)—which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act—corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (*b*)—which states that such conduct must constitute a breach of an international obligation—corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

(12) In subparagraph (*a*), the term "attribution" is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term "imputation" is also used.[74] But the term "attribution" avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is "really" that of someone else.

[73] For examples of analysis of different obligations, see *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above), pp. 30–33, paras. 62–68; *"Rainbow Warrior"* (footnote 46 above), pp. 266–267, paras. 107–110; and WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (WT/DS152/R), 22 December 1999, paras. 7.41 et seq.

[74] See, e.g., *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above), p. 29, paras. 56 and 58; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 51, para. 86.

(13) In subparagraph (*b*), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term "obligation" is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an "obligation" is limited to an obligation under international law, a matter further clarified in article 3.

### *Article 3. Characterization of an act of a State as internationally wrongful*

**The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.**

*Commentary*

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law—even if, under that law, the State was actually bound to act in that way.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of PCIJ in the *Treatment of Polish Nationals* case.[75] The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the ground that:

> according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted ... [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force ... The application of the Danzig Constitution may ... result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law ... However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City.[76]

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. Interna-

[75] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 4.

[76] *Ibid.*, pp. 24–25. See also *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 24.

tional judicial decisions leave no doubt on that subject. In particular, PCIJ expressly recognized the principle in its first judgment, in the *S.S. "Wimbledon"* case. The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

> a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. ... under Article 380 of the Treaty of Versailles, it was [Germany's] definite duty to allow [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article.[77]

The principle was reaffirmed many times:

> it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty;[78]
>
> ... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations;[79]
>
> ... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[80]

A different facet of the same principle was also affirmed in the advisory opinions on *Exchange of Greek and Turkish Populations*[81] and *Jurisdiction of the Courts of Danzig*.[82]

(4) ICJ has often referred to and applied the principle.[83] For example, in the *Reparation for Injuries* case, it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible … the Member cannot contend that this obligation is governed by municipal law".[84] In the *ELSI* case, a Chamber of the Court emphasized this rule, stating that:

> Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.[85]

Conversely, as the Chamber explained:

> the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness … Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication.[86]

The principle has also been applied by numerous arbitral tribunals.[87]

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State responsibility,[88] as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The Commission's draft Declaration on Rights and Duties of States, article 13, provided that:

> Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.[89]

(6) Similarly this principle was endorsed in the 1969 Vienna Convention, article 27 of which provides that:

> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.[90]

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[77] *S.S. "Wimbledon"* (see footnote 34 above), pp. 29–30.

[78] *Greco-Bulgarian "Communities"*, *Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32.

[79] *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 12; and *ibid., Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 167.

[80] *Treatment of Polish Nationals* (see footnote 75 above), p. 24.

[81] *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 20.

[82] *Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15*, pp. 26–27. See also the observations of Lord Finlay in *Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7*, p. 26.

[83] See *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 55, at p. 67; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 12, at pp. 34–35, para. 57.

[84] *Reparation for Injuries* (see footnote 38 above), at p. 180.

[85] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15, at p. 51, para. 73.

[86] *Ibid.*, p. 74, para. 124.

[87] See, e.g., the Geneva Arbitration (the *"Alabama"* case), in Moore, *History and Digest*, vol. IV, p. 4144, at pp. 4156 and 4157 (1872); *Norwegian Shipowners' Claims (Norway* v. *United States of America)*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 307, at p. 331 (1922); *Aguilar-Amory and Royal Bank of Canada Claims* (*Tinoco* case) *(Great Britain* v. *Costa Rica), ibid.*, p. 369, at p. 386 (1923); *Shufeldt Claim*, *ibid.*, vol. II (Sales No. 1949.V.1), p. 1079, at p. 1098 ("it is a settled principle of international law that a sovereign can not be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject") (1930); *Wollemborg Case*, *ibid.*, vol. XIV (Sales No. 65.V.4), p. 283, at p. 289 (1956); and *Flegenheimer*, *ibid.*, p. 327, at p. 360 (1958).

[88] In point I of the request for information on State responsibility sent to States by the Preparatory Committee for the 1930 Hague Conference it was stated:

> "In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law."

In their replies, States agreed expressly or implicitly with this principle (see League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (document C.75.M.69.1929.V), p. 16). During the debate at the 1930 Hague Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the Conference adopted article 5 to the effect that "A State cannot avoid international responsibility by invoking the state of its municipal law" (document C.351(c) M.145(c).1930.V; reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3).

[89] See General Assembly resolution 375 (IV) of 6 December 1949, annex. For the debate in the Commission, see *Yearbook ... 1949*, pp. 105–106, 150 and 171. For the debate in the Assembly, see *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 168th–173rd meetings, 18–25 October 1949; 175th–183rd meetings, 27 October–3 November 1949; and *ibid.*, *Fourth Session, Plenary Meetings*, 270th meeting, 6 December 1949.

[90] Article 46 of the Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions "was manifest and concerned a rule of … internal law of fundamental importance".

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law", which is similar to article 5 of the draft adopted on first reading at the 1930 Hague Conference and also to article 27 of the 1969 Vienna Convention, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term "internal law" is preferred to "municipal law", because the latter is sometimes used in a narrower sense, and because the 1969 Vienna Convention speaks of "internal law". Still less would it be appropriate to use the term "national law", which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities. The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.[91] In the French version the expression *droit interne* is preferred to *législation interne* and *loi interne*, because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

[91] Cf. *LaGrand (Germany* v. *United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28.

## CHAPTER II

## ATTRIBUTION OF CONDUCT TO A STATE

### *Commentary*

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, i.e. when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.[92]

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a Special Commission of Jurists certain questions arising from an incident between Italy and Greece.[93] This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Commission stated that:

> The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.[94]

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link

[92] See, e.g., I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132–166; D. D. Caron, "The basis of responsibility: attribution and other trans-substantive rules", *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. Magraw, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p. 109; L. Condorelli, "L'imputation à l'État d'un fait internationalement illicite : solutions classiques et nouvelles tendances", *Recueil des cours..., 1984–VI* (Dordrecht, Martinus Nijhoff, 1988), vol. 189, p. 9; H. Dipla, *La responsabilité de l'État pour violation des droits de l'homme: problèmes d'imputation* (Paris, Pedone, 1994); A. V. Freeman, "Responsibility of States for unlawful acts of their armed forces", *Recueil des cours..., 1955–II* (Leiden, Sijthoff, 1956), vol. 88, p. 261; and F. Przetacznik, "The international responsibility of States for the unauthorized acts of their organs", *Sri Lanka Journal of International Law*, vol. 1 (June 1989), p. 151.

[93] League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

[94] *Ibid.*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 82 (1925).

of factual causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[95] In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the Head of State or Government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.[96] Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.[97] Thus, the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its Government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.[98] Conduct engaged in by organs of the State in excess of their competence may also be attributed to the State under international law, whatever the position may be under internal law.[99]

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8 to 11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*[100]), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the Iran-United States Claims Tribunal has affirmed, "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State".[101] This follows already from the provisions of article 2.

[95] See *United States Diplomatic and Consular Staff in Tehran* (footnote 59 above).

[96] See articles 7, 8, 46 and 47 of the 1969 Vienna Convention.

[97] The point was emphasized, in the context of federal States, in *LaGrand* (see footnote 91 above). It is not of course limited to federal States. See further article 5 and commentary.

[98] See paragraph (11) of the commentary to article 4; see also article 5 and commentary.

[99] See article 7 and commentary.

[100] See article 55 and commentary.

[101] *Kenneth P. Yeager* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 17 , p. 92, at pp. 101–102 (1987).

### *Article 4. Conduct of organs of a State*

**1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.**

**2. An organ includes any person or entity which has that status in accordance with the internal law of the State.**

*Commentary*

(1) *Paragraph 1* of article 4 states the first principle of attribution for the purposes of State responsibility in international law—that the conduct of an organ of the State is attributable to that State. The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.

(2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.

(3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: "An officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority."[102] There have been many statements of the principle since then.[103]

(4) The replies by Governments to the Preparatory Committee for the 1930 Hague Conference[104] were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of "any failure on the part of its organs to carry out the international obligations of the State".[105]

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus, the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the tribunal said that:

> a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity.[106]

ICJ has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

> According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule … is of a customary character.[107]

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.[108] As PCIJ said in *Certain German Interests in Polish Upper Silesia (Merits)*:

[102] Moore, *History and Digest*, vol. III, p. 3127, at p. 3129 (1871).

[103] See, e.g., *Claims of Italian Nationals* (footnote 41 above); *Salvador Commercial Company*, UNRIAA, vol. XV (Sales No. 66.V.3), p. 455, at p. 477 (1902); and *Finnish Shipowners (Great Britain/Finland)*, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1479, at p. 1501 (1934).

[104] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), pp. 25, 41 and 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (document C.75(a)M.69(a).1929.V), pp. 2–3 and 6.

[105] Reproduced in *Yearbook ... 1956*, vol. II, p. 225, document A/CN.4/96, annex 3.

[106] See *Salvador Commercial Company* (footnote 103 above). See also *Chattin* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 282, at pp. 285–286 (1927); and *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *ibid.*, vol. XIII (Sales No. 64.V.3), p. 389, at p. 438 (1955).

[107] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above), p. 87, para. 62, referring to the draft articles on State responsibility, article 6, now embodied in article 4.

[108] As to legislative acts, see, e.g., *German Settlers in Poland* (footnote 65 above), at pp. 35–36; *Treatment of Polish Nationals* (footnote 75 above), at pp. 24–25; *Phosphates in Morocco* (footnote 34 above), at pp. 25–26; and *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 176, at pp. 193–194. As to executive acts, see, e.g., *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above); and *ELSI* (footnote 85 above). As to judicial acts, see, e.g., *"Lotus"* (footnote 76 above); *Jurisdiction of the Courts of Danzig* (footnote 82 above); and *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10, at pp. 21–22. In some cases, the conduct in question may involve both executive and judicial acts; see, e.g., *Application of the Convention of 1902* (footnote 83 above) at p. 65.

From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[109]

Thus, article 4 covers organs, whether they exercise "legislative, executive, judicial or any other functions". This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover, the term is one of extension, not limitation, as is made clear by the words "or any other functions".[110] It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as *acta iure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law.[111] Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,[112] and it might in certain circumstances amount to an internationally wrongful act.[113]

(7) Nor is any distinction made at the level of principle between the acts of "superior" and "subordinate" officials, provided they are acting in their official capacity. This is expressed in the phrase "whatever position it holds in the organization of the State" in article 4. No doubt lower-level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.[114]

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example, the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic.[115]

This principle was strongly supported during the preparatory work for the 1930 Hague Conference. Governments were expressly asked whether the State became responsible as a result of "[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)". All answered in the affirmative.[116]

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. The award in the *"Montijo"* case is the starting point for a consistent series of decisions to this effect.[117] The French-Mexican Claims Commission in the *Pellat* case reaffirmed "the principle of the international responsibility ... of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility "... cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law".[118] That rule has since been consistently applied. Thus, for example, in the *LaGrand* case, ICJ said:

Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.[119]

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[109] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, at p. 19.

[110] These functions might involve, e.g. the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as "guidance" it is clearly attributable to the State. See, e.g., GATT, Report of the Panel, Japan–Trade in Semi-conductors, 24 March 1988, paras. 110–111; and WTO, Report of the Panel, Japan–Measures affecting Consumer Photographic Film and Paper (WT/DS44/R), paras. 10.12–10.16.

[111] See article 3 and commentary.

[112] See, e.g., the decisions of the European Court of Human Rights in *Swedish Engine Drivers' Union* v. *Sweden, Eur. Court H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström* v. *Sweden, ibid., Series A, No. 21* (1976), at p. 15.

[113] The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission (see *Yearbook ... 1998*, vol. II (Part Two), p. 17, para. 35).

[114] See, e.g., the *Currie* case, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 21, at p. 24 (1954); *Dispute concerning the interpretation of article 79* (footnote 106 above), at pp. 431–432; and *Mossé* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 486, at pp. 492–493 (1953). For earlier decisions, see the *Roper* case, *ibid.*, vol. IV (Sales No. 1951.V.1), p. 145 (1927); *Massey, ibid.*, p. 155 (1927); *Way, ibid.*, p. 391, at p. 400 (1928); and *Baldwin, ibid.*, vol. VI (Sales No. 1955.V.3), p. 328 (1933). Cf. the consideration of the requisition of a plant by the Mayor of Palermo in *ELSI* (see footnote 85 above), e.g. at p. 50, para. 70.

[115] UNRIAA, vol. XIII (Sales No. 64.V.3), p. 150, at p. 161 (1951). For earlier decisions, see, e.g., the *Pieri Dominique and Co.* case, *ibid.*, vol. X (Sales No. 60.V.4), p. 139, at p. 156 (1905).

[116] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 104 above), p. 90; *Supplement to Vol. III …* (*ibid.*), pp. 3 and 18.

[117] See Moore, *History and Digest*, vol. II, p. 1440, at p. 1440 (1874). See also *De Brissot and others*, Moore, *History and Digest*, vol. III, p. 2967, at pp. 2970–2971 (1855); *Pieri Dominique and Co.* (footnote 115 above), at pp. 156–157; *Davy* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 467, at p. 468 (1903); *Janes* case (footnote 94 above); *Swinney*, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 101 (1925); *Quintanilla*, *ibid.*, p. 101, at p. 103 (1925); *Youmans*, *ibid.*, p. 110, at p. 116 (1925); *Mallén*, *ibid.*, p. 173, at p. 177 (1927); *Venable*, *ibid.*, p. 218, at p. 230 (1925); and *Tribolet*, *ibid.*, p. 598, at p. 601 (1925).

[118] UNRIAA, vol. V (Sales No. 1952.V.3), p. 534, at p. 536 (1929).

[119] *LaGrand, Provisional Measures* (see footnote 91 above). See also *LaGrand (Germany* v. *United States of America), Judgment, I.C.J.Reports 2001*, p. 466, at p. 495, para. 81.

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,[120] the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.[121] This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) *Paragraph 2* explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term "government" refers only to bodies at the highest level such as the Head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.[122] Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2.

(12) The term "person or entity" is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term "entity" is used in a similar sense[123] in the draft articles on jurisdictional immunities of States and their property, adopted in 1991.

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the Mexico-United States General Claims Commission in the *Mallén* case involved, first, the act of an official acting in a private capacity and, secondly, another act committed by the same official in his official capacity, although in an abusive way.[124] The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where "the act had no connexion with the official function and was, in fact, merely the act of a private individual".[125] The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra vires* or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.[126] In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

### *Article 5. Conduct of persons or entities exercising elements of governmental authority*

**The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.**

*Commentary*

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

[120] See, e.g., articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

[121] See, e.g., article 34 of the Convention for the Protection of the World Cultural and Natural Heritage.

[122] See, e.g., the *Church of Scientology* case, Germany, Federal Supreme Court, Judgment of 26 September 1978, case No. *VI ZR* 267/76, *Neue Juristische Wochenschrift*, No. 21 (May 1979), p. 1101; ILR, vol. 65, p. 193; and *Propend Finance Pty Ltd.* v. *Sing*, England, Court of Appeal, ILR, vol. 111, p. 611 (1997). These were State immunity cases, but the same principle applies in the field of State responsibility.

[123] See *Yearbook … 1991*, vol. II (Part Two), pp. 14–18.

[124] *Mallén* (see footnote 117 above), at p. 175.

[125] UNRIAA, vol. V (Sales No. 1952.V.3), p. 516, at p. 531 (1929). See also the *Bensley* case in Moore, *History and Digest*, vol. III, p. 3018 (1850) ("a wanton trespass … under no color of official proceedings, and without any connection with his official duties"); and the *Castelain* case *ibid.*, p. 2999 (1880). See further article 7 and commentary.

[126] See paragraph (7) of the commentary to article 7.

(2) The generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.[127]

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Parastatal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example, the replies to the request for information made by the Preparatory Committee for the 1930 Hague Conference indicated strong support from some Governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

> when, by delegation of powers, bodies act in a public capacity, *e.g.*, police an area … the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.[128]

The Preparatory Committee accordingly prepared the following basis of discussion, though the Third Committee of the Conference was unable in the time available to examine it:

> A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such … autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.[129]

(5) The justification for attributing to the State under international law the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock).

(6) Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

### *Article 6. Conduct of organs placed at the disposal of a State by another State*

**The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is**

[127] *Hyatt International Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88–94 (1985).

[128] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), p. 90. The German Government noted that these remarks would extend to the situation where "the State, as an exceptional measure, invests private organisations with public powers and duties or authorities [*sic*] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force", *ibid.*

[129] *Ibid.*, p. 92.

**acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.**

*Commentary*

(1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

(2) The words "placed at the disposal of" in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.[130]

(3) Examples of situations that could come within this limited notion of a State organ "placed at the disposal" of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.[131]

(4) Thus, what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State. The notion of an organ "placed at the disposal" of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the "beneficiary" State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.[132]

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisers placed at the disposal of a State under technical assistance programmes do not usually have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be "acting in the exercise of elements of the governmental authority" of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of "transferred responsibility". Yet, in State practice the situation is not unknown.

(6) In the *Chevreau* case, a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that: "the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power."[133] It is implicit in the Arbitrator's finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the Consul's acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of "delegated" powers.[134] At the relevant time Liechtenstein was not

[130] Thus, the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara and Others* v. *Italy and Albania*, application No. 39473/98, *Eur. Court H.R.*, decision of 11 January 2001. Conversely, the conduct of Turkey taken in the context of the Turkey-European Communities customs union was still attributable to Turkey: see WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44.

[131] See also article 47 and commentary.

[132] For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another, see articles 17 and 18 and commentaries.

[133] UNRIAA, vol. II (Sales No. 1949.V.1), p. 1113, at p. 1141 (1931).

[134] *X and Y* v. *Switzerland*, application Nos. 7289/75 and 7349/76, decision of 14 July 1977; Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 9, p. 57; and *Yearbook of the European Convention on Human Rights, 1977*, vol. 20 (1978), p. 372, at pp. 402–406.

a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.[135]

(8) A further, long-standing example of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council's role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.[136] There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority. This is even more exceptional than the inter-State cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.[137] In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

### *Article 7. Excess of authority or contravention of instructions*

**The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.**

*Commentary*

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.[138] Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,[139] State practice came to support the proposition, articulated by the British Government in response to an Italian request, that "all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity".[140] As the Spanish Government pointed out: "If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received."[141] At this time the United States supported "a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but

[135] See also *Drozd and Janousek* v. *France and Spain, Eur. Court H.R., Series A, No. 240* (1992), paras. 96 and 110. See also *Controller and Auditor-General* v. *Davison* (New Zealand, Court of Appeal), ILR, vol. 104 (1996), p. 526, at pp. 536–537 (Cooke, P.) and pp. 574–576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed, *Brannigan* v. *Davison*, *ibid.*, vol. 108, p. 622.

[136] For example, Agreement relating to Appeals to the High Court of Australia from the Supreme Court of Nauru (Nauru, 6 September 1976) (United Nations, *Treaty Series*, vol. 1216, No. 19617, p. 151).

[137] See, e.g., article 89 of the Rome Statute of the International Criminal Court.

[138] See, e.g., the "Star and Herald" controversy, Moore, *Digest*, vol. VI, p. 775.

[139] In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., the following cases: *"Only Son"*, Moore, *History and Digest*, vol. IV, pp. 3404–3405; *"William Lee"*, *ibid.*, p. 3405; and *Donoughho's*, *ibid.*, vol. III, p. 3012. Where the question was expressly examined, tribunals did not consistently apply any single principle: see, e.g., the *Lewis's* case, *ibid.*, p. 3019; the *Gadino* case, UNRIAA, vol. XV (Sales No. 66.V.3), p. 414 (1901); the *Lacaze* case, Lapradelle-Politis, vol. II, p. 290, at pp. 297–298; and the *"William Yeaton"* case, Moore, *History and Digest*, vol. III, p. 2944, at p. 2946.

[140] For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru, see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

[141] Note verbale by Duke Almodóvar del Río, 4 July 1898, *ibid.*

of their apparent authority".[142] It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed "by virtue of … official capacity". In any event, by the time of the 1930 Hague Conference, a majority of States responding to the Preparatory Committee's request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of "[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority".[143] The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

> International responsibility is … incurred by a State if damage is sustained by a foreigner as a result of unauthorised acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State.[144]

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.[145] It is confirmed, for example, in article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which provides that: "A Party to the conflict … shall be responsible for all acts committed by persons forming part of its armed forces": this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility".[146]

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held:

> that the two officers, even if they are deemed to have acted outside their competence … and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status.[147]

(6) International human rights courts and tribunals have applied the same rule. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said:

> This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.[148]

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority".[149]

(8) The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.[150] In short, the question is whether they were acting with apparent authority.

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e.

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[142] "American Bible Society" incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; "Shine and Milligen", G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. V, p. 575; and "Miller", *ibid.*, pp. 570–571.

[143] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), point V, No. 2 (*b*), p. 74, and *Supplement to Vol. III …* (see footnote 104 above), pp. 3 and 17.

[144] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …*, document C.351(c)M.145(c).1930. V (see footnote 88 above), p. 237. For a more detailed account of the evolution of the modern rule, see *Yearbook … 1975*, vol. II, pp. 61–70.

[145] For example, the 1961 revised draft by the Special Rapporteur, Mr. García Amador, provided that "an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity" (*Yearbook … 1961*, vol. II, p. 53).

[146] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 1053–1054.

[147] *Caire* (see footnote 125 above). For other statements of the rule, see *Maal*, UNRIAA, vol. X (Sales No. 60.V.4), pp. 732–733 (1903); *La Masica, ibid.*, vol. XI (Sales No. 61.V.4), p. 560 (1916); *Youmans* (footnote 117 above); *Mallén*, *ibid.*; *Stephens*, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 267–268 (1927); and *Way* (footnote 114 above), pp. 400–401. The decision of the United States Court of Claims in *Royal Holland Lloyd* v. *United States*, 73 Ct. Cl. 722 (1931) (*Annual Digest of Public International Law Cases* (London, Butterworth, 1938), vol. 6, p. 442) is also often cited.

[148] *Velásquez Rodríguez* (see footnote 63 above); see also ILR, vol. 95, p. 232, at p. 296.

[149] *Petrolane, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 27, p. 64, at p. 92 (1991). See also paragraph (13) of the commentary to article 4.

[150] One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The articles are not concerned with questions that would then arise as to the validity of the transaction (cf. the 1969 Vienna Convention, art. 50). So far as responsibility for the corrupt conduct is concerned, various situations could arise which it is not necessary to deal with expressly in the present articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.[151] Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.[152]

### *Article 8. Conduct directed or controlled by a State*

**The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.**

*Commentary*

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.[153] Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.[154] In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity". Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary Activities in and against Nicaragua* case. The question was whether the conduct of the contras was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the contras. This was analysed by ICJ in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by the United States to Nicaraguan operatives.[155] But it rejected the broader claim of Nicaragua that all the conduct of the contras was attributable to the United States by reason of its control over them. It concluded that:

> [D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.
>
> …
>
> All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[156]

Thus while the United States was held responsible for its own support for the contras, only in certain individual instances were the acts of the contras themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be

[151] See *ELSI* (footnote 85 above), especially at pp. 52, 62 and 74.

[152] See further article 44, subparagraph (*b*), and commentary.

[153] Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially paragraph (7) for the meaning of the words "direction" and "control" in various languages.

[154] See, e.g., the *Zafiro* case, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 160 (1925); the *Stephens* case (footnote 147 above), p. 267; and *Lehigh Valley Railroad Company and Others (U.S.A.)* v. *Germany (Sabotage* cases*)*: "*Black Tom"* and *"Kingsland"* incidents, *ibid*., vol. VIII (Sales No. 58.V.2), p. 84 (1930) and p. 458 (1939).

[155] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 51, para. 86.

[156] *Ibid.*, pp. 62 and 64–65, paras. 109 and 115. See also the concurring opinion of Judge Ago, *ibid.*, p. 189, para. 17.

insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also addressed these issues. In the *Tadić*, case, the Chamber stressed that:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[157]

The Appeals Chamber held that the requisite degree of control by the Yugoslavian "authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations".[158] In the course of their reasoning, the majority considered it necessary to disapprove the ICJ approach in the *Military and Paramilitary Activities in and against Nicaragua* case. But the legal issues and the factual situation in the *Tadić* case were different from those facing the Court in that case. The tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.[159] In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.[160]

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion.[161] The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[162] Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the *de facto* seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property.[163] On the other hand, where there was evidence that the corporation was exercising public powers,[164] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[165] the conduct in question has been attributed to the State.[166]

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State's responsibility for actions going beyond the scope of the authorization. For example, questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored.

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[157] *Prosecutor* v. *Duško Tadić*, International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1518, at p. 1541, para. 117. For the judgment of the Trial Chamber (Case IT-94-1-T (1997)), see ILR, vol. 112, p. 1.

[158] ILM, vol. 38, No. 6 (November 1999), p. 1546, para. 145.

[159] See the explanation given by Judge Shahabuddeen, *ibid.*, pp. 1614–1615.

[160] The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal and the European Court of Human Rights: *Yeager* (see footnote 101 above), p. 103. See also *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 4, p. 122, at p. 143 (1983); *Loizidou* v. *Turkey, Merits, Eur. Court H.R., Reports*, 1996–VI, p. 2216, at pp. 2235–2236, para. 56, also p. 2234, para. 52; and *ibid., Preliminary Objections, Eur. Court H.R., Series A, No. 310*, p. 23, para. 62 (1995).

[161] *Barcelona Traction* (see footnote 25 above), p. 39, paras. 56–58.

[162] For example, the Workers' Councils considered in *Schering Corporation* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 5, p. 361 (1984); *Otis Elevator Company* v. *The Islamic Republic of Iran, ibid.*, vol. 14, p. 283 (1987); and *Eastman Kodak Company* v. *The Government of Iran, ibid.*, vol. 17, p. 153 (1987).

[163] *SEDCO, Inc.* v. *National Iranian Oil Company*, *ibid*., vol. 15, p. 23 (1987). See also *International Technical Products Corporation* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 9, p. 206 (1985); and *Flexi-Van Leasing, Inc.* v. *The Government of the Islamic Republic of Iran*, *ibid.*, vol. 12, p. 335, at p. 349 (1986).

[164] *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran*, *ibid.*, vol. 21, p. 79 (1989); and *Petrolane* (see footnote 149 above).

[165] *Foremost Tehran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. *ibid.*, vol. 10, p. 228 (1986); and *American Bell International Inc.* v. *The Islamic Republic of Iran*, *ibid.*, vol. 12, p. 170 (1986).

[166] See *Hertzberg et al.* v. *Finland* (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex XIV, communication No. R.14/61, p. 161, at p. 164, para. 9.1) (1982). See also *X* v. *Ireland*, application No. 4125/69, *Yearbook of the European Convention on Human Rights, 1971*, vol. 14 (1973), p. 199; and *Young, James and Webster* v. *the United Kingdom, Eur. Court H.R., Series A, No. 44* (1981).

The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words "person or group of persons", reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a *de facto* basis. Thus, while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

### *Article 9. Conduct carried out in the absence or default of the official authorities*

**The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.**

*Commentary*

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g. after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:[167] in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State responsibility. Thus, the position of the Revolutionary Guards or "Komitehs" immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards:

> at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.[168]

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general *de facto* Government. The cases envisaged by article 9 presuppose the existence of a Government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* Government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a Government is covered by article 4 rather than article 9.[169]

(5) In respect of the second condition, the phrase "in the absence or default of" is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase "absence or default" seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term "call for" conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.[170]

[167] This principle is recognized as legitimate by article 2 of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land); and by article 4, paragraph A (6), of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

[168] *Yeager* (see footnote 101 above), p. 104, para. 43.

[169] See, e.g., the award of 18 October 1923 by Arbitrator Taft in the *Tinoco* case (footnote 87 above), pp. 381–382. On the responsibility of the State for the conduct of *de facto* Governments, see also J. A. Frowein, *Das de facto-Regime im Völkerrecht* (Cologne, Heymanns, 1968), pp. 70–71. Conduct of a Government in exile might be covered by article 9, depending on the circumstances.

[170] See, e.g., the *Sambiaggio* case, UNRIAA, vol. X (Sales No. 60.V.4), p. 499, at p. 512 (1904); see also article 10 and commentary.

### *Article 10. Conduct of an insurrectional or other movement*

**1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.**

**2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.**

**3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.**

*Commentary*

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new Government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions[171] and arbitral tribunals[172] have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a "well-established principle of international law", that no Government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.[173] Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Hague Conference. Replies of Governments to point IX of the request for information addressed to them by the Preparatory Committee indicated substantial agreement that: (*a*) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (*b*) only conduct engaged in by organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.[174]

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new Government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual Government. Thus the term "conduct" only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover, it is the only subject of international law to which responsibility can be attributed. The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity be-

[171] See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments*, Moore, *History and Digest*, vol. III, p. 2873; *McKenny* case, *ibid.*, p. 2881; *Confederate States*, *ibid.*, p. 2886; *Confederate Debt*, *ibid.*, p. 2900; and *Maximilian Government*, *ibid.*, p. 2902, at pp. 2928–2929.

[172] See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 642; and the *Iloilo Claims*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 158, at pp. 159–160 (1925).

[173] UNRIAA, vol. IV (Sales No. 1951.V.1), p. 358, at p. 361 (1928) (referring to *Home Frontier and Foreign Missionary Society*, *ibid.*, vol. VI (Sales No. 1955.V.3), p. 42 (1920)); cf. the *Sambiaggio* case (footnote 170 above), p. 524.

[174] League of Nations, Conference for the Codification of International Law, *Bases of Discussion* … (see footnote 88 above), p. 108; and *Supplement to Volume III* … (see footnote 104 above), pp. 3 and 20.

tween the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the Government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) *Paragraph 1* of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous Government of the State in question. The phrase "which becomes the new Government" is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of Governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed Government. Thus, the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming.

(8) *Paragraph 2* of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression "or in a territory under its administration" is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term "insurrectional movement" as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement's actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) may be taken as a guide. Article 1, paragraph 1, refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (art. 1, para. 2). This definition of "dissident armed forces" reflects, in the context of the Protocols, the essential idea of an "insurrectional movement".

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include "insurrectional or other" movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not, however, extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new Government or State, as the case may be.

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international "legitimacy" or of any illegality in respect of their establishment as a Government, despite the potential importance of such distinctions in other contexts.[175] From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new Government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.[176] Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920–1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example, in the *Bolívar Railway Company* claim, the principle is stated in the following terms:

> The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.[177]

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* case emphasized that the State cannot be held responsible for the acts of revolutionaries "unless the revolution was successful", since such acts then involve the responsibility of the State "under the well-recognized rules of public law".[178] In the *Pinson* case, the French-Mexican Claims Commission ruled that:

[175] See H. Atlam, "National liberation movements and international responsibility", *United Nations Codification of State Responsibility*, B. Simma and M. Spinedi, eds. (New York, Oceana, 1987), p. 35.

[176] As ICJ said, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States", *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion I.C.J. Reports 1971*, p. 16, at p. 54, para. 118.

[177] UNRIAA, vol. IX (Sales No. 59.V.5), p. 445, at p. 453 (1903). See also *Puerto Cabello and Valencia Railway Company*, *ibid.*, p. 510, at p. 513 (1903).

[178] *Ibid.*, vol. X (Sales No. 60.V.4), p. 285, at p. 354 (1902). See also the *Dix* case, *ibid.*, vol. IX (Sales No. 59.V.5), p. 119 (1902).

if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused ... by offences committed by successful revolutionary forces, the responsibility of the State ... cannot be denied.[179]

(13) The possibility of holding the State responsible for the conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference. On the basis of replies received from a number of Governments, the Preparatory Committee drew up the following Basis of Discussion: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops." [180] Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case, the Supreme Court of Namibia went even further in accepting responsibility for "anything done" by the predecessor administration of South Africa.[181]

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term "however related to that of the movement concerned" is intended to have a broad meaning. Thus, the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present articles, which are concerned only with the responsibility of States.

[179] *Ibid.*, vol. V (Sales No. 1952.V.3), p. 327, at p. 353 (1928).

[180] League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (see footnote 88 above), pp. 108 and 116; and Basis of discussion No. 22 (*c*), *ibid.*, p. 118; reproduced in *Yearbook ... 1956*, vol. II, p. 223, at p. 224, document A/CN.4/96.

[181] Guided in particular by a constitutional provision, the Supreme Court of Namibia held that "the new government inherits responsibility for the acts committed by the previous organs of the State", *Minister of Defence, Namibia* v. *Mwandinghi, South African Law Reports*, 1992 (2), p. 355, at p. 360; and ILR, vol. 91, p. 341, at p. 361. See, on the other hand, *44123 Ontario Ltd.* v. *Crispus Kiyonga and Others*, 11 *Kampala Law Reports* 14, pp. 20–21 (1992); and ILR, vol. 103, p. 259, at p. 266 (High Court, Uganda).

### *Article 11. Conduct acknowledged and adopted by a State as its own*

**Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.**

*Commentary*

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus, like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction … and eventually continued by her, even after the acquisition of territorial sovereignty over the island".[182] In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.[183] However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

(4) Outside the context of State succession, the *United States Diplomatic and Consular Staff in Tehran* case provides a further example of subsequent adoption by a

[182] *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII (Sales No. 63.V.3), p. 155, at p. 198 (1956).

[183] The matter is reserved by article 39 of the Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention").

State of particular conduct. There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

> The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State.[184]

In that case it made no difference whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.[185] In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the tribunal did in the *Lighthouses* arbitration.[186] This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann's capture, a charge neither admitted nor denied by Israeli Foreign Minister Golda Meir, during the discussion in the Security Council of the complaint. She referred to Eichmann's captors as a "volunteer group".[187] Security Council resolution 138 (1960) of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann's captors were "in fact acting on the instructions of, or under the direction or control of" Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

(6) The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement.[188] ICJ in the *United States Diplomatic and Consular Staff in Tehran* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]".[189] These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies, States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may be phrased in the particular case, the term "acknowledges and adopts" in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word "and". The order of the two conditions indicates the normal sequence of

[184] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 35, para. 74.

[185] *Ibid.*, pp. 31–33, paras. 63–68.

[186] *Lighthouses* arbitration (see footnote 182 above), pp. 197–198.

[187] *Official Records of the Security Council, Fifteenth Year*, 866th meeting, 22 June 1960, para. 18.

[188] The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

[189] See footnote 59 above.

events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *United States Diplomatic and Consular Staff in Tehran* case), or it might be inferred from the conduct of the State in question.

## CHAPTER III

## BREACH OF AN INTERNATIONAL OBLIGATION

*Commentary*

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it or, to use the language of article 2, subparagraph (*b*), when such conduct constitutes "a breach of an international obligation of the State". This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.[190] In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless, a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (art. 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (art. 13), with the equally important question of continuing breaches (art. 14), and with the special problem of determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful (art. 15).

[190] See paragraphs (2) to (4) of the general commentary.

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.[191]

### *Article 12. Existence of a breach of an international obligation*

**There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.**

*Commentary*

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State—i.e. between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example, ICJ has used such expressions as "incompatibility with the obligations" of a State,[192] acts "contrary to" or "inconsistent with" a given rule,[193] and

[191] See, e.g., the classification of obligations of conduct and results, paragraphs (11) to (12) of the commentary to article 12.

[192] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 29, para. 56.

[193] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 64, para. 115, and p. 98, para. 186, respectively.

"failure to comply with its treaty obligations".[194] In the *ELSI* case, a Chamber of the Court asked the "question whether the requisition was in conformity with the requirements … of the FCN Treaty".[195] The expression "not in conformity with what is required of it by that obligation" is the most appropriate to indicate what constitutes the essence of a breach of an international obligation by a State. It allows for the possibility that a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it. In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act. Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition. In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation. The phrase "is not in conformity with" is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.

(3) Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation "regardless of its origin". As this phrase indicates, the articles are of general application. They apply to all international obligations of States, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act.[196] An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by ICJ or another tribunal, etc.). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula "regardless of its origin" refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. The word "source" is sometimes used in this context, as in the preamble to the Charter of the United Nations which stresses the need to respect "the obligations arising from treaties and other sources of international law". The word "origin", which has the same meaning, is not attended by the doubts and doctrinal debates the term "source" has provoked.

(4) According to article 12, the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.[197] Moreover, these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus, international courts and tribunals have treated responsibility as arising for a State by reason of any "violation of a duty imposed by an international juridical standard".[198] In the *"Rainbow Warrior"* arbitration, the tribunal said that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation".[199] In the *Gabčíkovo-Nagymaros Project* case, ICJ referred to the relevant draft article provisionally adopted by the Commission in 1976 in support of the proposition that it is "well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect".[200]

(5) Thus, there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*. In the *"Rainbow Warrior"* arbitration, the tribunal affirmed that "in the field of international law there is no distinction between contractual and tortious responsibility".[201] As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the "civil" and "criminal" responsibility as is the case in internal legal systems.

(6) State responsibility can arise from breaches of bilateral obligations or of obligations owed to some States

[194] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

[195] *ELSI* (see footnote 85 above), p. 50, para. 70.

[196] Thus, France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand* v. *France)*, *ibid.*, p. 457. The extent of the obligation thereby undertaken was clarified in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand* v. *France) Case, Order of 22 September 1995, I.C.J. Reports 1995*, p. 288.

[197] ICJ has recognized "[t]he existence of identical rules in international treaty law and customary law" on a number of occasions, *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 95, para. 177; see also *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63.

[198] *Dickson Car Wheel Company* (see footnote 42 above); cf. the *Goldenberg* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 901, at pp. 908–909 (1928); *International Fisheries Company* (footnote 43 above), p. 701 ("some principle of international law"); and *Armstrong Cork Company* (footnote 45 above), p. 163 ("any rule whatsoever of international law").

[199] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75. See also *Barcelona Traction* (footnote 25 above), p. 46, para. 86 ("breach of an international obligation arising out of a treaty or a general rule of law").

[200] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 38, para. 47. The qualification "likely to be involved" may have been inserted because of possible circumstances precluding wrongfulness in that case.

[201] *"Rainbow Warrior"* (see footnote 46 above), p. 251, para. 75.

or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Questions of the gravity of the breach and the peremptory character of the obligation breached can affect the consequences which arise for the responsible State and, in certain cases, for other States also. Certain distinctions between the consequences of certain breaches are accordingly drawn in Parts Two and Three of these articles.[202] But the regime of State responsibility for breach of an international obligation under Part One is comprehensive in scope, general in character and flexible in its application: Part One is thus able to cover the spectrum of possible situations without any need for further distinctions between categories of obligation concerned or the category of the breach.

(7) Even fundamental principles of the international legal order are not based on any special source of law or specific law-making procedure, in contrast with rules of constitutional character in internal legal systems. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts. But this is an issue belonging to the content of State responsibility.[203] So far at least as Part One of the articles is concerned, there is a unitary regime of State responsibility which is general in character.

(8) Rather similar considerations apply with respect to obligations arising under the Charter of the United Nations. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The special importance of the Charter, as reflected in its Article 103,[204] derives from its express provisions as well as from the virtually universal membership of States in the United Nations.

(9) The general scope of the articles extends not only to the conventional or other origin of the obligation breached but also to its subject matter. International awards and decisions specifying the conditions for the existence of an internationally wrongful act speak of the breach of an international obligation without placing any restriction on the subject matter of the obligation breached.[205] Courts and tribunals have consistently affirmed the principle that there is no *a priori* limit to the subject matters on which States may assume international obligations. Thus, PCIJ stated in its first judgment, in the *S.S. "Wimbledon"* case, that "the right of entering into international engagements is an attribute of State sovereignty".[206] That proposition has often been endorsed.[207]

(10) In a similar perspective, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same description. That proposition formed the basis of an objection to the jurisdiction of ICJ in the *Oil Platforms* case. It was argued that a treaty of friendship, commerce and navigation could not in principle have been breached by conduct involving the use of armed force. The Court responded in the following terms:

> The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not *per se* excluded from the reach of the Treaty of 1955.[208]

Thus, the breach by a State of an international obligation constitutes an internationally wrongful act, whatever the subject matter or content of the obligation breached, and whatever description may be given to the non-conforming conduct.

(11) Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, "regardless of its … character". In practice, various classifications of international obligations have been adopted. For example, a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive,[209] and it does not seem to bear specific or direct consequences as far as the present articles are concerned. In the *Colozza* case, for example, the European Court of Human Rights was concerned with the trial in absentia of a person who, without actual notice of his trial, was sentenced to six years' imprisonment and was not allowed subsequently to contest his conviction.

[202] See Part Three, chapter II and commentary; see also article 48 and commentary.

[203] See articles 40 and 41 and commentaries.

[204] According to which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

[205] See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above); *Factory at Chorzów, Merits* (*ibid.*); and *Reparation for Injuries* (footnote 38 above). In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (footnote 39 above), p. 228.

[206] *S.S. "Wimbledon"* (see footnote 34 above), p. 25.

[207] See, e.g., *Nottebohm, Second Phase*, *Judgment, I.C.J. Reports 1955*, p. 4, at pp. 20–21; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6, at p. 33; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 131, para. 259.

[208] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at pp. 811–812, para. 21.

[209] Cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 77, para. 135, where the Court referred to the parties having accepted "obligations of conduct, obligations of performance, and obligations of result".

He claimed that he had not had a fair hearing, contrary to article 6, paragraph 1, of the European Convention on Human Rights. The Court noted that:

> The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 § 1 in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved ... For this to be so, the resources available under domestic law must be shown to be effective and a person "charged with a criminal offence" ... must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*.[210]

The Court thus considered that article 6, paragraph 1, imposed an obligation of result.[211] But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare the result required (the opportunity for a trial in the accused's presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather, it examined what more Italy could have done to make the applicant's right "effective".[212] The distinction between obligations of conduct and result was not determinative of the actual decision that there had been a breach of article 6, paragraph 1.[213]

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down that is applicable to all cases.[214] Certain obligations may be breached by the mere passage of incompatible legislation.[215] Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility.[216] In other circumstances, the enactment of legislation may not in and of itself amount to a breach,[217] especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.[218]

### *Article 13. International obligation in force for a State*

**An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.**

*Commentary*

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when the State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case:

> [A] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.[219]

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute … unless …") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the

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[210] *Colozza* v. *Italy, Eur. Court H.R., Series A, No. 89* (1985), pp. 15–16, para. 30, citing *De Cubber* v. *Belgium, ibid., No. 86* (1984), p. 20, para. 35.

[211] Cf. *Plattform "Ärzte für das Leben"* v. *Austria*, in which the Court gave the following interpretation of article 11:

> "While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used … In this area the obligation they enter into under article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved" (*Eur. Court H.R., Series A, No. 139*, p. 12, para. 34 (1988)).

In the *Colozza* case (see footnote 210 above), the Court used similar language but concluded that the obligation was an obligation of result. Cf. C. Tomuschat, "What is a 'breach' of the European Convention on Human Rights?", *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*, Lawson and de Blois, eds. (Dordrecht, Martinus Nijhoff, 1994), vol. 3, p. 315, at p. 328.

[212] *Colozza* case (see footnote 210 above), para. 28.

[213] See also *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Iran-U.S. C.T.R., vol. 32, p. 115 (1996).

[214] Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (footnote 83 above), p. 30, para. 42.

[215] A uniform law treaty will generally be construed as requiring immediate implementation, i.e. as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, e.g., B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale*, vol. 24 (1988), p. 233.

[216] See article 4 and commentary. For illustrations, see, e.g., the findings of the European Court of Human Rights in *Norris* v. *Ireland*, *Eur. Court H.R., Series A, No. 142*, para. 31 (1988), citing *Klass and Others* v. *Germany, ibid., No. 28*, para. 33 (1978); *Marckx* v. *Belgium, ibid., No. 31*, para. 27 (1979); *Johnston and Others* v. *Ireland, ibid., No. 112*, para. 42 (1986); *Dudgeon* v. *the United Kingdom, ibid., No. 45*, para. 41 (1981); and *Modinos* v. *Cyprus, ibid., No. 259*, para. 24 (1993). See also *International responsibility for the promulgation and enforcement of laws in violation of the Convention (arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC–14/94, Inter-American Court of Human Rights, Series A, No. 14 (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC–3/83, Series A, No. 3 (1983).

[217] As ICJ held in *LaGrand*, *Judgment* (see footnote 119 above), p. 497, paras. 90–91.

[218] See, e.g., WTO, Report of the Panel (footnote 73 above), paras. 7.34–7.57.

[219] *Island of Palmas* (Netherlands/United States of America), UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928). Generally on intertemporal law, see resolution I adopted in 1975 by the Institute of International Law at its Wiesbaden session, *Annuaire de l'Institut de droit international*, vol. 56 (1975), pp. 536–540; for the debate, *ibid.*, pp. 339–374; for M. Sørensen's reports, *ibid.*, vol. 55 (1973), pp. 1–116. See further W. Karl, "The time factor in the law of State responsibility", Spinedi and Simma, eds., *op. cit.* (footnote 175 above), p. 95.

conduct of British authorities who had seized United States vessels engaged in the slave trade and freed slaves belonging to United States nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was "contrary to the law of nations". Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.[220] The later incidents occurred when the slave trade had been "prohibited by all civilized nations" and did not involve the responsibility of Great Britain.[221]

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal hunting outside Russia's territorial waters should be considered internationally wrongful. In his award in the *"James Hamilton Lewis"* case, he observed that the question had to be settled "according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel".[222] Since, under the principles in force at the time, Russia had no right to seize the United States vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.[223] The same principle has consistently been applied by the European Commission and the European Court of Human Rights to deny claims relating to periods during which the European Convention on Human Rights was not in force for the State concerned.[224]

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements,[225] and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed.[226]

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the 1969 Vienna Convention, this does not entail any retrospective assumption of responsibility. Article 71, paragraph 2 (*b*), provides that such a new peremptory norm "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm".

(6) Accordingly, it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is, however, without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State. In fact, cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (art. 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.[227]

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as ICJ said in the *Northern Cameroons* case:

> [I]f during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust.[228]

Similarly, in the *"Rainbow Warrior"* arbitration, the arbitral tribunal held that, although the relevant treaty obli-

[220] See the *"Enterprize"* case, Lapradelle-Politis (footnote 139 above), vol. I, p. 703 (1855); and Moore, *History and Digest*, vol. IV, p. 4349, at p. 4373. See also the *"Hermosa"* and *"Créole"* cases, Lapradelle-Politis, *op. cit*., p. 704 (1855); and Moore, *History and Digest*, vol. IV, pp. 4374–4375.

[221] See the *"Lawrence"* case, Lapradelle-Politis, *op. cit*., p. 741; and Moore, *History and Digest*, vol. III, p. 2824. See also the *"Volusia"* case, Lapradelle-Politis, *op. cit*., p. 741.

[222] *Affaire des navires Cape Horn Pigeon, James Hamilton Lewis, C. H. White et Kate and Anna*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 66, at p. 69 (1902).

[223] See also the *"C. H. White"* case, *ibid.*, p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See further the *S.S. "Lisman"* case, *ibid.*, vol. III (Sales No. 1949.V.2), p. 1767, at p. 1771 (1937).

[224] See, e.g., *X* v. *Germany*, application No. 1151/61, Council of Europe, European Commission of Human Rights, *Recueil des décisions*, No. 7 (March 1962), p. 119 (1961) and many later decisions.

[225] See, e.g., Declarations exchanged between the Government of the United States of America and the Imperial Government of Russia, for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships, UNRIAA, vol. IX (Sales No. 59.V.5), p. 57 (1900).

[226] See, e.g., P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en droit international public: problèmes de droit intertemporel ou de droit transitoire* (Paris, Librairie générale de droit et de jurisprudence, 1970), pp. 119, 135 and 292; D. Bindschedler-Robert, "De la rétroactivité en droit international public", *Recueil d'études de droit international en hommage à Paul Guggenheim* (University of Geneva Law Faculty/Graduate Institute of International Studies, 1968), p. 184; M. Sørensen, "Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme", *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T. O. Elias, "The doctrine of intertemporal law", AJIL, vol. 74, No. 2 (April 1980), p. 285; and R. Higgins, "Time and the law: international perspectives on an old problem", *International and Comparative Law Quarterly*, vol. 46 (July 1997), p. 501.

[227] As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, especially paragraph (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.

[228] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 15, at p. 35.

gation had terminated with the passage of time, France's responsibility for its earlier breach remained.[229]

(8) Both aspects of the principle are implicit in the ICJ decision in the *Certain Phosphate Lands in Nauru* case. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947–1968) could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.[230] But it went on to say that:

> [I]t will be for the Court, in due time, to ensure that Nauru's delay in seising [*sic*] it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law.[231]

Evidently, the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. Its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had subsequently terminated.[232]

(9) The basic principle stated in article 13 is thus well established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the *Namibia* case.[233] But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases,[234] but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.[235]

[229] *"Rainbow Warrior"* (see footnote 46 above), pp. 265–266.

[230] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 253–255, paras. 31–36. See article 45, subparagraph (*b*), and commentary.

[231] *Certain Phosphate Lands in Nauru*, *ibid.*, p. 255, para. 36.

[232] The case was settled before the Court had the opportunity to consider the merits: *Certain Phosphate Lands in Nauru, Order of 13 September 1993, I.C.J. Reports 1993*, p. 322; for the settlement agreement, see Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (Nauru, 10 August 1993) (United Nations, *Treaty Series*, vol. 1770, No. 30807, p. 379).

[233] *Namibia* case (see footnote 176 above), pp. 31–32, para. 53.

[234] See, e.g., *Tyrer* v. *the United Kingdom, Eur. Court H.R., Series A, No. 26*, pp. 15–16 (1978).

[235] See, e.g., *Zana* v. *Turkey*, *Eur. Court H.R., Reports*, 1997–VII, p. 2533 (1997); and J. Pauwelyn, "The concept of a 'continuing violation' of an international obligation: selected problems", BYBIL, *1995*, vol. 66, p. 415, at pp. 443–445.

### *Article 14. Extension in time of the breach of an international obligation*

**1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.**

**2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.**

**3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.**

*Commentary*

(1) The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently[236] and has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30. Although the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach, certain basic concepts are established. These are introduced in article 14. Without seeking to be comprehensive in its treatment of the problem, article 14 deals with several related questions. In particular, it develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively), and it also deals with the application of that distinction to the important case of obligations of prevention. In each of these cases it takes into account the question of the continuance in force of the obligation breached.

(2) Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with *paragraph 1*, a completed act occurs "at the moment when the act is performed", even though its effects or consequences may continue. The words "at the moment" are intended to provide a more precise description of the time frame when a completed wrongful act is performed,

[236] See, e.g., *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 35; *Phosphates in Morocco* (footnote 34 above), pp. 23–29; *Electricity Company of Sofia and Bulgaria, Judgment, 1939*, *P.C.I.J., Series A/B, No. 77*, p. 64, at pp. 80–82; and *Right of Passage over Indian Territory* (footnote 207 above), pp. 33–36. The issue has often been raised before the organs of the European Convention on Human Rights. See, e. g., the decision of the European Commission of Human Rights in the *De Becker* v. *Belgium* case, application No. 214/56, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 214, at pp. 234 and 244; and the Court's judgments in *Ireland* v. *the United Kingdom, Eur. Court H.R., Series A, No. 25*, p. 64 (1978); *Papamichalopoulos and Others* v. *Greece, ibid., No. 260–B*, para. 40 (1993); and *Agrotexim and Others* v. *Greece, ibid., No. 330–A*, p. 22, para. 58 (1995). See also E. Wyler, "Quelques réflexions sur la réalisation dans le temps du fait internationalement illicite", RGDIP, vol. 95, p. 881 (1991).

without requiring that the act necessarily be completed in a single instant.

(3) In accordance with *paragraph 2*, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.[237] Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.[238] The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, "creeping" or disguised occupation, however, may well be different.[239] Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act.[240]

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect, it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.[241] It has been repeatedly referred to by ICJ and by other international tribunals. For example, in the *United States Diplomatic and Consular Staff in Tehran* case, the Court referred to "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963".[242]

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, the *"Rainbow Warrior"* arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand. The arbitral tribunal referred with approval to the Commission's draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

> Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features.[243]

The tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.[244]

(9) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases. The issue arises because the Court's jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus, in the *Papamichalopoulos* case, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court's competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of the Protocol to the European Convention on Human Rights,

[237] See article 13 and commentary, especially para. (2).

[238] *Blake*, Inter-American Court of Human Rights, Series C, No. 36, para. 67 (1998).

[239] *Papamichalopoulos* (see footnote 236 above).

[240] *Loizidou*, *Merits* (see footnote 160 above), p. 2216.

[241] H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula "situations or facts prior to a given date" used in some declarations of acceptance of the compulsory jurisdiction of ICJ.

[242] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 37, para. 80. See also pages 36–37, paras. 78–79.

[243] *"Rainbow Warrior"* (see footnote 46 above), p. 264, para. 101.

[244] *Ibid*., pp. 265–266, paras. 105–106. But see the separate opinion of Sir Kenneth Keith, *ibid*., pp. 279–284.

which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.[245]

(10) In the *Loizidou* case,[246] similar reasoning was applied by the Court to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 Constitution so that the expropriation was not completed at that time and the property continued to belong to the applicant. The conduct of the Turkish Republic and of Turkish troops in denying the applicant access to her property continued after Turkey's acceptance of the Court's jurisdiction, and constituted a breach of article 1 of the Protocol to the European Convention on Human Rights after that time.[247]

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, although the loss had occurred at the time of her marriage in 1970 and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was:

> not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol … In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status … at the time of her marriage in 1970 …
>
> The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date.[248]

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was sufficient to constitute a breach of article 27 of the International Covenant on Civil and Political Rights after that date. Here the notion of a continuing breach was relevant not only to the Committee's jurisdiction but also to the application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus, conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State responsibility. For example, the obligation of cessation contained in article 30 applies to continuing wrongful acts.

(13) A question common to wrongful acts whether completed or continuing is when a breach of international law occurs, as distinct from being merely apprehended or imminent. As noted in the context of article 12, that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,[249] incitement or attempt,[250] in which case the threat, incitement or attempt is itself a wrongful act. On the other hand, where the internationally wrongful act is the occurrence of some event—e.g. the diversion of an international river—mere preparatory conduct is not necessarily wrongful.[251] In the *Gabčíkovo-Nagymaros Project* case, the question was when the diversion scheme ("Variant C") was put into effect. ICJ held that the breach did not occur until the actual diversion of the Danube. It noted:

> that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.
>
> Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act". [252]

Thus, the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a

[245] See footnote 236 above.

[246] *Loizidou, Merits* (see footnote 160 above), p. 2216.

[247] *Ibid*., pp. 2230–2232 and 2237–2238, paras. 41–47 and 63–64. See, however, the dissenting opinion of Judge Bernhardt, p. 2242, para. 2 (with whom Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed). See also *Loizidou, Preliminary Objections* (footnote 160 above), pp. 33–34, paras. 102–105; and *Cyprus* v. *Turkey*, application No. 25781/94, judgement of 10 May 2001, *Eur. Court H.R., Reports*, 2001–IV.

[248] *Lovelace* v. *Canada*, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40* (A/36/40), annex XVIII, communication No. R.6/24, p. 172, paras. 10–11 (1981).

[249] Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits "the threat or use of force against the territorial integrity or political independence of any state". For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), pp. 246–247, paras. 47–48; see also R. Sadurska, "Threats of force", AJIL, vol. 82, No. 2 (April 1988), p. 239.

[250] A particularly comprehensive formulation is that of article III of the Convention on the Prevention and Punishment of the Crime of Genocide which prohibits conspiracy, direct and public incitement, attempt and complicity in relation to genocide. See also article 2 of the International Convention for the Suppression of Terrorist Bombings and article 2 of the International Convention for the Suppression of the Financing of Terrorism.

[251] In some legal systems, the notion of "anticipatory breach" is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See K. Zweigert and H. Kötz, *Introduction to Comparative Law*, 3rd rev. ed., trans. T. Weir (Oxford, Clarendon Press, 1998), p. 508. Other systems achieve similar results without using this concept, e.g. by construing a refusal to perform in advance of the time for performance as a "positive breach of contract", *ibid*., p. 494 (German law). There appears to be no equivalent in international law, but article 60, paragraph 3 (*a*), of the 1969 Vienna Convention defines a material breach as including "a repudiation … not sanctioned by the present Convention". Such a repudiation could occur in advance of the time for performance.

[252] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 54, para. 79, citing the draft commentary to what is now article 30.

breach if it does not "predetermine the final decision to be taken". Whether that is so in any given case will depend on the facts and on the content of the primary obligation. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The various possibilities are intended to be covered by the use of the term "occurs" in paragraphs 1 and 3 of article 14.

(14) *Paragraph 3* of article 14 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the breach of obligations to prevent the occurrence of a given event. Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State is bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration,[253] was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.[254] If the obligation in question has ceased, any continuing conduct by definition ceases to be wrongful at that time.[255] Both qualifications are intended to be covered by the phrase in paragraph 3, "and remains not in conformity with that obligation".

### *Article 15. Breach consisting of a composite act*

**1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.**

**2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.**

*Commentary*

(1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.

(2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is "a series of acts or omissions defined in aggregate as wrongful". Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc. Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15.[256]

(3) Even though it has special features, the prohibition of genocide, formulated in identical terms in the Convention on the Prevention and Punishment of the Crime of Genocide and in later instruments,[257] may be taken as an illustration of a "composite" obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice. According to article II, subparagraph (*a*), of the Convention, the prime case of genocide is "[k]illing members of the [national, ethnical, racial or religious] group" with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Genocide has also to be carried out with the relevant intention, aimed at physically eliminating the group "as such". Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.[258]

(4) It is necessary to distinguish composite obligations from simple obligations breached by a "composite" act. Composite acts may be more likely to give rise to

[253] *Trail Smelter*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905 (1938, 1941).

[254] An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated.

[255] See the *"Rainbow Warrior"* case (footnote 46 above), p. 266.

[256] See further J. J. A. Salmon, "Le fait étatique complexe: une notion contestable", *Annuaire français de droit international*, vol. 28 (1982), p. 709.

[257] See, e.g., article 4 of the statute of the International Tribunal for the Former Yugoslavia, originally published as an annex to document S/25704 and Add.1, approved by the Security Council in its resolution 827 (1993) of 25 May 1993, and amended on 13 May 1998 by resolution 1166 (1998) and on 30 November 2000 by resolution 1329 (2000); article 2 of the statute of the International Tribunal for Rwanda, approved by the Security Council in its resolution 955 (1994) of 8 November 1994; and article 6 of the Rome Statute of the International Criminal Court.

[258] The intertemporal principle does not apply to the Convention, which according to its article I is declaratory. Thus, the obligation to prosecute relates to genocide whenever committed. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), p. 617, para. 34.

continuing breaches, but simple acts can cause continuing breaches as well. The position is different, however, where the obligation itself is defined in terms of the cumulative character of the conduct, i.e. where the cumulative conduct constitutes the essence of the wrongful act. Thus, apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.

(5) In *Ireland* v. *the United Kingdom*, Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland which was said to amount to torture or inhuman or degrading treatment, and the case was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article VII of the Convention on the Prevention and Punishment of the Crime of Genocide, and to call for its cessation. As the Court said:

> A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches* ...*
>
> The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in Article 26 of the Convention, applies to State applications ... in the same way as it does to "individual" applications ... On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice.[259]

In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

(6) A further distinction must be drawn between the necessary elements of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination by a State is internationally wrongful,[260] even though it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In its essence such discrimination is not a composite act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act.

(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.

(8) *Paragraph 1* of article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. Further, the fact that the series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

(9) While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example, the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful. Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.

(10) *Paragraph 2* of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.

(11) The word "remain" in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In

[259] *Ireland* v. *the United Kingdom* (see footnote 236 above), p. 64, para. 159; see also page 63, para. 157. See further the United States counterclaim in *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190, which likewise focuses on a general situation rather than specific instances.

[260] See, e.g., article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; and article 26 of the International Covenant on Civil and Political Rights.

cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).

## Chapter IV

## RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

### *Commentary*

(1) In accordance with the basic principles laid down in chapter I, each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under chapter II which is in breach of an international obligation of that State in accordance with chapter III.[261] The principle that State responsibility is specific to the State concerned underlies the present articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.[262] This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be that a number of States act through a common organ to commit a wrongful act.[263] Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can coexist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In the *Certain Phosphate Lands in Nauru* case, proceedings were commenced against Australia alone in respect of acts performed on the "joint behalf" of the three States.[264] The acts performed by Australia involved both "joint" conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely "placed at the disposal" of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State's conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached its own international obligations. For example, in the *Soering* case the European Court of Human Rights held that the proposed extradition of a person to a State not party to the European Convention on Human Rights where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.[265] Alternatively, a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from such conduct. Thus, the basis of responsibility in the *Corfu Channel* case[266] was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for

[261] See, in particular, article 2 and commentary.

[262] See M. L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); Brownlie, *System of the Law of Nations* … (footnote 92 above), pp. 189–192; J. Quigley, "Complicity in international law: a new direction in the law of State responsibility", BYBIL, *1986*, vol. 57, p. 77; J. E. Noyes and B. D. Smith, "State responsibility and the principle of joint and several liability", *Yale Journal of International Law*, vol. 13 (1988), p. 225; and B. Graefrath, "Complicity in the law of international responsibility", *Revue belge de droit international*, vol. 29 (1996), p. 370.

[263] In some cases, the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present articles. See article 57 and commentary.

[264] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, *ibid*., p. 284.

[265] *Soering* v. *the United Kingdom*, *Eur. Court H.R., Series A, No. 161*, pp. 33–36, paras. 85–91 (1989). See also *Cruz Varas and Others* v. *Sweden*, *ibid.*, *No. 201*, p. 28, paras. 69–70 (1991); and *Vilvarajah and Others* v. *the United Kingdom, ibid.*, *No. 215*, p. 37, paras. 115–116 (1991).

[266] *Corfu Channel, Merits* (see footnote 35 above), p. 22.

the coercion would be,[267] an internationally wrongful act on the part of the coerced State. In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is, or but for the coercion would be, a breach of that State's international obligations. The implication of the second State in that breach arises from the special circumstance of its willing assistance in, its direction and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a mere supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility.[268] It is justified on the basis that responsibility under chapter IV is in a sense derivative.[269] In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the "general part" of the law of obligations. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II.

(8) On the other hand, the situations covered in chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the 1969 Vienna Convention, that a "treaty does not create either obligations or rights for a third State without its consent"; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful. Thus, it is necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus, the articles in this chapter require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of "wrongful intent" in matters of State responsibility, on which the articles are neutral.[270]

(9) Similar considerations dictate the exclusion of certain situations of "derived responsibility" from chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.[271] However, there can be specific treaty obligations prohibiting incitement under certain circumstances.[272] Another concerns the issue which is described in some systems of internal law as being an "accessory after the fact". It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

### *Article 16. Aid or assistance in the commission of an internationally wrongful act*

**A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:**

**(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and**

**(*b*) the act would be internationally wrongful if committed by that State.**

[267] If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

[268] See paras. (1)–(2) and (4) of the general commentary for an explanation of the distinction.

[269] Cf. the term *responsabilité dérivée* used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco* (footnote 44 above), p. 648.

[270] See above, the commentary to paragraphs (3) and (10) of article 2.

[271] See the statement of the United States-French Commissioners relating to the *French Indemnity of 1831* case in Moore, *History and Digest*, vol. V, p. 4447, at pp. 4473–4476. See also *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 129, para. 255, and the dissenting opinion of Judge Schwebel, p. 389, para. 259.

[272] See, e.g., article III (*c*) of the Convention on the Prevention and Punishment of the Crime of Genocide; and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

*Commentary*

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term "by the latter" in the *chapeau* to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.[273] Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph 5, of the Charter of the United Nations, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act". A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State *vis-à-vis* third States. This basic principle is also embodied in articles 34 and 35 of the 1969 Vienna Convention. Correspondingly, a State is free to act for itself in a way which is inconsistent with the obligations of another State *vis-à-vis* third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided *vis-à-vis* the injured State. Thus, it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 the Islamic Republic of Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.[274] The Government of the United Kingdom denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.[275] In 1998, a similar allegation surfaced that the Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.[276]

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic of Germany

[273] See, e.g., the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex); and article 3 (*f*) of the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex).

[274] *The New York Times*, 6 March 1984, p. A1.

[275] *Ibid.*, 5 March 1984, p. A3.

[276] *Ibid.*, 26 August 1998, p. A8.

in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.[277] Another example arises from the Tripoli bombing incident in April 1986. The Libyan Arab Jamahiriya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of United States fighter planes to attack Libyan targets.[278] The Libyan Arab Jamahiriya asserted that the United Kingdom "would be held partly responsible" for having "supported and contributed in a direct way" to the raid.[279] The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on United States targets.[280] A proposed Security Council resolution concerning the attack was vetoed, but the General Assembly issued a resolution condemning the "military attack" as "a violation of the Charter of the United Nations and of international law", and calling upon all States "to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya".[281]

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the Security Council[282] or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.[283] Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.[284] In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. ICJ has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, "it would have to rule, as a prerequisite, on the lawfulness"[285] of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.[286] That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover, that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

### *Article 17. Direction and control exercised over the commission of an internationally wrongful act*

**A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:**

**(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and**

[277] For the text of the note from the Federal Government, see *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 20 (August 1960), pp. 663–664.

[278] See United States of America, *Department of State Bulletin*, No. 2111 (June 1986), p. 8.

[279] See the statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris, *The Times*, 16 April 1986, p. 6.

[280] Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986), reprinted in BYBIL, *1986*, vol. 57, pp. 637–638.

[281] General Assembly resolution 41/38 of 20 November 1986, paras. 1 and 3.

[282] See, e.g., Report by President Clinton, AJIL, vol. 91, No. 4 (October 1997), p. 709.

[283] Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII (A/37/745), p. 50.

[284] For the question of concurrent responsibility of several States for the same injury, see article 47 and commentary.

[285] *East Timor* (see footnote 54 above), p. 105, para. 35.

[286] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 261, para. 55.

**(*b*) the act would be internationally wrongful if committed by that State.**

*Commentary*

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16, a State providing aid or assistance with a view to the commission of an internationally wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as "suzerainty" or "protectorate" warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States of America in Morocco*,[287] France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court's judgment would be binding both on France and on Morocco,[288] and the case proceeded on that basis.[289] The Court's judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the application and by the United States counterclaim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that "the responsibility of the protecting State … proceeds … from the fact that the protecting State alone represents the protected territory in its international relations",[290] and that the protecting State is answerable "in place of the protected State".[291] The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.[292] The justification for such an acceptance was not based on the relationship of "representation" as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories, fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State, the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other State: the normal principles specified in articles 4 to 9 of the draft articles apply, and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.[293]

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus, the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.[294] In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because

[287] *Rights of Nationals of the United States of America in Morocco* (see footnote 108 above), p. 176.

[288] *Ibid*., *I.C.J. Pleadings*, vol. I, p. 235; and vol. II, pp. 431–433; the United States thereupon withdrew its preliminary objection: *ibid*., p. 434.

[289] See *Rights of Nationals of the United States of America in Morocco* (footnote 108 above), p. 179.

[290] *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 649.

[291] *Ibid*., p. 648.

[292] *Ibid*.

[293] See, e.g., *LaGrand, Provisional Measures* (footnote 91 above).

[294] See R. Ago, "L'occupazione bellica di Roma e il Trattato lateranense", *Comunicazioni e Studi* (Milan, Giuffrè, 1945), vol. II, pp. 167–168.

the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Brown* case, for example, the arbitral tribunal held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, "fell far short of what would be required to make her responsible for the wrong inflicted upon Brown".[295] It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence "that Great Britain ever did undertake to interfere in this way".[296] Accordingly, the relation of suzerainty "did not operate to render Great Britain liable for the acts complained of".[297] In the *Heirs of the Duc de Guise* case, the Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a time when it was under Allied occupation. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. Rather, the majority pointed to the absence in fact of any "intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees".[298] The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.[299]

(7) In the formulation of article 17, the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, "*direction and control*", raised some problems in other languages, owing in particular to the ambiguity of the term "*direction*" which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence of "superior orders" does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State's conduct may not be precluded under chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, e.g. *force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely, it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

### *Article 18. Coercion of another State*

**A State which coerces another State to commit an act is internationally responsible for that act if:**

**(*a*) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and**

**(*b*) the coercing State does so with knowledge of the circumstances of the act.**

*Commentary*

(1) The third case of derived responsibility dealt with by chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State's obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State *vis-à-vis* the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State *vis-à-vis* a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the

[295] *Robert E. Brown (United States)* v. *Great Britain*, UNRIAA, vol. VI (Sales No. 1955.V.3), p. 120, at p. 130 (1923).

[296] *Ibid*., p. 131.

[297] *Ibid*.

[298] *Heirs of the Duc de Guise* (see footnote 115 above). See also, in another context, *Drozd and Janousek* v. *France and Spain* (footnote 135 above); see also *Iribarne Pérez* v. *France*, *Eur. Court H.R., Series A, No. 325–C*, pp. 62–63, paras. 29–31 (1995).

[299] It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)*, Kammergericht of Berlin, ILR, vol. 44, p. 301, at pp. 340–342 (1965).

coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.[300] As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, e.g. because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, i.e. coercive interference, in the affairs of another State. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.[301] However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded *vis-à-vis* the injured third State. This is reflected in the phrase "but for the coercion" in subparagraph (*a*) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded *vis-à-vis* the coerced State. Therefore, the act is not described as an internationally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded *vis-à-vis* the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct. The reference to "circumstances" in subparagraph (*b*) is understood as reference to the factual situation rather than to the coercing State's judgement of the legality of the act. This point is clarified by the phrase "circumstances of the act". Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State's obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by a United States company on the orders of the Government of Romania during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been "compelled" by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed "a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out on the territory of that Ally".[302] The British Government denied responsibility, asserting that its influence over the conduct of the Romanian authorities "did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause".[303] The point of disagreement between the Governments of the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of "compulsion" in the particular circumstances of the case.[304]

### *Article 19. Effect of this chapter*

**This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.**

*Commentary*

(1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.

(2) Secondly, the article makes clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful. The phrase "under

[300] P. Reuter, *Introduction to the Law of Treaties*, 2nd rev. ed. (London, Kegan Paul International, 1995), paras. 271–274.

[301] See article 49, para. 2, and commentary.

[302] Note from the United States Embassy in London, dated 16 February 1925, in Hackworth, *op. cit.* (footnote 142 above), p. 702.

[303] Note from the British Foreign Office dated 5 July 1928, *ibid.*, p. 704.

[304] For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice, see C. L. Bouvé, "Russia's liability in tort for Persia's breach of contract", AJIL, vol. 6, No. 2 (April 1912), p. 389.

other provisions of these articles" is a reference, *inter alia*, to article 23 (*Force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.

(3) Thirdly, article 19 preserves the responsibility "of any other State" to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

(4) Thus, article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance, or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

## CHAPTER V

## CIRCUMSTANCES PRECLUDING WRONGFULNESS

### *Commentary*

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (art. 20), self-defence (art. 21), countermeasures (art. 22), *force majeure* (art. 23), distress (art. 24) and necessity (art. 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistent with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,[305] they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by ICJ in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obligations under the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System was precluded by necessity. In dealing with the Hungarian plea, the Court said:

> The state of necessity claimed by Hungary—supposing it to have been established—thus could not permit of the conclusion that ... it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did.[306]

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, "the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present".[307]

(3) This distinction emerges clearly from the decisions of international tribunals. In the *"Rainbow Warrior"* arbitration, the tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force, including the question whether the wrongfulness of the conduct in question was precluded.[308] In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

> [E]ven if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but—unless the parties by mutual agreement terminate the treaty—it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.[309]

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the 1969 Vienna Convention, the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory

[305] For example, by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

[306] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 39, para. 48.

[307] *Yearbook ... 1959*, vol. II, p. 41, document A/CN.4/120.

[308] *"Rainbow Warrior"* (see footnote 46 above), pp. 251–252, para. 75.

[309] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 101; see also page 38, para. 47.

Committee of the 1930 Hague Conference. Among its Bases of discussion,[310] it listed two "[c]ircumstances under which States can decline their responsibility", self-defence and reprisals.[311] It considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by ILC in its work on international responsibility for injuries to aliens[312] and the performance of treaties.[313] In the event, the subject of excuses for the non-performance of treaties was not included within the scope of the 1969 Vienna Convention.[314] It is a matter for the law on State responsibility.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.[315] On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.[316] Certain other candidates have been excluded. For example, the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.[317] The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.[318] The so-called "clean hands" doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.[319]

### *Article 20. Consent*

**Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.**

*Commentary*

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part One. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of

[310] *Yearbook ... 1956*, vol. II, pp. 219–225, document A/CN.4/96.

[311] *Ibid*., pp. 224–225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

[312] *Yearbook ... 1958*, vol. II, p. 72. For the discussion of the circumstances by Special Rapporteur García Amador, see his first report on State responsibility, *Yearbook ... 1956*, vol. II, pp. 203–209, document A/CN.4/96, and his third report on State responsibility, *Yearbook ... 1958*, vol. II, pp. 50–55, document A/CN.4/111.

[313] See the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote 307 above), pp. 44–47, and his comments, *ibid*., pp. 63–74.

[314] See article 73 of the Convention.

[315] See the comparative review by C. von Bar, *The Common European Law of Torts* (Oxford University Press, 2000), vol. 2, pp. 499–592.

[316] For the effect of contribution to the injury by the injured State or other person or entity, see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

[317] Cf. *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*, p. 4, especially at pp. 50 and 77. See also the fourth report on the law of treaties of Special Rapporteur Fitzmaurice (footnote 307 above), pp. 43–47; D. W. Greig, "Reciprocity, proportionality and the law of treaties", *Virginia Journal of International Law*, vol. 34 (1994), p. 295; and for a comparative review, G. H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1988), pp. 245–317. For the relationship between the exception of non-performance and countermeasures, see below, paragraph (5) of commentary to Part Three, chap. II.

[318] See, e.g., *Factory at Chorzów, Jurisdiction* (footnote 34 above), p. 31; cf. *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 67, para. 110.

[319] See J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), pp. 392–394.

conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty, the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.[320] But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast, cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be "valid". Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.[321] Indeed there may be a question whether the State could validly consent at all. The reference to a "valid consent" in article 20 highlights the need to consider these issues in certain cases.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central Government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.[322] In other cases, the "legitimacy" of the Government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State's internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to chapter V as a whole.[323]

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.[324] In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State's entering the premises of the mission.[325]

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another.[326] Furthermore, where consent is relied on to

[320] 1969 Vienna Convention, art. 54 (*b*).

[321] See, e.g., the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nuremberg Tribunal. The tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See "International Military Tribunal (Nuremberg), judgment and sentences October 1, 1946: judgment", reprinted in AJIL, vol. 41, No. 1 (January 1947) p. 172, at pp. 192–194.

[322] This issue arose with respect to the dispatch of Belgian troops to the Republic of the Congo in 1960. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, particularly the statement of the representative of Belgium, paras. 186–188 and 209.

[323] See paragraph (6) of the commentary to article 26.

[324] UNRIAA, vol. XI (Sales No. 61.V.4), p. 243, at pp. 252–255 (1911).

[325] Vienna Convention on Diplomatic Relations, art. 22, para. 1.

[326] Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the parties to the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles). Likewise, Germany's consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of Peace between the Allied and Associated Powers and Austria (Peace Treaty of Saint-Germain-en-Laye). See *Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46 and 49.

preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consent to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.[327] These limitations are indicated by the words "given act" in article 20 as well as by the phrase "within the limits of that consent".

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (art. 27, para. 1), consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State. The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application.[328] In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast, article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

### *Article 21. Self-defence*

**The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.**

*Commentary*

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4. Thus, a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4.[329]

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.[330] In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at "peace" with each other.[331] The 1969 Vienna Convention leaves such issues to one side by providing in article 73 that the Convention does not prejudice "any question that may arise in regard to a treaty ... from the outbreak of hostilities between States".

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions for the protection of war victims of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.[332] Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

(4) ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapon*s provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. The Court said:

> [T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.
>
> The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment

[327] The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

[328] See, e.g., International Covenant on Civil and Political Rights, arts. 7; 8, para. 3; 14, para. 3 (*g*); and 23, para. 3.

[329] Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 244, para. 38, and p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

[330] See further Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed. (Cambridge University Press, 1966).

[331] In *Oil Platforms, Preliminary Objection* (see footnote 208 above), it was not denied that the 1955 Treaty of Amity, Economic Relations and Consular Rights remained in force, despite many actions by United States naval forces against the Islamic Republic of Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

[332] As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79, "they constitute intransgressible principles of international customary law". On the relationship between human rights and humanitarian law in time of armed conflict, see page 240, para. 25.

is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.[333]

A State acting in self-defence is "totally restrained" by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.[334]

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence *vis-à-vis* an attacking State. But there may be effects *vis-à-vis* third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that:

> [A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.[335]

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war. Article 21 leaves open all issues of the effect of action in self-defence *vis-à-vis* third States.

(6) Thus, article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action "taken in conformity with the Charter of the United Nations". In addition, the term "lawful" implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

### *Article 22. Countermeasures in respect of an internationally wrongful act*

**The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.**

*Commentary*

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, ICJ clearly accepted that countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and … directed against that State",[336] provided certain conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the *"Naulilaa"*,[337] *"Cysne"*,[338] and *Air Service Agreement*[339] awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a "sanction", or to a "reaction" to a prior internationally wrongful act; historically the more usual terminology was that of "legitimate reprisals" or, more generally, measures of "self-protection" or "self-help". The term "sanctions" has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term "measures", not "sanctions". The term "reprisals" is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Service Agreement* arbitration,[340] the term "countermeasures" has been preferred, and it has been adopted for the purposes of the present articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State, countermeasures may be justified only in relation to that State. This is emphasized by the phrases "if and to the extent" and "countermeasures taken against" the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act.

[333] *Ibid.*, p. 242, para. 30.

[334] See, e.g., the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques.

[335] *I.C.J. Reports 1996* (see footnote 54 above), p. 261, para. 89.

[336] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

[337] *Portuguese Colonies* case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025–1026 (1928).

[338] *Ibid.*, p. 1035, at p. 1052 (1930).

[339] *Air Service Agreement* (see footnote 28 above).

[340] *Ibid.*, especially pp. 443–446, paras. 80–98.

The principle is clearly expressed in the *"Cysne"* case, where the tribunal stressed that:

> reprisals, which constitute an act in principle contrary to the law of nations, are defensible only insofar as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible.[341]

Accordingly, the wrongfulness of Germany's conduct *vis-à-vis* Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be "directed against" the responsible State.[342]

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.[343] For example, in the case of an obligation owed to the international community as a whole ICJ has affirmed that all States have a legal interest in compliance.[344] Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

### *Article 23.* Force majeure

**1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.**

**2. Paragraph 1 does not apply if:**

**(*a*) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or**

**(*b*) the State has assumed the risk of that situation occurring.**

*Commentary*

(1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.[345] It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (art. 24) or necessity (art. 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.

(2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (*a*) the act in question must be brought about by an irresistible force or an unforeseen event; (*b*) which is beyond the control of the State concerned; and (*c*) which makes it materially impossible in the circumstances to perform the obligation. The adjective "irresistible" qualifying the word "force" emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been "unforeseen" the event must have been neither foreseen nor of an easily foreseeable kind. Further the "irresistible force" or "unforeseen event" must be causally linked to the situation of material impossibility, as indicated by the words "due to *force majeure* … making it materially impossible". Subject to paragraph 2, where these elements are met, the wrongfulness of the State's conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (e.g. stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g. loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the neglect or

[341] *"Cysne"* (see footnote 338 above), pp. 1056–1057.

[342] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83.

[343] For the distinction between injured States and other States entitled to invoke State responsibility, see articles 42 and 48 and commentaries.

[344] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[345] "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine", study prepared by the Secretariat (*Yearbook … 1978*, vol. II (Part One), p. 61, document A/CN.4/315).

default of the State concerned,[346] even if the resulting injury itself was accidental and unintended.[347]

(4) In drafting what became article 61 of the 1969 Vienna Convention, ILC took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.[348] The same view was taken at the United Nations Conference on the Law of Treaties.[349] But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty on grounds of supervening impossibility, as ICJ pointed out in the *Gabčíkovo-Nagymaros Project* case:

> Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties ... Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.[350]

(5) In practice, many of the cases where "impossibility" has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred, e.g. where a State aircraft is forced, due to damage or loss of control of the aircraft owing to weather, into the airspace of another State without the latter's authorization. In such cases the principle that wrongfulness is precluded has been accepted.[351]

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone (the United Nations Convention on the Law of the Sea, art. 18, para. 2), as well as in article 7, paragraph 1, of the Convention on Transit Trade of Land-locked States. In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless, its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.[352] In the *Lighthouses* arbitration, a lighthouse owned by a French company had been requisitioned by the Government of Greece in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeure*.[353] In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.[354] *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by PCIJ in the *Serbian Loans* and *Brazilian Loans* cases.[355] More recently, in the *"Rainbow Warrior"* arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The tribunal dealt with the point briefly:

> New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of

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[346] For example, in relation to occurrences such as the bombing of La Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered (study prepared by the Secretariat, *ibid*., paras. 255–256).

[347] For example, in 1906 an American officer on the USS *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

> "While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire."

M. M. Whiteman, *Damages in International Law* (Washington, D.C., United States Government Printing Office, 1937), vol. I, p. 221. See also the study prepared by the Secretariat (footnote 345 above), para. 130.

[348] *Yearbook … 1966*, vol. II, p. 255.

[349] See, e.g., the proposal of the representative of Mexico, *United Nations Conference on the Law of Treaties, First and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 182, para. 531 (*a*).

[350] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para. 102.

[351] See, e.g., the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the study prepared by the Secretariat (footnote 345 above), paras. 250–256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946, United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XV, No. 376 (15 September 1946), p. 502, reproduced in the study prepared by the Secretariat, para. 144, and the incident provoking the application to ICJ in 1954, *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

[352] See, e.g., the decision of the American-British Claims Commission in the *Saint Albans Raid* case, Moore, *History and Digest*, vol. IV, p. 4042 (1873), and the study prepared by the Secretariat (footnote 345 above), para. 339; the decisions of the United States-Venezuela Claims Commission in the *Wipperman* case, Moore, *History and Digest*, vol. III, p. 3039, and the study prepared by the Secretariat, paras. 349–350; *De Brissot and others* case (footnote 117 above), and the study prepared by the Secretariat, para. 352; and the decision of the British-Mexican Claims Commission in the *Gill* case, UNRIAA, vol. V (Sales No. 1952.V.3), p. 157 (1931), and the study prepared by the Secretariat, para. 463.

[353] *Lighthouses* arbitration (see footnote 182 above), pp. 219–220.

[354] UNRIAA, vol. XI (Sales No. 61.V.4), p. 421, at p. 443 (1912).

[355] *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, pp. 39–40; *Brazilian Loans, Judgment No. 15, ibid., No. 21*, p. 120.

absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeur*e.[356]

(8) In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international commercial arbitration, and may qualify as a general principle of law.[357]

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company and The Republic of Burundi*, the arbitral tribunal rejected a plea of *force majeure* because "the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State ..."[358] Under the equivalent ground for termination of a treaty in article 61 of the 1969 Vienna Convention, material impossibility cannot be invoked "if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty". By analogy with this provision, *paragraph 2* (a) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For paragraph 2 (*a*) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be "due" to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Paragraph 2 (*a*) requires that the State's role in the occurrence of *force majeure* must be substantial.

(10) *Paragraph 2* (b) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.[359] Once a State accepts the responsibility for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

### *Article 24. Distress*

**1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.**

**2. Paragraph 1 does not apply if:**

**(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or**

**(*b*) the act in question is likely to create a comparable or greater peril.**

*Commentary*

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.[360] Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people's lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.[361] An example is the entry of United States military aircraft into Yugoslavia's airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav chargé d'affaires informed the United States Department of State that Marshal Tito had

[356] *"Rainbow Warrior"* (see footnote 46 above), p. 253.

[357] On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306–320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, e.g., case 145/85, *Denkavit* v. *Belgium*, *Eur. Court H.R., Reports* 1987–2, p. 565; case 101/84, *Commission of the European Communities* v. *Italian Republic*, *ibid*., *Reports* 1985–6, p. 2629. See also article 79 of the United Nations Convention on Contracts for the International Sale of Goods; P. Schlechtriem, ed., *Commentary on the UN Convention on the International Sale of Goods*, 2nd ed. (trans. G. Thomas) (Oxford, Clarendon Press, 1998), pp. 600–626; and article 7.1.7 of the UNIDROIT Principles, *Principles of International Commercial Contracts* (Rome, Unidroit, 1994), pp. 169–171.

[358] ILR, vol. 96 (1994), p. 318, para. 55.

[359] As the study prepared by the Secretariat (footnote 345 above), para. 31, points out, States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

[360] For this reason, writers who have considered this situation have often defined it as one of "relative impossibility" of complying with the international obligation. See, e.g., O. J. Lissitzyn, "The treatment of aerial intruders in recent practice and international law", AJIL, vol. 47, No. 4 (October 1953), p. 588.

[361] See the study prepared by the Secretariat (footnote 345 above), paras. 141–142 and 252.

forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government "would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities".[362] The reply of the United States Acting Secretary of State reiterated the assertion that no United States planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities "unless forced to do so in an emergency". However, the Acting Secretary of State added:

I presume that the Government of Yugoslavia recognizes that *in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety, even though such action may result in flying over Yugoslav territory without prior clearance*.[363]

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the British Government claimed that the vessels in question had done so in search of "shelter from severe weather, as they have the right to do under customary international law".[364] Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.[365] The *"Rainbow Warrior"* arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. France sought to justify its conduct in removing the two officers from the island of Hao on the ground of "circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State".[366] The tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the tribunal required France to show three things:

(1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.

(2) The reestablishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.

(3) The existence of a good faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement.[367]

In fact, the danger to one of the officers, though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer, the justifications given (the need for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The tribunal held that:

[C]learly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations.[368]

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14, paragraph 3, of the Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas insofar as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea.[369] Similar provisions appear in the international conventions on the prevention of pollution at sea.[370]

(6) Article 24 is limited to cases where human life is at stake. The tribunal in the *"Rainbow Warrior"* arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit. In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present a wide range of possibilities. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does

[362] United States of America, *Department of State Bulletin* (see footnote 351 above), reproduced in the study prepared by the Secretariat (see footnote 345 above), para. 144.

[363] Study prepared by the Secretariat (see footnote 345 above), para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to ICJ in relation to another aerial incident (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 358–359).

[364] *Official Records of the Security Council, Thirtieth Year*, 1866th meeting, 16 December 1975, para. 24; see the study prepared by the Secretariat (footnote 345 above), para. 136.

[365] There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, e.g., the case of violation of the Austrian border by Italian soldiers in 1862, study prepared by the Secretariat (footnote 345 above), para. 121.

[366] *"Rainbow Warrior"* (see footnote 46 above), pp. 254–255, para. 78.

[367] *Ibid*., p. 255, para. 79.

[368] *Ibid*., p. 263, para. 99.

[369] See also articles 39, paragraph 1 (*c*), 98 and 109, of the Convention.

[370] See, e.g., the International Convention for the Prevention of Pollution of the Sea by Oil, article IV, paragraph 1 (*a*) of which provides that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea". See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, article V, paragraph 1 of which provides that the prohibition on dumping of wastes does not apply when it is "necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea … in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat". See also the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (art. 8, para. 1); and the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), annex I, regulation 11 (*a*).

not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The "no other reasonable way" criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and the need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus, it does not exempt the State or its agent from complying with other requirements (national or international), e.g. the requirement to notify arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or the cargo.[371]

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under *paragraph 2* (a), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23, paragraph 2 (*a*).[372]

(10) Distress can only preclude wrongfulness where the interests sought to be protected (e.g. the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. *Paragraph 2* (b) stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had "no other reasonable way" to save life establishes an objective test. The words "comparable or greater peril" must be assessed in the context of the overall purpose of saving lives.

[371] See *Cashin and Lewis* v. *The King, Canada Law Reports* (1935), p. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also the *"Rebecca"*, Mexico-United States General Claims Commission, AJIL, vol. 23, No. 4 (October 1929), p. 860 (vessel entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); the *"May"* v. *The King, Canada Law Reports* (1931), p. 374; the *"Queen City"* v. *The King, ibid*., p. 387; and *Rex* v. *Flahaut*, *Dominion Law Reports* (1935), p. 685 (test of "real and irresistible distress" applied).

[372] See paragraph (9) of the commentary to article 23.

### *Article 25. Necessity*

**1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:**

**(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and**

**(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.**

**2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:**

**(*a*) the international obligation in question excludes the possibility of invoking necessity; or**

**(*b*) the State has contributed to the situation of necessity.**

*Commentary*

(1) The term "necessity" (*état de nécessité*) is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.[373]

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongful-

[373] Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J. B. Scott, ed., *Diplomatic Documents relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), part I, pp. 749–750, and the speech in the Reichstag by the German Chancellor von Bethmann-Hollweg, on 4 August 1914, containing the well-known words: *wir sind jetzt in der Notwehr; und Not kennt kein Gebot!* (we are in a state of self-defence and necessity knows no law), *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

ness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that:

> the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.
>
> The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent.[374]

(5) The *"Caroline"* incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it has at present. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by United States citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the protests by the United States, the British Minister in Washington, Fox, referred to the "necessity of self-defence and self-preservation"; the same point was made by counsel consulted by the British Government, who stated that "the conduct of the British Authorities" was justified because it was "absolutely necessary as a measure of precaution".[375] Secretary of State Webster replied to Minister Fox that "nothing less than a clear and absolute necessity can afford ground of justification" for the commission "of hostile acts within the territory of a Power at Peace", and observed that the British Government must prove that the action of its forces had really been caused by "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[376] In his message to Congress of 7 December 1841, President Tyler reiterated that:

> This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government."[377]

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that "a strong overpowering necessity may arise when this great principle may and must be suspended". "It must be so", added Lord Ashburton, the British Government's *ad hoc* envoy to Washington, "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity".[378]

(6) In the *Russian Fur Seals* controversy of 1893, the "essential interest" to be safeguarded against a "grave and imminent peril" was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12 February (24 February) 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the "absolute necessity of immediate provisional measures" in view of the imminence of the hunting season. He "emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances"[379] and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Government of the Ottoman Empire, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as *"force majeure"* but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

> *The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened "if the very existence of the State is endangered, if observation of the international duty is ... *self-destructive*".[380]

It considered, however, that:

> It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation.[381]

In its view, compliance with an international obligation must be "self-destructive" for the wrongfulness of the conduct not in conformity with the obligation to be precluded.[382]

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[374] Lord McNair, ed., *International Law Opinions* (Cambridge University Press, 1956), vol. II, Peace, p. 232.

[375] See respectively W. R. Manning, ed., *Diplomatic Correspondence of the United States: Canadian Relations 1784–1860* (Washington, D.C., Carnegie Endowment for International Peace, 1943), vol. III, p. 422; and Lord McNair, ed., *International Law Opinions* (footnote 374 above), p. 221, at p. 228.

[376] *British and Foreign State Papers, 1840–1841* (London, Ridgway, 1857), vol. 29, p. 1129.

[377] *Ibid.*, 1841–1842, vol. 30, p. 194.

[378] *Ibid.*, p. 195. See Secretary of State Webster's reply on page 201.

[379] *Ibid.*, *1893–1894* (London, HM Stationery Office, 1899), vol. 86, p. 220; and the study prepared by the Secretariat (see footnote 345 above), para. 155.

[380] See footnote 354 above; see also the study prepared by the Secretariat (footnote 345 above), para. 394.

[381] *Ibid.*

[382] A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodopia*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1405 (1933); see League of Nations, *Official Journal*, 15th Year, No. 11 (part I) (November 1934), p. 1432.

(8) In *Société commerciale de Belgique*,[383] the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to PCIJ for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government pleaded the country's serious budgetary and monetary situation.[384] The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.[385]

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.[386] No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.[387]

(10) In the *"Rainbow Warrior"* arbitration, the arbitral tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".[388]

(11) By contrast, in the *Gabčíkovo-Nagymaros Project* case, ICJ carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, the Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

> The Court considers ... that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words ...
>
> Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.
>
> ... In the present case, the following basic conditions ... are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law. [389]

(12) The plea of necessity was apparently an issue in the *Fisheries Jurisdiction* case.[390] Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization (NAFO) but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks were "threatened with extinction", and asserted that the purpose of the Act and regulations was "to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding". Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Spanish Government denied that the arrest could be justified by concerns as to conservation "since it violates the established provisions of the NAFO Convention [Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries] to which Canada is a party".[391] Canada disagreed, asserting that "the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".[392] The Court held that it had no jurisdiction over the case.[393]

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[383] *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 160.

[384] *P.C.I.J., Series C, No. 87*, pp. 141 and 190; study prepared by the Secretariat (footnote 345 above), para. 278. See generally paragraphs 276–287 for the Greek arguments relative to the state of necessity.

[385] See footnote 383 above; and the study prepared by the Secretariat (footnote 345 above), para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar (footnote 355 above); the *French Company of Venezuelan Railroads* case (footnote 178 above) p. 353; and the study prepared by the Secretariat (footnote 345 above), paras. 263–268 and 385–386. In his separate opinion in the *Oscar Chinn* case, Judge Anzilotti accepted the principle that "necessity may excuse the non-observance of international obligations", but denied its applicability on the facts (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at pp. 112–114).

[386] *The "Torrey Canyon"*, Cmnd. 3246 (London, HM Stationery Office, 1967).

[387] International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties.

[388] *"Rainbow Warrior"* (see footnote 46 above), p. 254. In *Libyan Arab Foreign Investment Company and The Republic of Burundi* (see footnote 358 above), p. 319, the tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest "against a grave and imminent peril".

[389] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 40–41, paras. 51–52.

[390] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432.

[391] *Ibid*., p. 443, para. 20. For the European Community protest of 10 March 1995, asserting that the arrest "cannot be justified by any means", see Memorial of Spain (Jurisdiction of the Court), *I.C.J. Pleadings, Fisheries Jurisdiction (Spain* v. *Canada)*, p. 17, at p. 38, para. 15.

[392] *Fisheries Jurisdiction* (see footnote 390 above), p. 443, para. 20. See also the Canadian Counter-Memorial (29 February 1996), *I.C.J. Pleadings* (footnote 391 above), paras. 17–45.

[393] By an Agreed Minute between Canada and the European Community, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to release the *Estai*. The parties expressly maintained "their respective positions on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention" and reserved "their ability to preserve and defend their rights in conformity with international law". See Canada-European Community: Agreed Minute on the Con-

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers, subject to strict conditions.[394] In the nineteenth century, abuses of necessity associated with the idea of "fundamental rights of States" led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.[395]

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.[396] It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language ("Necessity may not be invoked … unless").[397] In this respect it mirrors the language of article 62 of the 1969 Vienna Convention dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph 1, two conditions without which necessity may not be invoked and excluding, in paragraph 2, two situations entirely from the scope of the excuse of necessity.[398]

servation and Management of Fish Stocks (Brussels, 20 April 1995), ILM, vol. 34, No. 5 (September 1995), p. 1260. See also the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

[394] See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582) (Washington, D.C., Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612) (Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646) (Oxford, Clarendon Press, 1925), vol. II, pp. 193 et seq.; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688) (Oxford, Clarendon Press, 1934), vol. II, pp. 295–296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764) (Oxford, Clarendon Press, 1934), pp. 173–174; and E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) (Washington, D.C., Carnegie Institution, 1916), vol. III, p. 149.

[395] For a review of the earlier doctrine, see *Yearbook … 1980*, vol. II (Part Two), pp. 47–49; see also P. A. Pillitu, *Lo stato di necessità nel diritto internazionale* (University of Perugia/Editrice Licosa, 1981); J. Barboza, "Necessity (revisited) in international law", *Essays in International Law in Honour of Judge Manfred Lachs*, J. Makarczyk, ed. (The Hague, Martinus Nijhoff, 1984), p. 27; and R. Boed, "State of necessity as a justification for internationally wrongful conduct", *Yale Human Rights and Development Law Journal*, vol. 3 (2000), p. 1.

[396] Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

[397] This negative formulation was referred to by ICJ in the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), p. 40, para. 51.

[398] A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms (see article 26 and commentary).

(15) The first condition, set out in *paragraph 1* (a), is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

> That does not exclude ... that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.[399]

Moreover, the course of action taken must be the "only way" available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus, in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.[400] The word "way" in paragraph 1 (*a*) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover, the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of paragraph 1 (*a*) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,[401] but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in *paragraph 1* (b), is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as

[399] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 42, para. 54.

[400] *Ibid*., pp. 42–43, para. 55.

[401] *Ibid*., p. 40, para. 51.

a whole (see paragraph (18) below). In other words, the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.[402]

(18) As a matter of terminology, it is sufficient to use the phrase "international community as a whole" rather than "international community of States as a whole", which is used in the specific context of article 53 of the 1969 Vienna Convention. The insertion of the words "of States" in article 53 of the Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character. On the other hand, ICJ used the phrase "international community as a whole" in the *Barcelona Traction* case,[403] and it is frequently used in treaties and other international instruments in the same sense as in paragraph 1(*b*).[404]

(19) Over and above the conditions in paragraph 1, *paragraph 2* lays down two general limits to any invocation of necessity. This is made clear by the use of the words "in any case". *Paragraph 2* (a) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus, certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to *paragraph 2* (b), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus, in the *Gabčíkovo-Nagymaros Project* case, ICJ considered that because Hungary had "helped, by act or omission to bring about" the situation of alleged necessity, it could not then rely on that situation as a circumstance precluding wrongfulness.[405] For a plea of necessity to be precluded under paragraph 2 (*b*), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Paragraph 2 (*b*) is phrased in more categorical terms than articles 23, paragraph 2 (*a*), and 24, paragraph 2 (*a*), because necessity needs to be more narrowly confined.

(21) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity". It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.[406] The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.[407] The same thing is true of the doctrine of "military necessity" which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty provisions in the field of international humanitarian law.[408] In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.[409]

### *Article 26. Compliance with peremptory norms*

**Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.**

*Commentary*

(1) In accordance with article 53 of the 1969 Vienna Convention, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremp-

[402] In the *Gabčíkovo-Nagymaros Project* case ICJ affirmed the need to take into account any countervailing interest of the other State concerned (see footnote 27 above), p. 46, para. 58.

[403] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[404] See, e.g., third preambular paragraph of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; fourth preambular paragraph of the International Convention Against the Taking of Hostages; fifth preambular paragraph of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; third preambular paragraph of the Convention on the Safety of United Nations and Associated Personnel; tenth preambular paragraph of the International Convention for the Suppression of Terrorist Bombings; ninth preambular paragraph of the Rome Statute of the International Criminal Court; and ninth preambular paragraph of the International Convention for the Suppression of the Financing of Terrorism.

[405] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 46, para. 57.

[406] For example, in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *Official Records of the Security Council, Fifteenth Year*, 873rd meeting, 13–14 July 1960, paras. 144, 182 and 192; 877th meeting, 20–21 July 1960, paras. 31 et seq. and para. 142; 878th meeting, 21 July 1960, paras. 23 and 65; and 879th meeting, 21–22 July 1960, paras. 80 et seq. and paras. 118 and 151. For the *"Caroline"* incident, see above, paragraph (5).

[407] See also article 26 and commentary for the general exclusion of the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

[408] See, e.g., article 23 (*g*) of the Regulations respecting the Laws and Customs of War on Land (annexed to the Hague Conventions II of 1899 and IV of 1907), which prohibits the destruction of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war". Similarly, article 54, paragraph 5, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), appears to permit attacks on objects indispensable to the survival of the civilian population if "imperative military necessity" so requires.

[409] See, e.g., M. Huber, "Die Kriegsrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. De Visscher, "Les lois de la guerre et la théorie de la nécessité", RGDIP, vol. 24 (1917), p. 74; N. C. H. Dunbar, "Military necessity in war crimes trials", BYBIL, *1952*, vol. 29, p. 442; C. Greenwood, "Historical development and legal basis", *The Handbook of Humanitarian Law in Armed Conflicts*, D. Fleck, ed. (Oxford University Press, 1995), p. 1, at pp. 30–33; and Y. Dinstein, "Military necessity", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 1997), vol. 3, pp. 395–397.

tory norm becomes void and terminates.[410] The question is what implications these provisions may have for the matters dealt with in chapter V.

(2) Sir Gerald Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of "continued compatibility with international law", noting that:

> A treaty obligation the observance of which is incompatible a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility …
>
> The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty.[411]

The Commission did not, however, propose with any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory, one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.[412] Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is, however, desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide.[413] The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this class of norms to deal with the basic principle separately. Hence, article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.[414]

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.[415] Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[416]

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise.[417] But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.[418]

### *Article 27. Consequences of invoking a circumstance precluding wrongfulness*

**The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:**

**(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;**

**(*b*) the question of compensation for any material loss caused by the act in question.**

[410] See also article 44, paragraph 5, which provides that in cases falling under article 53, no separation of the provisions of the treaty is permitted.

[411] Fourth report on the law of treaties, *Yearbook … 1959* (see footnote 307 above), p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

[412] For a possible analogy, see the remarks of Judge *ad hoc* Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, at pp. 439–441. ICJ did not address these issues in its order.

[413] As ICJ noted in its decision in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, "in no case could one breach of the Convention serve as an excuse for another" (*Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 243, at p. 258, para. 35).

[414] For convenience, this limitation is spelled out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras. (9) and (10).

[415] See, e.g., the decisions of the International Tribunal for the Former Yugoslavia in case IT-95-17/1-T, *Prosecutor* v. *Furundzija*, judgement of 10 December 1998; ILM, vol. 38, No. 2 (March 1999), p. 317, and of the British House of Lords in *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte (No. 3)*, ILR, vol. 119. Cf. *Legality of the Threat or Use of Nuclear Weapons* (footnote 54 above), p. 257, para. 79.

[416] Cf. *East Timor* (footnote 54 above).

[417] See paragraph (4) of the commentary to article 45.

[418] See paragraphs (4) to (7) of the commentary to article 20.

*Commentary*

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Secondly, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation and, as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) *Subparagraph* (a) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes it clear that chapter V has a merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. The words "and to the extent" are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the tribunal in the *"Rainbow Warrior"* arbitration,[419] and even more clearly by ICJ in the *Gabčíkovo-Nagymaros Project* case. In considering Hungary's argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that "[a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives".[420] It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus, a breach of a treaty justifying countermeasures may be "material" in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty by the injured State. Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to "compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists". Here "compliance with the obligation in question" includes cessation of the wrongful conduct.

(4) *Subparagraph* (b) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although the article uses the term "compensation", it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather, it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference to "material loss" is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) Subparagraph (*b*) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse, the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns onto an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčíkovo-Nagymaros Project* case. As ICJ noted, "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner".[421]

(6) Subparagraph (*b*) does not attempt to specify in what circumstances compensation should be payable. Generally, the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

## Part Two

## CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

(1) Whereas Part One of the articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State. It is true that a State may face legal consequences of conduct which is internationally wrongful outside the sphere of State responsibility. For example, a material breach of a treaty may give an injured State the right to terminate or suspend the treaty in whole or in part.[422] The focus of Part Two, however, is on the new legal relationship which arises upon the commission by a State of an internationally wrongful act. This constitutes the substance or content of the international responsibility of a State under the articles.

(2) Within the sphere of State responsibility, the consequences which arise by virtue of an internationally wrongful act of a State may be specifically provided for in such terms as to exclude other consequences, in whole or

[419] *"Rainbow Warrior"* (see footnote 46 above), pp. 251–252, para. 75.

[420] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 63, para 101; see also page 38, para. 47.

[421] *Ibid.*, p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project (*ibid*., p. 81, paras. 152–153).

[422] 1969 Vienna Convention, art. 60.

in part.[423] In the absence of any specific provision, however, international law attributes to the responsible State new obligations, and in particular the obligation to make reparation for the harmful consequences flowing from that act. The close link between the breach of an international obligation and its immediate legal consequence in the obligation of reparation was recognized in article 36, paragraph 2, of the PCIJ Statute, which was carried over without change as Article 36, paragraph 2, of the ICJ Statute. In accordance with article 36, paragraph 2, States parties to the Statute may recognize as compulsory the Court's jurisdiction, *inter alia*, in all legal disputes concerning:

(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) The nature or extent of the reparation to be made for the breach of an international obligation.

Part One of the articles sets out the general legal rules applicable to the question identified in subparagraph (*c*), while Part Two does the same for subparagraph (*d*).

(3) Part Two consists of three chapters. Chapter I sets out certain general principles and specifies more precisely the scope of Part Two. Chapter II focuses on the forms of reparation (restitution, compensation, satisfaction) and the relations between them. Chapter III deals with the special situation which arises in case of a serious breach of an obligation arising under a peremptory norm of general international law, and specifies certain legal consequences of such breaches, both for the responsible State and for other States.

## CHAPTER I

## GENERAL PRINCIPLES

### *Commentary*

(1) Chapter I of Part Two comprises six articles, which define in general terms the legal consequences of an internationally wrongful act of a State. Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and peoples, the territorial integrity and political independence of States and the environment of whole regions. This may be true whether the obligations in question are owed to one other State or to some or all States or to the international community as a whole. But over and above the gravity or effects of individual cases, the rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.

(2) Within chapter I, article 28 is an introductory article, affirming the principle that legal consequences are entailed whenever there is an internationally wrongful act of a State. Article 29 indicates that these consequences are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached. This point is carried further by article 30, which deals with the obligation of cessation and assurances or guarantees of non-repetition. Article 31 sets out the general obligation of reparation for injury suffered in consequence of a breach of international law by a State. Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two. Finally, article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the articles.

### *Article 28. Legal consequences of an internationally wrongful act*

**The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.**

### *Commentary*

(1) Article 28 serves an introductory function for Part Two and is expository in character. It links the provisions of Part One which define when the international responsibility of a State arises with the provisions of Part Two which set out the legal consequences which responsibility for an internationally wrongful act involves.

(2) The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (art. 30) and to make full reparation for the injury caused by the internationally wrongful act (art. 31). Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach and not to render aid or assistance to the responsible State in maintaining the situation so created (arts. 40–41).

(3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations *of* the State and not only those owed *to* other States. Thus, State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent

[423] On the *lex specialis* principle in relation to State responsibility, see article 55 and commentary.

that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

### *Article 29. Continued duty of performance*

**The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.**

*Commentary*

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see subparagraph (*a*) of article 30).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example, a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.[424] But as the relevant provisions of the 1969 Vienna Convention make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.[425] It is a matter for the injured State to react to the breach to the extent permitted by the Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, including the obligation to make reparation for any breach.[426] A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast, the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

### *Article 30. Cessation and non-repetition*

**The State responsible for the internationally wrongful act is under an obligation:**

**(*a*) to cease that act, if it is continuing;**

**(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.**

*Commentary*

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.[427]

(2) Subparagraph (*a*) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word "act" covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time "regardless of whether the conduct of a State is

[424] See footnote 422 above.

[425] Indeed, in the *Gabčíkovo-Nagymaros Project* case, ICJ held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System (see footnote 27 above), p. 68, para. 114.

[426] See, e.g., *"Rainbow Warrior"* (footnote 46 above), p. 266, citing Lord McNair (dissenting) in *Ambatielos, Preliminary Objection, I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed, *ibid*., p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System on account of the breach by Czechoslovakia were prospective only, and did not affect the accrued rights of either party (see footnote 27 above), pp. 73–74, paras. 125–127. The Court held that the Treaty was still in force, and therefore did not address the question.

[427] 1969 Vienna Convention, art. 70, para. 1.

an action or an omission … since there may be cessation consisting in abstaining from certain actions".[428]

(3) The tribunal in the *"Rainbow Warrior"* arbitration stressed "two essential conditions intimately linked" for the requirement of cessation of wrongful conduct to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".[429] While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,[430] article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase "if it is continuing" at the end of subparagraph (*a*) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.[431] It is frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast, reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.[432]

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to remedies, and it is appropriate that they are dealt with, at least in general terms, in articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless, the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.[433] It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the *"Rainbow Warrior"* arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.[434] Evidently, the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus, a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists. Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from such performance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (*b*) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow from 1964 to 1965, President Johnson stated that:

> The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between states. Expressions of regret and compensation are no substitute for adequate protection.[435]

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[428] *"Rainbow Warrior"* (see footnote 46 above), p. 270, para. 113.

[429] *Ibid*., para. 114.

[430] For the concept of a continuing wrongful act, see paragraphs (3) to (11) of the commentary to article 14.

[431] The focus of the WTO dispute settlement mechanism is on cessation rather than reparation: Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), especially article 3, paragraph 7, which provides for compensation "only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia-Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126/RW and Corr.1), 21 January 2000, para. 6.49.

[432] For cases where ICJ has recognized that this may be so, see, e.g., *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175, at pp. 201–205, paras. 65–76; and *Gabčíkovo-Nagymaros Project* (footnote 27 above), p. 81, para. 153. See also C. D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77–92.

[433] See article 35 (*b*) and commentary.

[434] UNRIAA, vol. XX, p. 217, at p. 266, para. 105 (1990).

[435] Reprinted in ILM, vol. 4, No. 2 (July 1965), p. 698.

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case. This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations. In its fourth submission, Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that ICJ lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively, no assurances or guarantees were appropriate in the light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction, the Court held:

> that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation … Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany.[436]

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been "subjected to prolonged detention or sentenced to severe penalties" following a failure of consular notification.[437] But in the light of information provided by the United States as to the steps taken to comply in future, the Court held:

> that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (*b*), must be regarded as meeting Germany's request for a general assurance of non-repetition.[438]

As to the specific assurances sought by Germany, the Court limited itself to stating that:

> if the United States, notwithstanding its commitment referred to … should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention.[439]

The Court thus upheld its jurisdiction on Germany's fourth submission and responded to it in the operative part. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g. the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice.[440] However, they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested, international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take[441] or, when the wrongful act affects its nationals, assurances of better protection of persons and property.[442] In the *LaGrand* case, ICJ spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States".[443] It noted further that a State may not be in a position to offer a firm guarantee of non-repetition.[444] Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.[445] In other cases, the injured State requires specific instructions to be given,[446] or other specific conduct to be

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[436] *LaGrand, Judgment* (see footnote 119 above), p. 485, para. 48, citing *Factory at Chorzów, Jurisdiction* (footnote 34 above).

[437] *LaGrand, Judgment* (see footnote 119 above), p. 512, para. 123.

[438] *Ibid*., p. 513, para. 124; see also the operative part, p. 516, para. 128 (6).

[439] *Ibid*., pp. 513–514, para. 125. See also paragraph 127 and the operative part (para. 128 (7)).

[440] See paragraph (5) of the commentary to article 36.

[441] In the "Dogger Bank" incident in 1904, the United Kingdom sought "security against the recurrence of such intolerable incidents", G. F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General in Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future, RGDIP, vol. 70 (1966), pp. 1013 et seq.

[442] Such assurances were given in the *Doane* incident (1886), Moore, *Digest*, vol. VI, pp. 345–346.

[443] *LaGrand, Judgment* (see footnote 119 above), p. 513, para. 125.

[444] *Ibid*., para. 124.

[445] See, e.g., the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory, RGDIP, vol. 8 (1901), p. 777, at pp. 788 and 792.

[446] See, e.g., the incidents involving the *"Herzog"* and the *"Bundesrath"*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions

taken.[447] But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words "if circumstances so require" at the end of subparagraph (*b*). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

### *Article 31. Reparation*

**1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.**

**2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.**

*Commentary*

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[448]

In this passage, which has been cited and applied on many occasions,[449] the Court was using the term "reparation" in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[450]

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.[451] In the second sentence, it dealt with that aspect of reparation encompassed by "compensation" for an unlawful act—that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make "full reparation" in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed"[452] through the provision of one or more of the forms of reparation set out in chapter II of this part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,[453] the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

(5) The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury", defined in *paragraph 2*, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, "injury" includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individu-

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to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war", Martens, *op. cit.* (footnote 441 above), vol. XXIX, p. 456 at p. 486.

[447] In the *Trail Smelter* case (see footnote 253 above), the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to "prevent future significant fumigations in the United States" (p. 1934). Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez* v. *Uruguay*, decision of 23 July 1980, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40* (A/35/40), p. 126, para. 19; *Lanza* v. *Uruguay*, decision of 3 April 1980, *ibid*., p. 119, para. 17; and *Dermit Barbato* v. *Uruguay*, decision of 21 October 1982, *ibid*., *Thirty-eighth Session, Supplement No. 40* (A/38/40), p. 133, para. 11.

[448] *Factory at Chorzów, Jurisdiction* (see footnote 34 above).

[449] Cf. the ICJ reference to this decision in *LaGrand, Judgment* (footnote 119 above), p. 485, para. 48.

[450] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

[451] Cf. P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", *Collected Courses ... 1984–V* (Dordrecht, Martinus Nijhoff, 1986), vol. 188, p. 9, at p. 94, who uses the term *restauration*.

[452] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

[453] For the States entitled to invoke responsibility, see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States, see article 46 and commentary.

ally unaffected by the breach.[454] "Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.[455]

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.[456] There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a specified act, e.g. to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence, article 12 defines a breach of an international obligation as a failure to conform with an obligation.

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the *"Rainbow Warrior"* arbitration it was initially argued that "in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation", but the parties subsequently agreed that:

> Unlawful action against non-material interests, such as acts affecting the honor, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State.[457]

The tribunal held that the breach by France had "provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage … of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well".[458]

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases, the damage that may follow from a breach (e.g. harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly, article 31 defines "injury" in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only "[i]njury … caused by the internationally wrongful act of a State" for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable to [the wrongful] act as a proximate cause",[459] or to damage which is "too indirect, remote, and uncertain to be appraised",[460] or to "any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of" the wrongful act.[461] Thus, causality in fact is a necessary

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[454] Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage, see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses ... 1984–II* (The Hague, Nijhoff, 1985), vol. 185, p. 95; A. Tanzi, "Is damage a distinct condition for the existence of an internationally wrongful act?", Spinedi and Simma, eds., *op. cit.* (footnote 175 above), p. 1; and Brownlie, *System of the Law of Nations …* (footnote 92 above), pp. 53–88.

[455] See especially article 36 and commentary.

[456] See paragraph (9) of the commentary to article 2.

[457] *"Rainbow Warrior"* (see footnote 46 above), pp. 266–267, paras. 107 and 109.

[458] *Ibid*., p. 267, para. 110.

[459] See United States-German Mixed Claims Commission, *Administrative Decision No. II*, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 23, at p. 30 (1923). See also *Dix* (footnote 178 above), p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978, ILM, vol. 18 (1979), p. 907, para. 23.

[460] See the *Trail Smelter* arbitration (footnote 253 above), p. 1931. See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", RGDIP, vol. 31 (1924), p. 209, citing the *"Alabama"* arbitration as the most striking application of the rule excluding "indirect" damage (footnote 87 above).

[461] Security Council resolution 687 (1991) of 3 April 1991, para. 16. This was a resolution adopted with reference to Chapter VII of the Charter of the United Nations, but it is expressed to reflect Iraq's liability "under international law … as a result of its unlawful invasion and occupation of Kuwait". UNCC and its Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under paragraph 16. See, e.g., Recommendations made by the panel of Commissioners concerning individual claims for serious personal injury or death (category "B" claims), report of 14 April 1994 (S/AC.26/1994/1), approved by the Governing Council in its decision 20 of 26 May 1994 (S/AC.26/Dec.20 (1994)); Report and recommendations made by the panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC claim"), of 15 November 1996 (S/AC.26/1996/5/Annex), paras. 66–86, approved by the Governing

but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used,[462] in others "foreseeability"[463] or "proximity".[464] But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[465] In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".[466] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[467] The point was clearly made in this sense by ICJ in the *Gabčíkovo-Nagymaros Project* case:

> Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained".
>
> It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.[468]

(12) Often two separate factors combine to cause damage. In the *United States Diplomatic and Consular Staff in Tehran* case,[469] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[470] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,[471] except in cases of contributory fault.[472] In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines.[473] Such a result should follow *a fortiori* in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *United States Diplomatic and Consular Staff in Tehran* case, the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[474]

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the

Council in its decision 40 of 17 December 1996 (S/AC.26/Dec.40 (1996)).

[462] As in Security Council resolution 687 (1991), para. 16.

[463] See, e.g., the *"Naulilaa"* case (footnote 337 above), p. 1031.

[464] For comparative reviews of issues of causation and remoteness, see, e.g., H. L. A. Hart and A. M. Honoré, *Causation in the Law*, 2nd ed. (Oxford, Clarendon Press, 1985); A. M. Honoré, "Causation and remoteness of damage", *International Encyclopedia of Comparative Law*, A. Tunc, ed. (Tübingen, Mohr/The Hague, Martinus Nijhoff, 1983), vol. XI, part I, chap. 7; Zweigert and Kötz, *op. cit*. (footnote 251 above), pp. 601–627, in particular pp. 609 et seq.; and B. S. Markesinis, *The German Law of Obligations: Volume II The Law of Torts: A Comparative Introduction*, 3rd ed. (Oxford, Clarendon Press, 1997), pp. 95–108, with many references to the literature.

[465] See, e.g., the decision of the Iran-United States Claims Tribunal in *The Islamic Republic of Iran* v. *The United States of America*, cases A15 (IV) and A24, Award No. 590–A15 (IV)/A24–FT, 28 December 1998, *World Trade and Arbitration Materials*, vol. 11, No. 2 (1999), p. 45.

[466] P. S. Atiyah, *An Introduction to the Law of Contract*, 5th ed. (Oxford, Clarendon Press, 1995), p. 466.

[467] In the WBC claim, a UNCC panel noted that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused" report of 15 November 1996 (S/AC.26/1996/5/Annex) (see footnote 461 above), para. 54.

[468] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 80.

[469] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 29–32.

[470] *Corfu Channel*, *Merits* (see footnote 35 above), pp. 17–18 and 22–23.

[471] This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause … In other words, the liability of a tortfeasor is not affected *vis-à-vis* the victim by the consideration that another is concurrently liable.": T. Weir, "Complex liabilities", A. Tunc, ed., *op. cit*. (footnote 464 above), part 2, chap. 12, p. 43. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident of 27 July 1955* case when it said, referring to Article 38, paragraph 1 (*c*) and (*d*), of the ICJ Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage" (Memorial of 2 December 1958 (see footnote 363 above), p. 229).

[472] See article 39 and commentary.

[473] See *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244, at p. 250.

[474] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 31–33.

onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers can not be identified, we are constrained to hold the United States liable for the whole.
>
> In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed.[475]

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However, the notion of "proportionality" applies differently to the different forms of reparation.[476] It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

### *Article 32. Irrelevance of internal law*

**The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.**

*Commentary*

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State's internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this part. Between them, articles 3 and 32 give effect for the purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.[477] Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 50 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation "if the internal law of the High Contracting Party concerned allows only partial reparation to be made".[478]

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example, the dispute between Japan and the United States in 1906 over California's discriminatory education policies was resolved by the revision of the Californian legislation.[479] In the incident concerning article 61, paragraph 2, of the Weimar Constitution (Constitution of the Reich of 11 August 1919), a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles).[480] In the *Peter Pázmány University* case, PCIJ specified that the property to be returned should be "freed from any measure of transfer, compulsory administration, or sequestration".[481] In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State's internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

### *Article 33. Scope of international obligations set out in this Part*

**1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.**

**2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.**

*Commentary*

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular, *paragraph 1* makes it clear that identifying the State or States towards which the responsible State's obligations in Part Two exist depends both on the primary rule establishing

[475] The *Zafiro* case (see footnote 154 above), pp. 164–165.

[476] See articles 35 (*b*), 37, paragraph 3, and 39 and commentaries.

[477] See paragraphs (2) to (4) of the commentary to article 3.

[478] Article 41 of the Convention, as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby. Other examples include article 32 of the Revised General Act for the Pacific Settlement of International Disputes and article 30 of the European Convention for the Peaceful Settlement of Disputes.

[479] See R. L. Buell, "The development of the anti-Japanese agitation in the United States", *Political Science Quarterly*, vol. 37 (1922), pp. 620 et seq.

[480] See *British and Foreign State Papers, 1919* (London, HM Stationery Office, 1922), vol. 112, p. 1094.

[481] *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), Judgment, 1933, P.C.I.J., Series A/B, No. 61*, p. 208, at p. 249.

the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently, the gravity of the breach may also affect the scope of the obligations of cessation and reparation.

(2) In accordance with paragraph 1, the responsible State's obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State necessarily affects all the other parties to the treaty.[482]

(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.[483] The range of possibilities is demonstrated from the ICJ judgment in the *LaGrand* case, where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".[484]

(4) Such possibilities underlie the need for *paragraph 2* of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (art. 55). The articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".

[482] See further article 42 (*b*) (ii) and commentary.

[483] Cf. *Jurisdiction of the Courts of Danzig* (footnote 82 above), pp. 17–21.

[484] *LaGrand, Judgment* (see footnote 119 above), para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right" (para. 78).

## CHAPTER II

## REPARATION FOR INJURY

*Commentary*

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz. restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

### *Article 34. Forms of reparation*

**Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.**

*Commentary*

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of "injury" and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,[485] article 34 need do no more than refer to "[f]ull reparation for the injury caused".

(2) In the *Factory at Chorzów* case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation.[486] In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

[485] See paragraphs (4) to (14) of the commentary to article 31.

[486] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.[487]

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase "in accordance with the provisions of this chapter". It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus, restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.[488] Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.[489] Satisfaction must "not be out of proportion to the injury".[490] Thus, each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.[491] To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others, especially compensation, will be correspondingly more important.

### *Article 35. Restitution*

**A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:**

**(*a*) is not materially impossible;**

**(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.**

*Commentary*

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by PCIJ in the *Factory at Chorzów*

[487] Thus, in the judgment in the *LaGrand* case (see footnote 119 above), ICJ indicated that a breach of the notification requirement in article 36 of the Vienna Convention on Consular Relations, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction "by taking account of the violation of the rights set forth in the Convention" (p. 514, para. 125). This would be a form of restitution which took into account the limited character of the rights in issue.

[488] See article 35 (*b*) and commentary.

[489] See article 31 and commentary.

[490] See article 37, paragraph 3, and commentary.

[491] For example, the *Mélanie Lachenal* case (UNRIAA, vol. XIII (Sales No. 64.V.3), p. 117, at pp. 130–131 (1954)), where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also paragraph (4) of the commentary to article 35.

case when it said that the responsible State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible". The Court went on to add that "[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution".[492] It can be seen in operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.[493] Despite the difficulties restitution may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed, in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand, there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.[494] But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed, in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in "the best interests of the parties, and of the public".[495] In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.[496]

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory,[497] the restitution of ships[498] or other types of property,[499] including documents, works of art, share certificates, etc.[500] The term "juridical restitution" is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,[501] the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner[502] or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.[503] In some cases, both material and juridical restitution may be involved.[504] In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.[505] The term "restitution" in article 35 thus

[492] *Factory at Chorzów, Merits* (see footnote 34 above), p. 48.

[493] See, e.g., *British Claims in the Spanish Zone of Morocco* (footnote 44 above), pp. 621–625 and 651–742; *Religious Property Expropriated by Portugal*, UNRIAA, vol. I (Sales No. 1948.V.2), p. 7 (1920); *Walter Fletcher Smith*, *ibid*., vol. II (Sales No. 1949.V.1), p. 913, at p. 918 (1929); and *Heirs of Lebas de Courmont*, *ibid*., vol. XIII (Sales No. 64.V.3), p. 761, at p. 764 (1957).

[494] See articles 43 and 45 and commentaries.

[495] *Walter Fletcher Smith* (see footnote 493 above). In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for "important State reasons" (see J. G. Wetter and S. M. Schwebel, "Some little known cases on concessions", BYBIL, *1964*, vol. 40, p. 216, at p. 221.

[496] *Government of Kuwait* v. *American Independent Oil Company (Aminoil)* ILR, vol. 66, p. 519, at p. 533 (1982).

[497] Examples of material restitution involving persons include the *"Trent"* (1861) and *"Florida"* (1864) incidents, both involving the arrest of individuals on board ships (Moore, *Digest*, vol. VII, pp. 768 and 1090–1091), and the *United States Diplomatic and Consular Staff in Tehran* case in which ICJ ordered Iran to immediately release every detained United States national (see footnote 59 above), pp. 44–45.

[498] See, e.g., the *"Giaffarieh"* incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry, Società Italiana per l'Organizzazione Internazionale–Consiglio Nazionale delle Ricerche, *La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, NY., Oceana, 1970), vol. II, pp. 901–902.

[499] For example, *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 36–37, where ICJ decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 219 (1950); the *Ottoz* case, *ibid*., p. 240 (1950); and the *Hénon* case, *ibid*., p. 248 (1951).

[500] In the *Bužau-Nehoiași Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1839 (1939).

[501] For cases where the existence of a law itself amounts to a breach of an international obligation, see paragraph (12) of the commentary to article 12.

[502] For example, the *Martini* case, UNRIAA, vol. II (Sales No. 1949.V.1), p. 975 (1930).

[503] In the *Bryan-Chamorro Treaty* case (*Costa Rica* v. *Nicaragua*), the Central American Court of Justice decided that "the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action" (*Anales de la Corte de Justicia Centroamericana* (San José, Costa Rica), vol. VI, Nos. 16–18 (December 1916–May 1917), p. 7); and AJIL, vol. 11, No. 3 (1917), p. 674, at p. 696; see also page 683.

[504] Thus, PCIJ held that Czechoslovakia was "bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question" (*Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (see footnote 481 above)).

[505] In the *Legal Status of Eastern Greenland* case, PCIJ decided that "the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid" (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22, at p. 75). In the case of the *Free Zones of Upper Savoy and the District of Gex* (see footnote 79 above), the Court decided that France "must withdraw its customs line in accordance with

(*Continued on next page.*)

has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.[506] Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required "provided and to the extent that" it is neither materially impossible nor wholly disproportionate. The phrase "provided and to the extent that" makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

(8) Under article 35, *subparagraph* (a), restitution is not required if it is "materially impossible". This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodopia* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.[507] The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.[508] The position may be different where the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodopia* case. But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35, *subparagraph* (b), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,[509] although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

### *Article 36. Compensation*

**1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.**

**2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.**

#### *Commentary*

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of "damage" is defined inclusively in article 31, paragraph 2, as any damage whether material or moral.[510] Article 36, paragraph 2, develops this definition by specifying that compensation shall cover any financially

(*Footnote 505 continued.*)
the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the Parties" (p. 172). See also F. A. Mann, "The consequences of an international wrong in international and municipal law", BYBIL, *1976–1977*, vol. 48, p. 1, at pp. 5–8.

[506] See above, paragraph (8) of the commentary to article 30.

[507] *Forests of Central Rhodopia* (see footnote 382 above), p. 1432.

[508] For questions of restitution in the context of State contract arbitration, see *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic* (1977), ILR, vol. 53, p. 389, at pp. 507–508, para. 109; *BP Exploration Company (Libya) Limited* v. *Government of the Libyan Arab Republic*, *ibid.*, p. 297, at p. 354 (1974); and *Libyan American Oil Company (LIAMCO)* v. *Government of the Libyan Arab Republic ibid.*, vol. 62, p. 141, at p. 200 (1977).

[509] See, e.g., J. H. W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht (German International Law Association) in *Yearbook ... 1969*, vol. II, p. 149.

[510] See paragraphs (5) to (6) and (8) of the commentary to article 31.

assessable damage including loss of profits so far as this is established in the given case. The qualification "financially assessable" is intended to exclude compensation for what is sometimes referred to as "moral damage" to a State, i.e. the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37.

(2) Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice. In the *Gabčíkovo-Nagymaros Project* case, ICJ declared: "It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."[511] It is equally well established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.[512]

(3) The relationship with restitution is clarified by the final phrase of article 36, paragraph 1 ("insofar as such damage is not made good by restitution"). Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.[513] As the Umpire said in the *"Lusitania"* case:

> The fundamental concept of "damages" is ... reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.[514]

Likewise, the role of compensation was articulated by PCIJ in the following terms:

> Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[515]

Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of jurists.

(4) As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.[516] Thus, compensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. It is true that monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.[517]

(5) Consistently with other provisions of Part Two, article 36 is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act.[518] The scope of this obligation is delimited by the phrase "any financially assessable damage", that is, any damage which is capable of being evaluated in financial terms. Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.

(6) In addition to ICJ, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,[519] the Iran-United States Claims Tribunal,[520] human rights courts and other

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[511] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 81, para. 152. See also the statement by PCIJ in *Factory at Chorzów*, *Merits* (footnote 34 above), declaring that "[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity" (p. 27).

[512] *Factory at Chorzów, Jurisdiction* (see footnote 34 above); *Fisheries Jurisdiction* (see footnote 432 above), pp. 203–205, paras. 71–76; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), p. 142.

[513] *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48.

[514] UNRIAA, vol. VII (Sales No. 1956.V.5), p. 32, at p. 39 (1923).

[515] *Factory at Chorzów, Merits* (see footnote 34 above), p. 47, cited and applied, *inter alia*, by ITLOS in the case of the *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, *Judgment, ITLOS Reports 1999* , p. 65, para. 170 (1999). See also *Papamichalopoulos and Others* v. *Greece (article 50), Eur. Court H.R., Series A, No. 330–B*, para. 36 (1995); *Velásquez Rodríguez* (footnote 63 above), pp. 26–27 and 30–31; and *Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran*, Iran-U.S. C.T.R., vol. 6, p. 219, at p. 225 (1984).

[516] In the *Velásquez Rodriguez*, Compensatory Damages case, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989)). See also *Letelier and Moffitt*, ILR, vol. 88, p. 727 (1992), concerning the assassination in Washington, D.C., by Chilean agents of a former Chilean minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages, see also N. Jørgensen, "A reappraisal of punitive damages in international law", BYBIL, *1997*, vol. 68, pp. 247–266; and S. Wittich, "Awe of the gods and fear of the priests: punitive damages in the law of State responsibility", *Austrian Review of International and European Law*, vol. 3, No. 1 (1998), p. 101.

[517] See paragraph (3) of the commentary to article 37.

[518] For the requirement of a sufficient causal link between the internationally wrongful act and the damage, see paragraphs (11) to (13) of the commentary to article 31.

[519] For example, the *M/V "Saiga"* case (see footnote 515 above), paras. 170–177.

[520] The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. For reviews of the tribunal's juris-

(*Continued on next page.*)

bodies,[521] and ICSID tribunals under the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[522] Other compensation claims have been settled by agreement, normally on a without prejudice basis, with the payment of substantial compensation a term of the agreement.[523] The rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36.

(7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome.[524] The following examples illustrate the types of damage that may be compensable and the methods of quantification that may be employed.

(8) Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ships, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred in responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States are not closed.

(9) In the *Corfu Channel* case, the United Kingdom sought compensation in respect of three heads of damage: replacement of the destroyer *Saumarez*, which became a total loss, the damage sustained by the destroyer *"Volage"*, and the damage resulting from the deaths and injuries of naval personnel. ICJ entrusted the assessment to expert inquiry. In respect of the destroyer *Saumarez*, the Court found that "the true measure of compensation" was "the replacement cost of the [destroyer] at the time of its loss" and held that the amount of compensation claimed by the British Government (£ 700,087) was justified. For the damage to the destroyer *"Volage"*, the experts had reached a slightly lower figure than the £ 93,812 claimed by the United Kingdom, "explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment". In addition to the amounts awarded for the damage to the two destroyers, the Court upheld the United Kingdom's claim for £ 50,048 representing "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc".[525]

(10) In the *M/V "Saiga" (No. 2)* case, Saint Vincent and the Grenadines sought compensation from Guinea following the wrongful arrest and detention of a vessel registered in Saint Vincent and the Grenadines, the *"Saiga"*, and its crew. ITLOS awarded compensation of US$ 2,123,357 with interest. The heads of damage compensated included, *inter alia*, damage to the vessel, including costs of repair, losses suffered with respect to charter hire of the vessel, costs related to the detention of the vessel, and damages for the detention of the captain, members of the crew and others on board the vessel. Saint Vincent and the Grenadines had claimed compensation for the violation of its rights in respect of ships flying its flag occasioned by the arrest and detention of the *"Saiga"*; however, the tribunal considered that its declaration that Guinea acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate reparation.[526] Claims regarding the loss of registration revenue due to the illegal arrest of the vessel and for the expenses resulting from the time lost by officials in dealing with the arrest and detention of the ship and its crew were also unsuccessful. In respect of the former, the tribunal held that Saint Vincent and the Grenadines failed to produce supporting evidence. In respect of the latter, the tribunal considered that such expenses were not recoverable since they were incurred in the exercise of the normal functions of a flag State.[527]

(11) In a number of cases, payments have been directly negotiated between injured and injuring States following wrongful attacks on ships causing damage or sinking of the vessel, and in some cases, loss of life and injury among the crew.[528] Similar payments have been negotiated where damage is caused to aircraft of a State, such as

(*Footnote 520 continued.*)

prudence on these subjects, see, *inter alia*, Aldrich, *op. cit.* (footnote 357 above), chaps. 5–6 and 12; C. N. Brower and J. D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998), chaps. 14–18; M. Pellonpää, "Compensable claims before the Tribunal: expropriation claims", *The Iran-United States Claims Tribunal*: *Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. MaGraw, eds. (Irvington-on-Hudson, Transnational, 1998), pp. 185–266; and D. P. Stewart, "Compensation and valuation issues", *ibid*., pp. 325–385.

[521] For a review of the practice of such bodies in awarding compensation, see D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999), pp. 214–279.

[522] ICSID tribunals have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals. Some of these claims involve direct recourse to international law as a basis of claim. See, e.g., *Asian Agricultural Products Limited* v. *Republic of Sri Lanka*, *ICSID Reports* (Cambridge University Press, 1997), vol. 4, p. 245 (1990).

[523] See, e.g., *Certain Phosphate Lands in Nauru, Preliminary Objections* (footnote 230 above), and for the Court's order of discontinuance following the settlement, *ibid., Order* (footnote 232 above); *Passage through the Great Belt (Finland* v. *Denmark)*, *Order of 10 September 1992, I.C.J. Reports 1992*, p. 348 (order of discontinuance following settlement); and *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America), Order of 22 February 1996, I.C.J. Reports 1996,* p. 9 (order of discontinuance following settlement).

[524] See Aldrich, *op. cit.* (footnote 357 above), p. 242. See also Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote 454 above), p. 101; L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938); Gray, *op. cit.* (footnote 432 above), pp. 33–34; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939); and M. Iovane, *La riparazione nella teoria e nella prassi dell'illecito internazionale* (Milan, Giuffrè, 1990).

[525] *Corfu Channel, Assessment of Amount of Compensation* (see footnote 473 above), p. 249.

[526] The *M/V "Saiga"* case (see footnote 515 above), para. 176.

[527] *Ibid*., para. 177.

[528] See the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on the high seas of a Bahamian vessel, with loss of life among the crew (RGDIP, vol. 85 (1981), p. 540), the payment of compensation by Israel for an attack in 1967 on the USS *Liberty*, with loss of life and injury among the crew (*ibid.*, p. 562), and the payment by Iraq of US$ 27 million for the 37 deaths which occurred in May 1987 when Iraqi aircraft severely damaged the USS *Stark* (AJIL, vol. 83, No. 3 (July 1989), p. 561).

the "full and final settlement" agreed between the Islamic Republic of Iran and the United States following a dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.[529]

(12) Agreements for the payment of compensation are also frequently negotiated by States following attacks on diplomatic premises, whether in relation to damage to the embassy itself[530] or injury to its personnel.[531] Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.[532] In many cases, these payments have been made on an *ex gratia* or a without prejudice basis, without any admission of responsibility.[533]

(13) Another situation in which States may seek compensation for damage suffered by the State as such is where costs are incurred in responding to pollution damage. Following the crash of the Soviet *Cosmos 954* satellite on Canadian territory in January 1978, Canada's claim for compensation for expenses incurred in locating, recovering, removing and testing radioactive debris and cleaning up affected areas was based "jointly and separately on (a) the relevant international agreements … and (b) general principles of international law".[534] Canada asserted that it was applying "the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty".[535] The claim was eventually settled in April 1981 when the parties agreed on an *ex gratia* payment of Can$ 3 million (about 50 per cent of the amount claimed).[536]

(14) Compensation claims for pollution costs have been dealt with by UNCC in the context of assessing Iraq's liability under international law "for any direct loss, damage—including environmental damage and the depletion of natural resources … as a result of its unlawful invasion and occupation of Kuwait".[537] The UNCC Governing Council decision 7 specifies various heads of damage encompassed by "environmental damage and the depletion of natural resources".[538]

(15) In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.[539] However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc.—sometimes referred to as "non-use values") is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.

(16) Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as "moral damage" in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the *"Lusitania"* case.[540] The umpire considered that international law provides compensation for mental

[529] *Aerial Incident of 3 July 1988* (see footnote 523 above) (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement on the Settlement of Certain International Court of Justice and Tribunal Cases (1996), attached to the Joint Request for Arbitral Award on Agreed Terms, Iran-U.S. C.T.R., vol. 32, pp. 213–216 (1996).

[530] See, e.g., the Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia concerning the losses incurred by the Government of the United Kingdom and by British nationals as a result of the disturbances in Indonesia in September 1963 (1 December 1966) for the payment by Indonesia of compensation for, *inter alia*, damage to the British Embassy during mob violence (*Treaty Series No. 34 (1967)*) (London, HM Stationery Office) and the payment by Pakistan to the United States of compensation for the sacking of the United States Embassy in Islamabad in 1979 (RGDIP, vol. 85 (1981), p. 880).

[531] See, e.g., Claim of Consul *Henry R. Myers (United States* v. *Salvador)* (1890), *Papers relating to the Foreign Relations of the United States*, pp. 64–65; (1892), pp. 24–44 and 49–51; (1893), pp. 174–179, 181–182 and 184; and Whiteman, *Damages in International Law* (footnote 347 above), pp. 80–81.

[532] For examples, see Whiteman, *Damages in International Law* (footnote 347 above), p. 81.

[533] See, e.g., the United States-China agreement providing for an *ex gratia* payment of US$ 4.5 million, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on 7 May 1999, AJIL, vol. 94, No. 1 (January 2000), p. 127.

[534] The claim of Canada against the Union of Soviet Socialist Republics for damage caused by *Cosmos 954*, 23 January 1979 (see footnote 459 above), pp. 899 and 905.

[535] *Ibid*., p. 907.

[536] Protocol between Canada and the Union of Soviet Socialist Republics in respect of the claim for damages caused by the Satellite "Cosmos 954" (Moscow, 2 April 1981), United Nations, *Treaty Series*, vol. 1470, No. 24934, p. 269. See also ILM, vol. 20, No. 3 (May 1981), p. 689.

[537] Security Council resolution 687 (1991), para. 16 (see footnote 461 above).

[538] Decision 7 of 16 March 1992, Criteria for additional categories of claims (S/AC.26/1991/7/Rev.1), para 35.

[539] See the decision of the arbitral tribunal in the *Trail Smelter* case (footnote 253 above), p. 1911, which provided compensation to the United States for damage to land and property caused by sulphur dioxide emissions from a smelter across the border in Canada. Compensation was assessed on the basis of the reduction in value of the affected land.

[540] See footnote 514 above. International tribunals have frequently granted pecuniary compensation for moral injury to private parties. For example, the *Chevreau* case (see footnote 133 above) (English translation in AJIL, vol. 27, No. 1 (January 1933), p. 153); the *Gage* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 226 (1903); the *Di Caro* case, *ibid*., vol. X (Sales No. 60.V.4), p. 597 (1903); and the *Heirs of Jean Maninat* case, *ibid*., p. 55 (1903).

suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being "very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated …".[541]

(17) International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. For example, in the *M/V "Saiga"* case,[542] the tribunal held that Saint Vincent and the Grenadines' entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.

(18) Historically, compensation for personal injury suffered by nationals or officials of a State arose mainly in the context of mixed claims commissions dealing with State responsibility for injury to aliens. Claims commissions awarded compensation for personal injury both in cases of wrongful death and deprivation of liberty. Where claims were made in respect of wrongful death, damages were generally based on an evaluation of the losses of the surviving heirs or successors, calculated in accordance with the well-known formula of Umpire Parker in the *"Lusitania"* case:

> Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.[543]

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.[544] Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.[545]

(19) Compensation for personal injury has also been dealt with by human rights bodies, in particular the European Court of Human Rights and the Inter-American Court of Human Rights. Awards of compensation encompass material losses (loss of earnings, pensions, medical expenses, etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. Hitherto, amounts of compensation or damages awarded or recommended by these bodies have been modest.[546] Nonetheless, the decisions of human rights bodies on compensation draw on principles of reparation under general international law.[547]

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,[548] property claims of nationals arising out of an internationally wrongful act have been adjudicated by a wide range of *ad hoc* and standing tribunals and commissions, with reported cases spanning two centuries. Given the diversity of adjudicating bodies, the awards exhibit considerable variability.[549] Nevertheless, they provide useful principles to guide the determination of compensation under this head of damage.

(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the "fair market value" of the property lost.[550] The method used to

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[541] *"Lusitania"* (see footnote 514 above), p. 40.

[542] See footnote 515 above.

[543] *"Lusitania"* (see footnote 514 above), p. 35.

[544] For example, the *"Topaze"* case, UNRIAA, vol. IX (Sales No. 59.V.5), p. 387, at p. 389 (1903); and the *Faulkner* case, *ibid*., vol. IV (Sales No. 1951.V.1), p. 67, at p. 71 (1926).

[545] For example, the *William McNeil* case, *ibid*., vol. V (Sales No. 1952.V.3), p. 164, at p. 168 (1931).

[546] See the review by Shelton, *op. cit.* (footnote 521 above), chaps. 8–9; A. Randelzhofer and C. Tomuschat, eds., *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague, Martinus Nijhoff, 1999); and R. Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione europea", *La Comunità internazionale*, vol. 53, No. 2 (1998), p. 215.

[547] See, e.g., the decision of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case (footnote 63 above), pp. 26–27 and 30–31. Cf. *Papamichalopoulos* (footnote 515 above).

[548] See, e.g., R. B. Lillich and B. H. Weston, *International Claims*: *Their Settlement by Lump Sum Agreements* (Charlottesville, University Press of Virginia, 1975); and B. H. Weston, R. B. Lillich and D. J. Bederman, *International Claims*: *Their Settlement by Lump Sum Agreements, 1975–1995* (Ardsley, N.Y., Transnational, 1999).

[549] Controversy has persisted in relation to expropriation cases, particularly over standards of compensation applicable in the light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other, a distinction clearly drawn by PCIJ in *Factory at Chorzów, Merits* (footnote 34 above), p. 47. In a number of cases, tribunals have employed the distinction to rule in favour of compensation for lost profits in cases of unlawful takings (see, e.g., the observations of the arbitrator in *Libyan American Oil Company (LIAMCO)* (footnote 508 above), pp. 202–203; and also the *Aminoil* arbitration (footnote 496 above), p. 600, para. 138; and *Amoco International Finance Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 15, p. 189, at p. 246, para. 192 (1987)). Not all cases, however, have drawn a distinction between the applicable compensation principles based on the lawfulness or unlawfulness of the taking. See, e.g., the decision of the Iran-United States Claims Tribunal in *Phillips Petroleum* (footnote 164 above), p. 122, para. 110. See also *Starrett Housing Corporation* v. *Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 16, p. 112 (1987), where the tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits.

[550] See *American International Group, Inc*. v. *The Islamic Republic of Iran*, which stated that, under general international law, "the valuation should be made on the basis of the fair market value of the shares", Iran-U.S. C.T.R., vol. 4, p. 96, at p. 106 (1983). In *Starrett Housing Corporation* (see footnote 549 above), the tribunal accepted its expert's concept of fair market value "as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat" (p. 201). See also the Guidelines on the Treatment of Foreign Direct Investment, which state in paragraph 3 of part IV that compensation "will be deemed 'adequate' if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known", World Bank, *Legal Framework*

assess "fair market value", however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding claims.[551] Where the property interests in question are unique or unusual, for example, art works or other cultural property,[552] or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.[553]

(23) Decisions of various *ad hoc* tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability, as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.[554]

(24) An alternative valuation method for capital loss is the determination of net book value, i.e. the difference between the total assets of the business and total liabilities as shown on its books. Its advantages are that the figures can be determined by reference to market costs, they are normally drawn from a contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. Accordingly, net book value (or some variant of this method) has been employed to assess the value of businesses. The limitations of the method lie in the reliance on historical figures, the use of accounting principles which tend to undervalue assets, especially in periods of inflation, and the fact that the purpose for which the figures were produced does not take account of the compensation context and any rules specific to it. The balance sheet may contain an entry for goodwill, but the reliability of such figures depends upon their proximity to the moment of an actual sale.

(25) In cases where a business is not a going concern,[555] so-called "break-up", "liquidation" or "dissolution" value is generally employed. In such cases, no provision is made for value over and above the market value of the individual assets. Techniques have been developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.[556]

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.[557] The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be useful in the context of calculating value for compensation purposes.[558] But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a

*for the Treatment of Foreign Investment* (Washington, D.C., 1992), vol. II, p. 41. Likewise, according to article 13, paragraph 1, of the Energy Charter Treaty, compensation for expropriation "shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation".

[551] Particularly in the case of lump-sum settlements, agreements have been concluded decades after the claims arose. See, e.g., the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics concerning the Settlement of Mutual Financial and Property Claims arising before 1939 of 15 July 1986 (*Treaty Series*, No. 65 (1986)) (London, HM Stationery Office) concerning claims dating back to 1917 and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Settlement of Mutual Historical Property Claims of 5 June 1987 (*Treaty Series*, No. 37 (1987), *ibid*.) in respect of claims arising in 1949. In such cases, the choice of valuation method was sometimes determined by availability of evidence.

[552] See Report and recommendations made by the panel of Commissioners concerning part two of the first instalment of individual claims for damages above US$ 100 000 (category "D" claims), 12 March 1998 (S/AC.26/1998/3), paras. 48–49, where UNCC considered a compensation claim in relation to the taking of the claimant's Islamic art collection by Iraqi military personnel.

[553] Where share prices provide good evidence of value, they may be utilized, as in *INA Corporation* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 8, p. 373 (1985).

[554] Early claims recognized that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business. The American-Mexican Claims Commission, in rejecting a claim for lost profits in the case of a lawful taking, stated that payment for property elements would be "augmented by the existence of those elements which constitute a going concern": *Wells Fargo and Company (Decision No. 22–B)* (1926), American-Mexican Claims Commission (Washington, D.C., United States Government Printing Office, 1948), p. 153 (1926). See also decision No. 9 of the UNCC Governing Council in "Propositions and conclusions on compensation for business losses: types of damages and their valuation" (S/AC.26/1992/9), para. 16.

[555] For an example of a business found not to be a going concern, see *Phelps Dodge Corp.* v. *The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 10, p. 121 (1986), where the enterprise had not been established long enough to demonstrate its viability. In *SEDCO, Inc.* v. *National Iranian Oil Co.*, the claimant sought dissolution value only, *ibid*., p. 180 (1986).

[556] The hypothetical nature of the result is discussed in *Amoco International Finance Corporation* (see footnote 549 above), at pp. 256–257, paras. 220–223.

[557] See, for example, the detailed methodology developed by UNCC for assessing Kuwaiti corporate claims (report and recommendations made by the panel of Commissioners concerning the first instalment of "E4" claims, 19 March 1999 (S/AC.26/1999/4), paras. 32–62) and claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims (report and recommendations made by the panel of Commissioners concerning the third instalment of "E2" claims, 9 December 1999 (S/AC.26/1999/22)).

[558] The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corporation* (see footnote 549 above); *Starrett Housing Corporation* (*ibid.*); *Phillips Petroleum Company Iran* (see footnote 164 above); and *Ebrahimi (Shahin Shaine)* v. *Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 30, p. 170 (1994).

cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.[559] A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.[560]

(27) *Paragraph 2* of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate. International tribunals have included an award for loss of profits in assessing compensation: for example, the decisions in the *Cape Horn Pigeon* case[561] and *Sapphire International Petroleums Ltd.* v. *National Iranian Oil Company*.[562] Loss of profits played a role in the *Factory at Chorzów* case itself, PCIJ deciding that the injured party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.[563] Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO)*[564] and in some ICSID arbitrations.[565] Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.[566] When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.[567] This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.[568]

(28) Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use; secondly, lost profits from income-producing property between the date of taking of title and adjudication;[569] and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.[570]

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.[571] In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership.

(30) The second category of claims relates to the unlawful taking of income-producing property. In such cases

[559] See, e.g., *Amoco* (footnote 549 above); *Starrett Housing Corporation* (*ibid.*); and *Phillips Petroleum Company Iran* (footnote 164 above). In the context of claims for lost profits, there is a corresponding preference for claims to be based on past performance rather than forecasts. For example, the UNCC guidelines on valuation of business losses in decision 9 (see footnote 554 above) state: "The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future" (para. 19).

[560] See, e.g., *Ebrahimi* (footnote 558 above), p. 227, para. 159.

[561] *Navires* (see footnote 222 above) (*Cape Horn Pigeon* case), p. 63 (1902) (including compensation for lost profits resulting from the seizure of an American whaler). Similar conclusions were reached in the *Delagoa Bay Railway* case, Martens, *op. cit.* (footnote 441 above), vol. XXX, p. 329 (1900); Moore, *History and Digest*, vol. II, p. 1865 (1900); the *William Lee* case (footnote 139 above), pp. 3405–3407; and the *Yuille Shortridge and Co.* case *(Great Britain* v. *Portugal)*, Lapradelle–Politis, *op. cit.* (*ibid.*), vol. II, p. 78 (1861). Contrast the decisions in the *Canada* case *(United States of America* v. *Brazil)*, Moore, *History and Digest*, vol. II, p. 1733 (1870) and the *Lacaze* case (footnote 139 above).

[562] ILR, vol. 35, p. 136, at pp. 187 and 189 (1963).

[563] *Factory at Chorzów, Merits* (see footnote 34 above), pp. 47–48 and 53.

[564] *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140.

[565] See, e.g., *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration* (1984); *Annulment* (1986); *Resubmitted case* (1990), *ICSID Reports* (Cambridge, Grotius, 1993), vol. 1, p. 377; and *AGIP SpA* v. *the Government of the People's Republic of the Congo*, *ibid*., p. 306 (1979).

[566] According to the arbitrator in the *Shufeldt* case (see footnote 87 above), "the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative" (p. 1099). See also *Amco Asia Corporation and Others* (footnote 565 above), where it was stated that "non-speculative profits" were recoverable (p. 612, para. 178). UNCC has also stressed the requirement for claimants to provide "clear and convincing evidence of ongoing and expected profitability" (see report and recommendations made by the panel of Commissioners concerning the first instalment of "E3" claims, 17 December 1998 (S/AC.26/1998/13), para. 147). In assessing claims for lost profits on construction contracts, Panels have generally required that the claimant's calculation take into account the risk inherent in the project (*ibid*., para. 157; report and recommendations made by the panel of Commissioners concerning the fourth instalment of "E3" claims, 30 September 1999 (S/AC.26/1999/14), para. 126).

[567] In considering claims for future profits, the UNCC panel dealing with the fourth instalment of "E3" claims expressed the view that in order for such claims to warrant a recommendation, "it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e. profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded" (S/AC.26/1999/14), para. 140 (see footnote 566 above).

[568] According to Whiteman, "in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible" (*Damages in International Law* (Washington, D.C., United States Government Printing Office, 1943), vol. III, p. 1837).

[569] This is most commonly associated with the deprivation of property, as opposed to wrongful termination of a contract or concession. If restitution were awarded, the award of lost profits would be analogous to cases of temporary dispossession. If restitution is not awarded, as in the *Factory at Chorzów, Merits* (see footnote 34 above) and *Norwegian Shipowners' Claims* (footnote 87 above), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

[570] Awards of lost future profits have been made in the context of a contractually protected income stream, as in *Amco Asia Corporation and Others* v. *The Republic of Indonesia*, *First Arbitration*; *Annulment; Resubmitted case* (see footnote 565 above), rather than on the basis of the taking of income-producing property. In the UNCC report and recommendations on the second instalment of "E2" claims, dealing with reduced profits, the panel found that losses arising from a decline in business were compensable even though tangible property was not affected and the businesses continued to operate throughout the relevant period (S/AC.26/1999/6, para. 76).

[571] Many of the early cases concern vessels seized and detained. In the *"Montijo"*, an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel (see footnote 117 above). In the *"Betsey"*, compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications* (New York, Oxford University Press, 1933) vol. V, p. 47, at p. 113.

lost profits have been awarded for the period up to the time of adjudication. In the *Factory at Chorzów* case,[572] this took the form of re-invested income, representing profits from the time of taking to the time of adjudication. In the *Norwegian Shipowners' Claims* case,[573] lost profits were similarly not awarded for any period beyond the date of adjudication. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the rationale for the award of lost profits in these cases is less clearly articulated, it may be attributed to a recognition of the claimant's continuing beneficial interest in the property up to the moment when potential restitution is converted to a compensation payment.[574]

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.[575] In the case of contracts, it is the future income stream which is compensated, up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, e.g. where the contract is determinable at the instance of the State,[576] or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases, lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the *Oscar Chinn* case[577] a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,[578] a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.[579] Such expenses may be associated, for example, with the displacement of staff or the need to store or sell undelivered products at a loss.

### *Article 37. Satisfaction*

**1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.**

**2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.**

**3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.**

*Commentary*

(1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase "insofar as [the injury] cannot be made good by restitution or compensation". It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.

(2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of satisfaction. Paragraph 3 places limitations on the obliga-

[572] *Factory at Chorzów, Merits* (see footnote 34 above).

[573] *Norwegian Shipowners' Claims* (see footnote 87 above).

[574] For the approach of UNCC in dealing with loss of profits claims associated with the destruction of businesses following the Iraqi invasion of Kuwait, see S/AC.26/1999/4 (footnote 557 above), paras. 184–187.

[575] In some cases, lost profits were not awarded beyond the date of adjudication, though for reasons unrelated to the nature of the income-producing property. See, e.g., *Robert H. May (United States* v. *Guatemala)*, 1900 For. Rel. 648; and Whiteman, *Damages in International Law*, vol. III (footnote 568 above), pp. 1704 and 1860, where the concession had expired. In other cases, circumstances giving rise to *force majeure* had the effect of suspending contractual obligations: see, e.g., *Gould Marketing, Inc.* v. *Ministry of Defence of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 6, p. 272 (1984); and *Sylvania Technical Systems, Inc.* v. *The Government of the Islamic Republic of Iran, ibid*., vol. 8, p. 298 (1985). In the *Delagoa Bay Railway* case (footnote 561 above), and in *Shufeldt* (see footnote 87 above), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleums Ltd.* (see footnote 562 above), p. 136; *Libyan American Oil Company (LIAMCO)* (see footnote 508 above), p. 140; and *Amco Asia Corporation and Others* v. *The Republic of Indonesia, First Arbitration; Annulment; Resubmitted case* (see footnote 565 above), awards of lost profits were also sustained on the basis of contractual relationships.

[576] As in *Sylvania Technical Systems, Inc.* (see the footnote above).

[577] See footnote 385 above.

[578] See footnote 522 above.

[579] Compensation for incidental expenses has been awarded by UNCC (report and recommendations on the first instalment of "E2" claims (S/AC.26/1998/7) where compensation was awarded for evacuation and relief costs (paras. 133, 153 and 249), repatriation (para. 228), termination costs (para. 214), renovation costs (para. 225) and expenses in mitigation (para. 183)), and by the Iran-United States Claims Tribunal (see *General Electric Company* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 26, p. 148, at pp. 165–169, paras. 56–60 and 67–69 (1991), awarding compensation for items resold at a loss and for storage costs).

tion to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 2 of article 31, the injury for which a responsible State is obliged to make full reparation embraces "any damage, whether material or moral, caused by the internationally wrongful act of a State". Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as "non-material injury",[580] is well established in international law. The point was made, for example, by the tribunal in the *"Rainbow Warrior"* arbitration:

> There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.[581]

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,[582] violations of sovereignty or territorial integrity,[583] attacks on ships or aircraft,[584] ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons[585] and violations of the premises of embassies or consulates or of the residences of members of the mission.[586]

(5) *Paragraph 2* of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.[587] Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury,[588] a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act[589] or the award of symbolic damages for non-pecuniary injury.[590] Assurances or guarantees of non-repetition, which are dealt with in the articles in the context of cessation, may also amount to a form of satisfaction.[591] Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover, the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by ICJ in the *Corfu Channel* case, where the Court, after finding unlawful a minesweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

> [T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.

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[580] See C. Dominicé, "De la réparation constructive du préjudice immatériel souffert par un État", *L'ordre juridique international entre tradition et innovation: recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

[581] *"Rainbow Warrior"* (see footnote 46 above), pp. 272–273, para. 122.

[582] Examples are the *Magee* case (Whiteman, *Damages in International Law*, vol. I (see footnote 347 above), p. 64 (1874)), the *Petit Vaisseau* case (*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2564 (1863)) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), pp. 186–187).

[583] As occurred in the *"Rainbow Warrior"* arbitration (see footnote 46 above).

[584] Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (RGDIP, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*ibid*., vol. 84 (1980), pp. 1078–1079).

[585] See F. Przetacznik, "La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État", RGDIP, vol. 78 (1974), p. 919, at p. 951.

[586] Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria (*La prassi italiana di diritto internazionale*, 2nd series (see footnote 498 above), vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (RGDIP, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*ibid*., vol. 69 (1965), pp. 130–131) and in Karachi in 1965 (*ibid*., vol. 70 (1966), pp. 165–166).

[587] In the *"Rainbow Warrior"* arbitration the tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically, it recommended that France contribute US$ 2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries" (see footnote 46 above), p. 274, paras. 126–127. See also L. Migliorino, "Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du Rainbow Warrior", RGDIP, vol. 96 (1992), p. 61.

[588] For example, the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu, *The New York Times*, 8 February 2001, sect. 1, p. 1.

[589] Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (RGDIP, vol. 80 (1976, p. 257).

[590] See, e.g., the cases *"I'm Alone"*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1609 (1935); and "*Rainbow Warrior"* (footnote 46 above).

[591] See paragraph (11) of the commentary to article 30.

This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.[592]

This has been followed in many subsequent cases.[593] However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover, such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the Head of State. Expressions of regret or apologies were required in the *"I'm Alone"*,[594] *Kellett*[595] and *"Rainbow Warrior"*[596] cases, and were offered by the responsible State in the *Consular Relations*[597] and *LaGrand*[598] cases. Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other circumstances an apology may not be called for, e.g. where a case is settled on an *ex gratia* basis, or it may be insufficient. In the *LaGrand* case the Court considered that "an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties".[599]

(8) Excessive demands made under the guise of "satisfaction" in the past[600] suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.[601] In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. *Paragraph 3* of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term "humiliating" is imprecise, but there are certainly historical examples of demands of this kind.

### *Article 38. Interest*

**1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.**

**2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.**

*Commentary*

(1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term "principal sum" is used in article 38 rather than "compensation". Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.

(2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgement or award concerning, the claim and to the extent that it is necessary to ensure full reparation.[602] Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.[603] In the *S.S. "Wimbledon"*, PCIJ awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable "from the moment when the amount of the sum due

[592] *Corfu Channel, Merits* (see footnote 35 above), p. 35, repeated in the operative part (p. 36).

[593] For example, *"Rainbow Warrior"* (see footnote 46 above), p. 273, para. 123.

[594] See footnote 590 above.

[595] Moore, *Digest*, vol. V, p. 44 (1897).

[596] See footnote 46 above.

[597] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248. For the text of the United States' apology, see United States Department of State, Text of Statement Released in Asunción, Paraguay; Press statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings of 10 November 1998, see *I.C.J. Reports 1998*, p. 426.

[598] See footnote 119 above.

[599] *LaGrand*, *Merits* (*ibid.*), para. 123.

[600] For example, the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the *Tellini* affair in 1923: see C. Eagleton, *op. cit.* (footnote 582 above), pp. 187–188.

[601] The need to prevent the abuse of satisfaction was stressed by early writers such as J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, Beck, 1878); French translation by M. C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, Félix Alcan, 1895), pp. 268–269.

[602] Thus, interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration (footnote 182 above), pp. 252–253.

[603] See, e.g., the awards of interest made in the *Illinois Central Railroad Co. (U.S.A.)* v. *United Mexican States* case, UNRIAA, vol. IV (Sales No. 1951.V.1), p. 134 (1926); and the *Lucas* case, ILR, vol. 30, p. 220 (1966); see also administrative decision No. III of the United States-Germany Mixed Claims Commission, UNRIAA, vol. VII (Sales No. 1956.V.5), p. 66 (1923).

has been fixed and the obligation to pay has been established".[604]

(3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.[605] The experience of the Iran-United States Claims Tribunal is worth noting. In *The Islamic Republic of Iran* v. *The United States of America (Case A–19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise … of the discretion accorded to them in deciding each particular case".[606] On the issue of principle the tribunal said:

> Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by [a]rticle V of the Claims Settlement Declaration to decide claims "on the basis of respect for law". In doing so, it has regularly treated interest, where sought, as forming an integral part of the "claim" which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as "compensation for damages suffered due to delay in payment". … Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis*. Given that the power to award interest is inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered.[607]

The tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.[608] It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.[609]

(4) Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

> 1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
>
> 2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
>
> 3. Interest will be paid after the principal amount of awards.[610]

This provision combines a decision in principle in favour of interest where necessary to compensate a claimant with flexibility in terms of the application of that principle. At the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.[611]

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.[612] Some national court decisions have also dealt with issues of interest under international law,[613] although more often questions of interest are dealt with as part of the law of the forum.

(7) Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R.J. Reynolds Tobacco Co.* v. *The Government of the Islamic Republic of Iran*, the tribunal failed to find:

> any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, "[t]here are few rules within the scope of the

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[604] See footnote 34 above. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial situation of the world and … the conditions prevailing for public loans".

[605] In the *M/V "Saiga"* case (see footnote 515 above), ITLOS awarded interest at different rates in respect of different categories of loss (para. 173).

[606] *The Islamic Republic of Iran* v. *The United States of America*, Iran-U.S. C.T.R., vol. 16, p. 285, at p. 290 (1987). Aldrich, *op. cit.* (see footnote 357 above), pp. 475–476, points out that the practice of the three Chambers has not been entirely uniform.

[607] *The Islamic Republic of Iran* v. *The United States of America* (see footnote 606 above), pp. 289–290.

[608] See C. N. Brower and J. D. Brueschke, *op. cit*. (footnote 520 above), pp. 626–627, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

[609] See the detailed analysis of Chamber Three in *McCollough and Company, Inc.* v. *Ministry of Post, Telegraph and Telephone*, Iran-U.S. C.T.R., vol. 11, p. 3, at pp. 26–31 (1986).

[610] Awards of interest, decision of 18 December 1992 (S/AC.26/1992/16).

[611] See, e.g., the *Velásquez Rodríguez*, Compensatory Damages case (footnote 516 above), para. 57. See also *Papamichalopoulos* (footnote 515 above), para. 39, where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *op. cit.* (footnote 521 above), pp. 270–272.

[612] See, e.g., the Foreign Compensation (People's Republic of China), Order, Statutory Instrument No. 2201 (1987) (London, HM Stationery Office), para. 10, giving effect to the settlement Agreement between the United Kingdom and China (footnote 551 above).

[613] See, e.g., *McKesson Corporation* v. *The Islamic Republic of Iran*, United States District Court for the District of Columbia, 116 F, Supp. 2d 13 (2000).

subject of damages in international law that are better settled than the one that compound interest is not allowable" … Even though the term "all sums" could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest. [614]

Consistent with this approach, the tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit "wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal".[615] The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case:

the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other … is unanimous … in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest.[616]

The same is true for compound interest in respect of State-to-State claims.

(9) Nonetheless, several authors have argued for a reconsideration of this principle, on the ground that "compound interest reasonably incurred by the injured party should be recoverable as an item of damage".[617] This view has also been supported by arbitral tribunals in some cases.[618] But given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,[619] date on which payment should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.[620] In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran-United States Claims Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise … of the discretion accorded to [individual tribunals] in deciding each particular case".[621] On the other hand, the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly, article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

(12) Article 38 does not deal with post-judgement or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgement interest is a matter of its procedure.

### *Article 39. Contribution to the injury*

**In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought**.

*Commentary*

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially

[614] Iran-U.S. C.T.R., vol. 7, p. 181, at pp. 191–192 (1984), citing Whiteman, *Damages in International Law*, vol. III (see footnote 568 above), p. 1997.

[615] *Anaconda-Iran, Inc.* v. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 13, p. 199, at p. 235 (1986). See also Aldrich, *op. cit.* (footnote 357 above), pp. 477–478.

[616] *British Claims in the Spanish Zone of Morocco* (see footnote 44 above), p. 650. Cf. the *Aminoil* arbitration (footnote 496 above), where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award (p. 613, para. 178 (5)).

[617] F. A. Mann, "Compound interest as an item of damage in international law", *Further Studies in International Law* (Oxford, Clarendon Press, 1990), p. 377, at p. 383.

[618] See, e.g., *Compañía del Desarrollo de Santa Elena, S.A.* v. *Republic of Costa Rica*, case No. ARB/96/1, *ICSID Reports* (Cambridge, Grotius, 2002), vol. 5, final award (17 February 2000), paras. 103–105.

[619] Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case (see footnote 354 above), p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

[620] See, e.g., J. Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the sharia, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example, payment of interest is prohibited by the Iranian Constitution, articles 43 and 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited" (*ibid*., pp. 38–40, with references).

[621] *The Islamic Republic of Iran* v. *The United States of America (Case No. A-19)* (see footnote 606 above).

contributed to the damage by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as "contributory negligence", "comparative fault", "faute de la victime", etc.[622]

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury—but nothing more—arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the *LaGrand* case, ICJ recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There, Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted that "Germany may be criticized for the manner in which these proceedings were filed and for their timing", and stated that it would have taken this factor, among others, into account "had Germany's submission included a claim for indemnification".[623]

(4) The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature[624] and in State practice.[625] While questions of an injured State's contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather, article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.[626] While the notion of a negligent action or omission is not qualified, e.g. by a requirement that the negligence should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.[627] The phrase "account shall be taken" indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or "any person or entity in relation to whom reparation is sought". This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

## CHAPTER III

## SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

### *Commentary*

(1) Chapter III of Part Two is entitled "Serious breaches of obligations under peremptory norms of general international law". It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; and secondly, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (art. 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the chapter (art. 41).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.[628] The issue was underscored by ICJ in the *Barcelona Traction* case, when it said that:

[622] See C. von Bar, *op. cit*. (footnote 315 above), pp. 544–569.

[623] *LaGrand, Judgment* (see footnote 119 above), at p. 487, para. 57, and p. 508, para. 116. For the relevance of delay in terms of loss of the right to invoke responsibility, see article 45, subparagraph (*b*), and commentary.

[624] See, e.g., B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages" (footnote 454 above) and B. Bollecker-Stern, *op. cit.* (footnote 454 above), pp. 265–300.

[625] In the *Delagoa Bay Railway* case (see footnote 561 above), the arbitrators noted that: "[a]ll the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter's liability and warrant ... a reduction in reparation." In *S.S. "Wimbledon"* (see footnote 34 above), p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. PCIJ implicitly acknowledged that the captain's conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances. For other examples, see Gray, *op. cit.* (footnote 432 above), p. 23.

[626] This terminology is drawn from article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects.

[627] It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the "responsible" State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage, see paragraph (11) of the commentary to article 31.

[628] For full bibliographies, see M. Spinedi, "Crimes of State: bibliography", *International Crimes of State*, J. H. H. Weiler, A. Cassese and M. Spinedi, eds. (Berlin, De Gruyter, 1989), pp. 339–353; and N. H. B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000) pp. 299–314.

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.[629]

The Court was there concerned to contrast the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. Although no such obligation was at stake in that case, the Court's statement clearly indicates that for the purposes of State responsibility certain obligations are owed to the international community as a whole, and that by reason of "the importance of the rights involved" all States have a legal interest in their protection.

(3) On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations to the international community as a whole, although it has been cautious in applying it. In the *East Timor* case, the Court said that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable".[630] At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, it stated that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*":[631] this finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

(4) A closely related development is the recognition of the concept of peremptory norms of international law in articles 53 and 64 of the 1969 Vienna Convention. These provisions recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty.[632]

(5) From the first it was recognized that these developments had implications for the secondary rules of State responsibility which would need to be reflected in some way in the articles. Initially, it was thought this could be done by reference to a category of "international crimes of State", which would be contrasted with all other cases of internationally wrongful acts ("international delicts").[633] There has been, however, no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34, the function of damages is essentially compensatory.[634] Overall, it remains the case, as the International Military Tribunal said in 1946, that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[635]

(6) In line with this approach, despite the trial and conviction by the Nuremberg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as "criminal" by the instruments creating these tribunals.[636] As to more recent international practice, a similar approach underlies the establishment of the *ad hoc* tribunals for Yugoslavia and Rwanda by the Security Council. Both tribunals are concerned only with the prosecution of individuals.[637] In its decision relating to a *subpoena duces tecum* in the *Blaskić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia stated that "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems".[638] The Rome Statute of the International Criminal Court likewise establishes jurisdiction over the "most serious crimes of concern to the international community as a whole" (preamble), but limits this jurisdiction to "natural persons" (art. 25, para. 1). The same article specifies that no provision of the Statute "relating to individual criminal responsibility shall affect the responsibility of States under international law" (para. 4).[639]

(7) Accordingly, the present articles do not recognize the existence of any distinction between State "crimes" and "delicts" for the purposes of Part One. On the other hand, it is necessary for the articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which ICJ has given of

[629] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33. See M. Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford, Clarendon Press, 1997).

[630] See footnote 54 above.

[631] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (see footnote 54 above), p. 616, para. 31.

[632] See article 26 and commentary.

[633] See *Yearbook … 1976*, vol. II (Part Two), pp. 95–122, especially paras. (6)–(34). See also paragraph (5) of the commentary to article 12.

[634] See paragraph (4) of the commentary to article 36.

[635] International Military Tribunal (Nuremberg), judgement of 1 October 1946, reprinted in AJIL (see footnote 321 above), p. 221.

[636] This despite the fact that the London Charter of 1945 specifically provided for the condemnation of a "group or organization" as "criminal"; see Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, annex, United Nations, Treaty Series, vol. 82, No. 251, p. 279, arts. 9 and 10.

[637] See, respectively, articles 1 and 6 of the statute of the International Tribunal for the Former Yugoslavia; and articles 1 and 7 of the statute of the International Tribunal for Rwanda (footnote 257 above).

[638] *Prosecutor* v. *Blaskić*, International Tribunal for the Former Yugoslavia, Case IT-95-14-AR 108 *bis*, ILR, vol. 110, p. 688, at p. 698, para. 25 (1997). Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (footnote 54 above), in which neither of the parties treated the proceedings as being criminal in character. See also paragraph (6) of the commentary to article 12.

[639] See also article 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

obligations towards the international community as a whole[640] all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the 1969 Vienna Convention[641] involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance—i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present chapter; the second is dealt with in article 48.

### *Article 40. Application of this chapter*

**1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.**

**2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.**

#### *Commentary*

(1) Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish "serious breaches of obligations under peremptory norms of general international law" from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.

(2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the 1969 Vienna Convention, a peremptory norm of general international law is one which is:

> accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.[642]

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the 1969 Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission's commentary to what was to become article 53,[643] uncontradicted statements by Governments in the course of the Vienna Conference on the Law of Treaties,[644] the submissions of both parties in the *Military and Paramilitary Activities in and against Nicaragua* case and the Court's own position in that case.[645] There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz. the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against

[640] According to ICJ, obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination": *Barcelona Traction* (see footnote 25 above), at p. 32, para. 34. See also *East Timor* (footnote 54 above); *Legality of the Threat or Use of Nuclear Weapons* (*ibid.*); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (*ibid.*).

[641] The Commission gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *jus cogens*: "(*a*) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (*b*) a treaty contemplating the performance of any other act criminal under international law, and (*c*) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate … treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples", *Yearbook … 1966*, vol. II, p. 248.

[642] For further discussion of the requirements for identification of a norm as peremptory, see paragraph (5) of the commentary to article 26, with selected references to the case law and literature.

[643] *Yearbook … 1966*, vol. II, pp. 247–249.

[644] In the course of the conference, a number of Governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 52nd meeting, paras. 3, 31 and 43; 53rd meeting, paras. 4, 9, 15, 16, 35, 48, 59 and 69; 54th meeting, paras. 9, 41, 46 and 55; 55th meeting, paras. 31 and 42; and 56th meeting, paras. 6, 20, 29 and 51.

[645] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), pp. 100–101, para. 190; see also the separate opinion of magistrate Nagendra Singh (president), p. 153.

genocide, this is supported by a number of decisions by national and international courts.[646]

(5) Although not specifically listed in the Commission's commentary to article 53 of the 1969 Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.[647] In the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.[648] Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the Court noted in the *East Timor* case, "[t]he principle of self-determination ... is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.[649]

(6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the 1969 Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the chapter, viz. that the breach should itself have been "serious". A "serious" breach is defined in paragraph 2 as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. The word "serious" signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies.[650]

(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.[651]

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover, the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter of the United Nations.

### *Article 41. Particular consequences of a serious breach of an obligation under this chapter*

**1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.**

[646] See, for example, ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* (footnote 412 above), pp. 439–440; *Counter-Claims* (footnote 413 above), p. 243; and the District Court of Jerusalem in the *Attorney-General of the Government of Israel* v. *Adolf Eichmann* case, ILR, vol. 36, p. 5 (1961).

[647] Cf. the United States Court of Appeals, Ninth Circuit, in *Siderman de Blake and Others* v. *The Republic of Argentina and Others*, ILR, vol. 103, p. 455, at p. 471 (1992); the United Kingdom Court of Appeal in *Al Adsani* v. *Government of Kuwait and Others*, ILR, vol. 107, p. 536, at pp. 540–541 (1996); and the United Kingdom House of Lords in *Pinochet* (footnote 415 above), pp. 841 and 881. Cf. the United States Court of Appeals, Second Circuit, in *Filartiga* v. *Pena-Irala*, ILR, vol. 77, p. 169, at pp. 177–179 (1980).

[648] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

[649] *East Timor* (*ibid.*). See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex, fifth principle.

[650] See the *Ireland* v. *the United Kingdom* case (footnote 236 above), para. 159; cf., e.g., the procedure established under Economic and Social Council resolution 1503 (XLVIII), which requires a "consistent pattern of gross and reliably attested violations of human rights".

[651] At its twenty-second session, the Commission proposed the following examples as cases denominated as "international crimes":

"(*a*) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

"(*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

"(*c*) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

"(*d*) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

*Yearbook … 1976*, vol. II (Part Two), pp. 95–96.

**2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.**

**3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.**

*Commentary*

(1) Article 41 sets out the particular consequences of breaches of the kind and gravity referred to in article 40. It consists of three paragraphs. The first two prescribe special legal obligations of States faced with the commission of "serious breaches" in the sense of article 40, the third takes the form of a saving clause.

(2) Pursuant to *paragraph 1* of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

(3) Neither does paragraph 1 prescribe what measures States should take in order to bring to an end serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.

(4) Pursuant to *paragraph 2* of article 41, States are under a duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40 and, secondly, not to render aid or assistance in maintaining that situation.

(5) The first of these two obligations refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of article 40.[652] The obligation applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.

(6) The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in decisions of ICJ. The principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized found a clear expression during the Manchurian crisis of 1931–1932, when the Secretary of State, Henry Stimson, declared that the United States of America—joined by a large majority of members of the League of Nations—would not:

> admit the legality of any situation de facto nor ... recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the ... sovereignty, the independence or the territorial and administrative integrity of the Republic of China, ... [nor] recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928.[653]

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations affirms this principle by stating unequivocally that States shall not recognize as legal any acquisition of territory brought about by the use of force.[654] As ICJ held in *Military and Paramilitary Activities in and against Nicaragua*, the unanimous consent of States to this declaration "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves".[655]

(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. Following the Iraqi declaration of a "comprehensive and eternal merger" with Kuwait, the Security Council, in resolution 662 (1990) of 9 August 1990, decided that the annexation had "no legal validity, and is considered null and void", and called upon all States, international organizations and specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect. In fact, no State recognized the

[652] This has been described as "an essential legal weapon in the fight against grave breaches of the basic rules of international law" (C. Tomuschat, "International crimes by States: an endangered species?", *International Law: Theory and Practice — Essays in Honour of Eric Suy*, K. Wellens, ed. (The Hague, Martinus Nijhoff, 1998), p. 253, at p. 259.

[653] Secretary of State's note to the Chinese and Japanese Governments, in Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1940), vol. I, p. 334; endorsed by Assembly resolutions of 11 March 1932, *League of Nations Official Journal*, March 1932, Special Supplement No. 101, p. 87. For a review of earlier practice relating to collective non-recognition, see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987), pp. 24–27.

[654] General Assembly resolution 2625 (XXV), annex, first principle.

[655] *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 100, para. 188.

legality of the purported annexation, the effects of which were subsequently reversed.

(8) As regards the denial by a State of the right of self-determination of peoples, the advisory opinion of ICJ in the *Namibia* case is similarly clear in calling for a non-recognition of the situation.[656] The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia[657] and the Bantustans in South Africa.[658] These examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.

(9) Under article 41, paragraph 2, no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently, the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question.[659]

(10) The consequences of the obligation of non-recognition are, however, not unqualified. In the *Namibia* advisory opinion the Court, despite holding that the illegality of the situation was opposable *erga omnes* and could not be recognized as lawful even by States not members of the United Nations, said that:

> the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[660]

Both the principle of non-recognition and this qualification to it have been applied, for example, by the European Court of Human Rights.[661]

(11) The second obligation contained in paragraph 2 prohibits States from rendering aid or assistance in maintaining the situation created by a serious breach in the sense of article 40. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by article 16. It deals with conduct "after the fact" which assists the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".[662] It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one. As to the elements of "aid or assistance", article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has "knowledge of the circumstances of the internationally wrongful act". There is no need to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

(12) In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40. This separate existence is confirmed, for example, in the resolutions of the Security Council prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule.[663] Just as in the case of the duty of non-recognition, these resolutions would seem to express a general idea applicable to all situations created by serious breaches in the sense of article 40.

(13) Pursuant to *paragraph 3*, article 41 is without prejudice to the other consequences elaborated in Part Two and to possible further consequences that a serious breach in the sense of article 40 may entail. The purpose of this paragraph is twofold. First, it makes it clear that a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapters I and II of Part Two. Consequently, a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.

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[656] *Namibia* case (see footnote 176 above), where the Court held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law" (p. 56, para. 126).

[657] Cf. Security Council resolution 216 (1965) of 12 November 1965.

[658] See, e.g., General Assembly resolution 31/6 A of 26 October 1976, endorsed by the Security Council in its resolution 402 (1976) of 22 December 1976; Assembly resolutions 32/105 N of 14 December 1977 and 34/93 G of 12 December 1979; see also the statements of 21 September 1979 and 15 December 1981 issued by the respective presidents of the Security Council in reaction to the "creation" of Venda and Ciskei (S/13549 and S/14794).

[659] See also paragraph (7) of the commentary to article 20 and paragraph (4) of the commentary to article 45.

[660] *Namibia* case (see footnote 176 above), p. 56, para. 125.

[661] *Loizidou, Merits* (see footnote 160 above), p. 2216; *Cyprus* v. *Turkey* (see footnote 247 above), paras. 89–98.

[662] *Namibia* case (see footnote 176 above), p. 56, para. 126.

[663] See, e.g., Security Council resolutions 218 (1965) of 23 November 1965 on the Portuguese colonies, and 418 (1977) of 4 November 1977 and 569 (1985) of 26 July 1985 on South Africa.

(14) Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the sense of article 40. The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

## Part Three

## THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Part Three deals with the implementation of State responsibility, i.e. with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act. Although State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do, what action they may take in order to secure the performance of the obligations of cessation and reparation on the part of the responsible State. This, sometimes referred to as the *mise-en-oeuvre* of State responsibility, is the subject matter of Part Three. Part Three consists of two chapters. Chapter I deals with the invocation of State responsibility by other States and with certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.

## Chapter I

## INVOCATION OF THE RESPONSIBILITY OF A STATE

### *Commentary*

(1) Part One of the articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State, person or entity. Part Three is concerned with the implementation of State responsibility, i.e. with the entitlement of other States to invoke the international responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33, paragraph 2.

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed, in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.[664] This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as "direct" versus "indirect" injury or "objective" versus "subjective" rights.

(3) Although article 42 is drafted in the singular ("an injured State"), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is "injured" in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (art. 43), certain aspects of the admissibility of claims (art. 44), loss of the right to invoke responsibility (art. 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (art. 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of the Treaty of Versailles, which was the subject of the decision in the *S.S. "Wimbledon"* case.[665] It is also true of article 33 of the European Convention on Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, i.e. to apply as a *lex specialis*.

[664] Cf. the statement by ICJ that "all States can be held to have a legal interest" as concerns breaches of obligations *erga omnes*, *Barcelona Traction* (footnote 25 above), p. 32, para. 33, cited in paragraph (2) of the commentary to chapter III of Part Two.

[665] Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the *S.S. "Wimbledon"* (see footnote 34 above).

### *Article 42. Invocation of responsibility by an injured State*

**A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:**

**(*a*) that State individually; or**

**(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:**

**(i) specially affects that State; or**

**(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.**

*Commentary*

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the "injured State". It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,[666] or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty,[667] or it must be considered an injured State. The purpose of article 42 is to define this latter category.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also—as is clear from the opening phrase of article 49—resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, e.g. under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility".

(4) The definition in article 42 is closely modelled on article 60 of the 1969 Vienna Convention, although the scope and purpose of the two provisions are different. Article 42 is concerned with any breach of an international obligation of whatever character, whereas article 60 is concerned with breach of treaties. Moreover, article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.[668] This is why article 60 is restricted to "material" breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty, the right can only be that of the other State party, but in the case of a multilateral treaty article 60, paragraph 2, does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the 1969 Vienna Convention, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-à-vis* the other State party (subparagraph (*a*)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (*b*) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (*b*) (ii)); this is the so-called "integral" or "inter-

[666] An analogous distinction is drawn by article 27, paragraph 2, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, which distinguishes between the bringing of an international claim in the field of diplomatic protection and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".

[667] In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

[668] Cf. the 1969 Vienna Convention, art. 73.

dependent" obligation.[669] In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

(6) Pursuant to *subparagraph* (a) of article 42, a State is "injured" if the obligation breached was owed to it individually. The expression "individually" indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (*a*) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an "injured State" in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation *vis-à-vis* another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.[670] If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgement of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.[671]

(8) In addition, subparagraph (*a*) is intended to cover cases where the performance of an obligation under a multilateral treaty or customary international law is owed to one particular State. The scope of subparagraph (*a*) in this respect is different from that of article 60, paragraph 1, of the 1969 Vienna Convention, which relies on the formal criterion of bilateral as compared with multilateral treaties. But although a multilateral treaty will characteristically establish a framework of rules applicable to all the States parties, in certain cases its performance in a given situation involves a relationship of a bilateral character between two parties. Multilateral treaties of this kind have often been referred to as giving rise to " 'bundles' of bilateral relations".[672]

(9) The identification of one particular State as injured by a breach of an obligation under the Vienna Convention on Diplomatic Relations does not exclude that all States parties may have an interest of a general character in compliance with international law and in the continuation of international institutions and arrangements which have been built up over the years. In the *United States Diplomatic and Consular Staff in Tehran* case, after referring to the "fundamentally unlawful character" of the Islamic Republic of Iran's conduct in participating in the detention of the diplomatic and consular personnel, the Court drew:

> the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.[673]

(10) Although discussion of multilateral obligations has generally focused on those arising under multilateral treaties, similar considerations apply to obligations under rules of customary international law. For example, the rules of general international law governing the diplomatic or consular relations between States establish bilateral relations between particular receiving and sending States, and violations of these obligations by a particular receiving State injure the sending State to which performance was owed in the specific case.

(11) *Subparagraph* (b) deals with injury arising from violations of collective obligations, i.e. obligations that apply between more than two States and whose performance in the given case is not owed to one State individually, but to a group of States or even the international community as a whole. The violation of these obligations only injures any particular State if additional requirements are met. In using the expression "group of States", article 42, subparagraph (*b*), does not imply that the group has any separate existence or that it has separate legal personality. Rather, the term is intended to refer to a group of States, consisting of all or a considerable number of States in the world or in a given region, which have combined to achieve some collective purpose and which may be

[669] The notion of "integral" obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook … 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an "all or nothing" basis. The term "interdependent obligations" may be more appropriate.

[670] Cf. the 1969 Vienna Convention, art. 36.

[671] See, e.g., Article 59 of the Statute of ICJ.

[672] See, e.g., K. Sachariew, "State responsibility for multilateral treaty violations: identifying the 'injured State' and its legal status", *Netherlands International Law Review*, vol. 35, No. 3 (1988), p. 273, at pp. 277–278; B. Simma, "Bilateralism and community interest in the law of State responsibility", *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Y. Dinstein, ed. (Dordrecht, Martinus Nijhoff, 1989), p. 821, at p. 823; C. Annacker, "The legal régime of *erga omnes* obligations in international law", *Austrian Journal of Public and International Law*, vol. 46, No. 2 (1994), p. 131, at p. 136; and D. N. Hutchinson, "Solidarity and breaches of multilateral treaties", BYBIL, *1988*, vol. 59, p. 151, at pp. 154–155.

[673] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), pp. 41–43, paras. 89 and 92.

considered for that purpose as making up a community of States of a functional character.

(12) *Subparagraph* (b) (i) stipulates that a State is injured if it is "specially affected" by the violation of a collective obligation. The term "specially affected" is taken from article 60, paragraph (2) (*b*), of the 1969 Vienna Convention. Even in cases where the legal effects of an internationally wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States. For example a case of pollution of the high seas in breach of article 194 of the United Nations Convention on the Law of the Sea may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed. In that case, independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach. Like article 60, paragraph (2) (*b*), of the 1969 Vienna Convention, subparagraph (*b*) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered "injured". This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, *subparagraph* (b) (ii) deals with a special category of obligations, the breach of which must be considered as affecting *per se* every other State to which the obligation is owed. Article 60, paragraph 2 (*c*), of the 1969 Vienna Convention recognizes an analogous category of treaties, viz. those "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations". Examples include a disarmament treaty,[674] a nuclear-free zone treaty, or any other treaty where each party's performance is effectively conditioned upon and requires the performance of each of the others. Under article 60, paragraph 2 (*c*), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially, the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in the termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

(15) The articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice, interdependent obligations covered by subparagraph (*b*) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly, a State is only considered injured under subparagraph (*b*) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

### *Article 43. Notice of claim by an injured State*

**1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.**

**2. The injured State may specify in particular:**

**(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;**

**(*b*) what form reparation should take in accordance with the provisions of Part Two.**

*Commentary*

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.[675]

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc. Moreover, the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the 1969 Vienna Convention. Notice under article 43 need not

[674] The example given in the commentary of the Commission to what became article 60: *Yearbook … 1966*, vol. II, p. 255, document A/6309/Rev.1, para. (8).

[675] See article 48, paragraph (3), and commentary.

be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless, an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the articles to specify in detail the form which an invocation of responsibility should take. In practice, claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In the *Certain Phosphate Lands in Nauru* case, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".[676] The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However, the Court also noted that:

> It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to "seek a sympathetic reconsideration of Nauru's position". [677]

The Court summarized the communications between the parties as follows:

> The Court … takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time. [678]

In the circumstances, it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus, *paragraph 2* (a) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) *Paragraph 2* (b) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus, it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,[679] or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.[680] Or it may content itself with declaratory relief, generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, insofar as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In the light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead, it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

### *Article 44. Admissibility of claims*

**The responsibility of a State may not be invoked if:**

**(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;**

**(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.**

*Commentary*

(1) The present articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather, they define the conditions for establishing the international responsibility of a State and for the invocation of

[676] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 253, para. 31.

[677] *Ibid*., p. 254, para. 35.

[678] *Ibid*., pp. 254–255, para. 36.

[679] As PCIJ noted in the *Factory at Chorzów, Jurisdiction* (see footnote 34 above), by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents (p. 17).

[680] In the *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12, ICJ did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement, see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *Annuaire français de droit international*, vol. 38 (1992), p. 905, at p. 940.

that responsibility by another State or States. Thus, it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of one international tribunal *vis-à-vis* another.[681] By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) *Subparagraph* (a) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As PCIJ said in the *Mavrommatis Palestine Concessions* case:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels.[682]

Subparagraph (*a*) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.[683]

(3) *Subparagraph* (b) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as "an important principle of customary international law".[684] In the context of a claim brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

> for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.[685]

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from "the merits of the case".[686]

(5) Only those local remedies which are "available and effective" have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular, there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44, subparagraph (*b*), does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.[687]

### *Article 45. Loss of the right to invoke responsibility*

**The responsibility of a State may not be invoked if:**

**(*a*) the injured State has validly waived the claim;**

**(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.**

*Commentary*

(1) Article 45 is analogous to article 45 of the 1969 Vienna Convention concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard, the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute

[681] For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts, see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. 2, pp. 427–575; and S. Rosenne, *The Law and Practice of the International Court, 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff, 1997), vol. II, *Jurisdiction*.

[682] *Mavrommatis* (see footnote 236 above), p. 12.

[683] Questions of nationality of claims will be dealt with in detail in the work of the Commission on diplomatic protection. See first report of the Special Rapporteur for the topic "Diplomatic protection" in *Yearbook … 2000*, vol. II (Part One), document A/CN.4/506 and Add.1.

[684] *ELSI* (see footnote 85 above), p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959*, p. 6, at p. 27. On the exhaustion of local remedies rule generally, see, e.g., C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappez, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, "Local remedies, exhaustion of", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (footnote 409 above), vol. 3, pp. 238–242; and G. Perrin, "La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la Commission du droit international", *Festschrift für Rudolf Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see, e.g., A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press, 1983); and E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65–89.

[685] *ELSI* (see footnote 85 above), p. 46, para. 59.

[686] *Ibid*., p. 48, para. 63.

[687] The topic will be dealt with in detail in the work of the Commission on diplomatic protection. See second report of the Special Rapporteur on diplomatic protection in *Yearbook … 2001*, vol. II (Part One), document A/CN.4/514.

between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) *Subparagraph* (a) deals with the case where an injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.[688]

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term "valid waiver" is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.[689] Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In the *Certain Phosphate Lands in Nauru* case, it was argued that the Nauruan authorities before independence had waived the rehabilitation claim by concluding an agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question "did not at any time effect a clear and unequivocal waiver of their claims".[690] In particular, the statements relied on "[n]otwithstanding some ambiguity in the wording … did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations".[691]

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. *Subparagraph* (b) deals with the case where an injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by ICJ in the *Certain Phosphate Lands in Nauru* case, in the following passage:

> The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[692]

In the *LaGrand* case, the Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.[693]

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, e.g. as concerns the collection and presentation of evidence. Thus, in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness to the respondent State were advanced.[694] In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.[695]

(9) Moreover, contrary to what may be suggested by the expression "delay", international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit,

[688] *Russian Indemnity* (see footnote 354 above), p. 446.

[689] Cf. the position with respect to valid consent under article 20: see paragraphs (4) to (8) of the commentary to article 20.

[690] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 247, para. 13.

[691] *Ibid*., p. 250, para. 20.

[692] *Ibid*., pp. 253–254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru's application was not inadmissible on this ground (para. 36). It reserved for the merits any question of prejudice to the respondent State by reason of the delay. See further paragraph (8) of the commentary to article 13.

[693] *LaGrand*, *Provisional Measures* (see footnote 91 above) and *LaGrand, Judgment* (see footnote 119 above), at pp. 486–487, paras. 53–57.

[694] See *Stevenson*, UNRIAA, vol. IX (Sales No. 59.V.5), p. 385 (1903); and *Gentini, ibid*., vol. X (Sales No. 60.V.4), p. 551 (1903).

[695] See, e.g., *Tagliaferro*, UNRIAA, vol. X (Sales No. 60.V.4), p. 592, at p. 593 (1903); see also the actual decision in *Stevenson* (footnote 694 above), pp. 386–387.

expressed in terms of years, has been laid down.[696] The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.[697] Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.[698] None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.[699] It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (e.g. before an international tribunal) will not usually be regarded as rendering it inadmissible.[700] Thus, in the *Certain Phosphate Lands in Nauru* case, ICJ held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.[701] In the *Tagliaferro* case, Umpire Ralston likewise held that, despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.[702]

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.[703]

[696] In some cases time limits are laid down for specific categories of claims arising under specific treaties (e.g. the six-month time limit for individual applications under article 35, paragraph 1, of the European Convention on Human Rights) notably in the area of private law (e.g. in the field of commercial transactions and international transport). See the Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol to the Convention. By contrast, it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

[697] Communiqué of 29 December 1970, in *Annuaire suisse de droit international*, vol. 32 (1976), p. 153.

[698] C.-A. Fleischhauer, "Prescription", *Encyclopedia of Public International Law* (see footnote 409 above), vol. 3, p. 1105, at p. 1107.

[699] A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather, the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru* (footnotes 230 and 232 above), see, e.g. *Gentini* (footnote 694 above), p. 561; and the *Ambatielos* arbitration, ILR, vol. 23, p. 306, at pp. 314–317 (1956).

[700] For statements of the distinction between notice of claim and commencement of proceedings, see, e.g. R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed. (Harlow, Longman, 1992), vol. I, *Peace*, p. 527; and C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

[701] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), p. 250, para. 20.

[702] *Tagliaferro* (see footnote 695 above), p. 593.

[703] See article 39 and commentary.

### *Article 46. Plurality of injured States*

**Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.**

*Commentary*

(1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.

(2) Several States may qualify as "injured" States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42, subparagraph (*b*) (ii), are injured by its breach. In a situation of a plurality of injured States, each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.

(3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example, in the *S.S. "Wimbledon"* case, four States brought proceedings before PCIJ under article 386, paragraph 1, of the Treaty of Versailles, which allowed "any interested Power" to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that "each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags". It held they were each covered by article 386, paragraph 1, "even though they may be unable to adduce a prejudice to any pecuniary interest".[704] In fact, only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.[705] In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Mururoa Atoll.[706]

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration

[704] *S.S. "Wimbledon"* (see footnote 34 above), p. 20.

[705] ICJ held that it lacked jurisdiction over the Israeli claim: *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 131, after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant Governments, and added: "One of the primary reasons for establishing coordination of this character from the earliest stages was to prevent, so far as was possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages" (see footnote 363 above), p. 106.

[706] See *Nuclear Tests (Australia* v. *France)* and *(New Zealand* v. *France)* (footnote 196 above), pp. 256 and 460, respectively.

of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.[707] In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery. As ICJ pointed out in its advisory opinion on *Reparation for Injuries*, "International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case".[708]

### *Article 47. Plurality of responsible States*

**1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.**

**2. Paragraph 1:**

**(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;**

**(*b*) is without prejudice to any right of recourse against the other responsible States.**

*Commentary*

(1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.

(2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example, two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.[709]

(3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as "joint", "joint and several" and "solidary" responsibility derive from different legal traditions[710] and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.[711] In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

(4) In the *Certain Phosphate Lands in Nauru* case,[712] Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in *Monetary Gold*,[713] the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was "solidary" and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of "solidary" responsibility it said:

> Australia has raised the question whether the liability of the three States would be "joint and several" (*solidaire*), so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This … is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia.[714]

The Court was careful to add that its decision on jurisdiction "does not settle the question whether reparation

[707] Cf. *Forests of Central Rhodopia*, where the arbitrator declined to award restitution, *inter alia*, on the ground that not all the persons or entities interested in restitution had claimed (see footnote 382 above), p. 1432.

[708] *Reparation for Injuries* (see footnote 38 above), p. 186.

[709] See article 17 and commentary.

[710] For a comparative survey of internal laws on solidary or joint liability, see T. Weir, *loc. cit.* (footnote 471 above), vol. XI, especially pp. 43–44, sects. 79–81.

[711] See paragraphs (1) to (5) of the introductory commentary to chapter IV of Part One.

[712] See footnote 230 above.

[713] See footnote 286 above. See also paragraph (11) of the commentary to article 16.

[714] *Certain Phosphate Lands in Nauru, Preliminary Objections* (see footnote 230 above), pp. 258–259, para. 48.

would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems … and, in particular, the special role played by Australia in the administration of the Territory".[715]

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.[716] A well-known example is the Convention on International Liability for Damage Caused by Space Objects. Article IV, paragraph 1, provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV, paragraph 2, provides:

> In all cases of joint and several liability referred to in paragraph 1 … the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.[717]

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present articles.[718] At the same time, it indicates what a regime of "joint and several" liability might amount to so far as an injured State is concerned.

(6) According to *paragraph 1* of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under paragraph 1 of article 47, where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The consequences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course, situations can also arise where several States by separate internationally wrongful conduct have contributed to causing the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. ICJ held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.[719] Yet, it was not suggested that Albania's responsibility for failure to warn was reduced, let alone precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in *paragraph 2*. *Subparagraph* (a) addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.[720] This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States, but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in *subparagraph* (b), recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV, paragraph 2, and V, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects. On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. Subparagraph (*b*) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

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[715] *Ibid*., p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *Certain Phosphate Lands in Nauru, Order* (footnote 232 above) and the settlement agreement (*ibid.*).

[716] A special case is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name. See, e.g., annex IX to the United Nations Convention on the Law of the Sea. Generally on mixed agreements, see, e.g., A. Rosas, "Mixed Union mixed agreements", *International Law Aspects of the European Union*, M. Koskenniemi, ed. (The Hague, Kluwer, 1998), p. 125.

[717] See also article V, paragraph 2, which provides for indemnification between States which are jointly and severally liable.

[718] See paragraph 4 of the general commentary for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

[719] *Corfu Channel, Merits* (see footnote 35 above), pp. 22–23.

[720] Such a principle was affirmed, for example, by PCIJ in the *Factory at Chorzów, Merits* case (see footnote 34 above), when it held that a remedy sought by Germany could not be granted "or the same compensation would be awarded twice over" (p. 59); see also pp. 45 and 49.

### *Article 48. Invocation of responsibility by a State other than an injured State*

**1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:**

**(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or**

**(*b*) the obligation breached is owed to the international community as a whole.**

**2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:**

**(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and**

**(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.**

**3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.**

*Commentary*

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase "[a]ny State other than an injured State" in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed, in respect of obligations to the international community as a whole, ICJ specifically said as much in its judgment in the *Barcelona Traction* case.[721] Although the Court noted that "all States can be held to have a legal interest in" the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as "interested States". The term "legal interest" would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48, paragraph 1.

(4) *Paragraph 1* refers to "[a]ny State other than an injured State". In the nature of things, all or many States will be entitled to invoke responsibility under article 48, and the term "[a]ny State" is intended to avoid any implication that these States have to act together or in unison. Moreover, their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations, the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (paragraph 1 (*a*)), and obligations owed to the international community as a whole (paragraph 1 (*b*)).[722]

(6) Under *paragraph 1* (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and secondly, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as "obligations *erga omnes partes*".

(7) Obligations coming within the scope of paragraph 1 (*a*) have to be "collective obligations", i.e. they must apply between a group of States and have been established in some collective interest.[723] They might concern, for example, the environment or security of a region (e.g. a regional nuclear-free-zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but would extend to agreements established by a group of States in some wider common interest.[724] But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the articles to provide an enumeration of such interests. If they fall within paragraph 1 (*a*), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in

[721] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33.

[722] For the extent of responsibility for serious breaches of obligations to the international community as a whole, see Part Two, chap. III and commentary.

[723] See also paragraph (11) of the commentary to article 42.

[724] In the *S.S. "Wimbledon"* (see footnote 34 above), the Court noted "[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind" (p. 23).

which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.[725]

(8) Under *paragraph 1* (b), States other than the injured State may invoke responsibility if the obligation in question was owed "to the international community as a whole".[726] The provision intends to give effect to the statement by ICJ in the *Barcelona Traction* case, where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole".[727] With regard to the latter, the Court went on to state that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".

(9) While taking up the essence of this statement, the articles avoid use of the term "obligations *erga omnes*", which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the articles to provide a list of those obligations which under existing international law are owed to the international community as a whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred, by way of example, to "the outlawing of acts of aggression, and of genocide" and to "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[728] In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.[729]

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by paragraph 1 (*a*) needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of paragraph 1 (*b*). All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course, such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) *Paragraph 2* specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48—such State not being injured in its own right and therefore not claiming compensation on its own account—is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one. For example, in the *S.S. "Wimbledon"* case, Japan, which had no economic interest in the particular voyage, sought only a declaration, whereas France, whose national had to bear the loss, sought and was awarded damages.[730] In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.[731] In that case, as the Court itself pointed out in 1971, "the injured entity" was a people, viz. the people of South West Africa.[732]

(12) Under *paragraph 2* (a), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require, assurances and guarantees of non-repetition under article 30. In addition, *paragraph 2* (b) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with paragraph 2 (*b*), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48, paragraph 2, involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.[733] Thus, a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its Government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present articles

[725] Article 22 of the Covenant of the League of Nations, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of ICJ in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

[726] For the terminology "international community as a whole", see paragraph (18) of the commentary to article 25.

[727] *Barcelona Traction* (see footnote 25 above), p. 32, para. 33, and see paragraphs (2) to (6) of the commentary to chapter III of Part Two.

[728] *Barcelona Traction* (*ibid.*), p. 32, para. 34.

[729] See footnote 54 above.

[730] *S.S. "Wimbledon"* (see footnote 34 above), p. 30.

[731] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, Judgment* (see footnote 725 above).

[732] *Namibia* case (see footnote 176 above), p. 56, para. 127.

[733] See, e.g., the observations of the European Court of Human Rights in *Denmark* v. *Turkey* (friendly settlement), judgment of 5 April 2000, Reports of Judgments and Decisions 2000-IV, pp. 7, 10 and 11, paras. 20 and 23.

cannot solve.[734] Paragraph 2 (*b*) can do no more than set out the general principle.

(13) Paragraph 2 (*b*) refers to the State claiming "[p]erformance of the obligation of reparation in accordance with the preceding articles". This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example, a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) *Paragraph 3* subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

## CHAPTER II

## COUNTERMEASURES

### *Commentary*

(1) This chapter deals with the conditions for and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures that would otherwise be contrary to the international obligations of an injured State *vis-à-vis* the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by Governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.[735] This is reflected in article 22 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term "reprisals" was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.[736] More recently, the term "reprisals" has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term "countermeasures" covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.[737] Countermeasures are to be contrasted with retorsion, i.e. "unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargoes of various kinds or withdrawal of voluntary aid programmes. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present articles. The term "sanction" is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the Charter of the United Nations refers only to "measures", even though these can encompass a very wide range of acts, including the use of armed force (Articles 39, 41 and 42). Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand, the articles are concerned with countermeasures as referred to in article 22. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the 1969 Vienna Convention. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.[738] Countermeasures involve conduct taken in derogation from a subsisting treaty

[734] See also paragraphs (3) to (4) of the commentary to article 33.

[735] For the substantial literature, see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational, 1984), pp. 179–189; O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 227–241; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite: Des contre-mesures à la légitime défense* (Paris, Librairie générale de droit et de jurisprudence, 1990), pp. 501–525; and D. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures en droit international public* (Paris, Pedone, 1994).

[736] See, e.g., E. de Vattel, *The Law of Nations, or the Principles of Natural Law* (footnote 394 above), vol. II, chap. XVIII, p. 342.

[737] *Air Service Agreement* (see footnote 28 above), p. 443, para. 80; *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 36 above), at p. 106, para. 201; and *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 82.

[738] On the respective scope of the codified law of treaties and the law of State responsibility, see paragraphs (3) to (7) of the introductory commentary to chapter V of Part One.

obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This chapter does not draw any distinction between what are sometimes called "reciprocal countermeasures" and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State "if such obligations correspond to, or are directly connected with, the obligation breached".[739] There is no requirement that States taking countermeasures should be limited to suspension of performance of the same or a closely related obligation.[740] A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.[741] Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so. The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Service Agreement* arbitration.[742]

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (art. 50, para. 1 (*a*)). Secondly, countermeasures are limited by the requirement that they be directed at the responsible State and not at third parties (art. 49, paras. 1 and 2). Thirdly, since countermeasures are intended as instrumental—in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment—they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (arts. 49, paras. 2 and 3, and 53). Fourthly, countermeasures must be proportionate (art. 51). Fifthly, they must not involve any departure from certain basic obligations (art. 50, para. 1), in particular those under peremptory norms of general international law.

[739] See the sixth report of the Special Rapporteur on State responsibility, William Riphagen, article 8 of Part Two of the draft articles, *Yearbook … 1985*, vol. II (Part One), p. 10, document A/CN.4/389.

[740] Contrast the exception of non-performance in the law of treaties, which is so limited: see paragraph (9) of the introductory commentary to chapter V of Part One.

[741] Cf. *Ireland* v. *the United Kingdom* (footnote 236 above).

[742] See footnote 28 above.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (art. 50, para. 2 (*a*)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (art. 50, para. 2 (*b*)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (art. 52, para. 3).

(8) The focus of the chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic. This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48, paragraph 1, to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (art. 54).

(9) In common with other chapters of these articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus, a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise, a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.[743]

### *Article 49. Object and limits of countermeasures*

**1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.**

**2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.**

**3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.**

[743] See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 1, 3, para. 7, and 22.

*Commentary*

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is continuing, and to provide reparation to the injured State.[744] Countermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word "only" in paragraph 1 of article 49.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by ICJ in the *Gabčíkovo Nagymaros Project* case, in the following passage:

> In order to be justifiable, a countermeasure must meet certain conditions …
>
> In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State.[745]

(3) *Paragraph 1* of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.[746] In this respect, there is no difference between countermeasures and other circumstances precluding wrongfulness.[747]

(4) A second essential element of countermeasures is that they "must be directed against"[748] a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present articles.[749] The word "only" in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.[750]

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and *paragraph 2* of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to "obligations" in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures, irrespective of their severity or consequences.[751]

(7) The phrase "for the time being" in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible

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[744] For these obligations, see articles 30 and 31 and commentaries.

[745] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 55, para. 83. See also *"Naulilaa"* (footnote 337 above), p. 1027; *"Cysne"* (footnote 338 above), p. 1057. At the 1930 Hague Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion …* (footnote 88 above), p. 128.

[746] The tribunal's remark in the *Air Service Agreement* case (see footnote 28 above), to the effect that "each State establishes for itself its legal situation vis-à-vis other States" (p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

[747] See paragraph (8) of the introductory commentary to chapter V of Part One.

[748] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 55–56, para. 83.

[749] In the *Gabčíkovo-Nagymaros Project* case ICJ held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Czechoslovakia's response was directed against it on that ground.

[750] On the specific question of human rights obligations, see article 50, paragraph (1) (*b*), and commentary.

[751] See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.[752] Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State "under Part Two". It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act, but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State's refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.[753] In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.[754]

(9) *Paragraph 3* of article 49 is inspired by article 72, paragraph 2, of the 1969 Vienna Convention, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found that it was not necessary to pronounce on the matter. After concluding that "the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate", the Court said:

> It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.[755]

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles. The phrase "as far as possible" in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

[752] This notion is further emphasized by articles 49, paragraph 3, and 53 (termination of countermeasures).

[753] See paragraph (1) of the commentary to article 37.

[754] Similar considerations apply to assurances and guarantees of non-repetition. See article 30, subparagraph (*b*), and commentary.

[755] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), pp. 56–57, para. 87.

### *Article 50. Obligations not affected by countermeasures*

**1. Countermeasures shall not affect:**

**(*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;**

**(*b*) obligations for the protection of fundamental human rights;**

**(*c*) obligations of a humanitarian character prohibiting reprisals;**

**(*d*) other obligations under peremptory norms of general international law.**

**2. A State taking countermeasures is not relieved from fulfilling its obligations:**

**(*a*) under any dispute settlement procedure applicable between it and the responsible State;**

**(*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.**

*Commentary*

(1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.

(2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations which, by reason of their character, must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

(3) *Paragraph 1* of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (*b*) obligations for the protection of fundamental human rights; (*c*) obligations of a humanitarian character prohibiting reprisals; and (*d*) other obligations under peremptory norms of general international law.

(4) *Paragraph 1* (a) deals with the prohibition of the threat or use of force as embodied in the Charter of the United Nations, including the express prohibition of the use of force in Article 2, paragraph 4. It excludes forcible measures from the ambit of permissible countermeasures under chapter II.

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that "States have a duty to refrain from acts of reprisal involving the use of force".[756] The prohibition is also consistent with the prevailing doctrine as well as a number of authoritative pronouncements of international judicial[757] and other bodies.[758]

(6) *Paragraph 1* (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the *"Naulilaa"* arbitration, the tribunal stated that a lawful countermeasure must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States".[759] The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must "abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience".[760] This has been taken further as a result of the development since 1945 of international human rights. In particular, the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.[761]

(7) In its general comment No. 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present articles,[762] as well as with countermeasures imposed by individual States or groups of States. It stressed that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights",[763] and went on to state that:

> it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country.[764]

Analogies can be drawn from other elements of general international law. For example, paragraph 1 of article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) stipulates unconditionally that "[s]tarvation of civilians as a method of warfare is prohibited".[765] Likewise, the final sentence of paragraph 2 of article 1 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights states that "In no case may a people be deprived of its own means of subsistence".

(8) *Paragraph 1* (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60, paragraph 5, of the 1969 Vienna Convention.[766] The paragraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the Geneva Convention relative to the Treatment of Prisoners of War of 1929, the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.[767]

(9) *Paragraph 1* (d) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently, a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (*d*) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to "other" obligations under

[756] General Assembly resolution 2625 (XXV), annex, first principle. The Final Act of the Conference on Security and Co-operation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration on Principles Guiding Relations between Participating States embodied in the first "Basket" of that Final Act reads: "Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force."

[757] See especially *Corfu Channel*, *Merits* (footnote 35 above), p. 35; and *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above), p. 127, para. 249.

[758] See, e.g., Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964, 316 (1972) of 26 June 1972, 332 (1973) of 21 April 1973, 573 (1985) of 4 October 1985 and 1322 (2000) of 7 October 2000. See also General Assembly resolution 41/38 of 20 November 1986.

[759] *"Naulilaa"* (see footnote 337 above), p. 1026.

[760] *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710.

[761] See article 4 of the International Covenant on Civil and Political Rights; article 15 of the European Convention on Human Rights; and article 27 of the American Convention on Human Rights.

[762] See below, article 59 and commentary.

[763] E/C.12/1997/8, para. 1.

[764] *Ibid*., para. 4.

[765] See also paragraph 2 of article 54 ("objects indispensable to the survival of the civilian population") and article 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II).

[766] Paragraph 5 of article 60 of the 1969 Vienna Convention precludes a State from suspending or terminating for material breach any treaty provision "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". This paragraph was added at the Vienna Conference on the Law of Treaties on a vote of 88 votes in favour, none against and 7 abstentions.

[767] See K. J. Partsch, "Reprisals", *Encyclopedia of Public International Law*, R. Bernhardt, ed. (Amsterdam, Elsevier, 2000), vol. 4, p. 200, at pp. 203–204; and S. Oeter, "Methods and means of combat", D. Fleck, ed., *op. cit.* (footnote 409 above) p. 105, at pp. 204–207, paras. 476–479, with references to relevant provisions.

peremptory norms makes it clear that subparagraph (*d*) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (*b*) and (*c*) stand on their own. Subparagraph (*d*) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.[768]

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50, paragraph 1 (*d*). In particular, a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.[769] Under the dispute settlement system of WTO, the prior authorization of the Dispute Settlement Body is required before a member can suspend concessions or other obligations under the WTO agreements in response to a failure of another member to comply with recommendations and rulings of a WTO panel or the Appellate Body.[770] Pursuant to article 23 of the WTO Dispute Settlement Understanding (DSU), members seeking "the redress of a violation of obligations or other nullification or impairment of benefits" under the WTO agreements, "shall have recourse to, and abide by" the DSU rules and procedures. This has been construed both as an "exclusive dispute resolution clause" and as a clause "preventing WTO members from unilaterally resolving their disputes in respect of WTO rights and obligations".[771] To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are "intransgressible",[772] they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, *paragraph 2* provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in *paragraph 2* (a), applies to "any dispute settlement procedure applicable" between the injured State and the responsible State. This phrase refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged. As ICJ said in *Appeal Relating to the Jurisdiction of the ICAO Council:*

> Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested.[773]

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise, unilateral action would replace an agreed provision capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the Court in the *United States Diplomatic and Consular Staff in Tehran* case:

> In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes.[774]

(14) The second exception in *paragraph 2* (b) limits the extent to which an injured State may resort, by way of countermeasures, to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Vienna Convention on Diplomatic Relations—such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50, paragraph 2 (*b*), is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in

[768] See paragraphs (4) to (6) of the commentary to article 40.

[769] On the exclusion of unilateral countermeasures in European Union law, see, for example, joined cases 90 and 91-63 (*Commission of the European Economic Community* v. *Grand Duchy of Luxembourg and Kingdom of Belgium*), *Reports of cases before the Court*, p. 625, at p. 631 (1964); case 52/75 (*Commission of the European Communities* v. *Italian Republic*), *ibid.*, p. 277, at p. 284 (1976); case 232/78 (*Commission of the European Economic Communities* v. *French Republic*), *ibid.*, p. 2729 (1979); and case C-5/94 (*The Queen.* v. *Ministry of Agriculture, Fisheries and Food,* ex parte *Hedley Lomas (Ireland) Ltd.*), *Reports of cases before the Court of Justice and the Court of First Instance*, p. I–2553 (1996).

[770] See Marrakesh Agreement establishing the World Trade Organization, annex 2 (Understanding on Rules and Procedures governing the Settlement of Disputes), arts. 3, para. 7 and 22.

[771] See WTO, Report of the Panel, United States–Sections 301–310 of the Trade Act of 1974 (footnote 73 above), paras. 7.35–7.46.

[772] To use the synonym adopted by ICJ in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* (see footnote 54 above), p. 257, para. 79.

[773] *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 46, at p. 53. See also S. M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13–59.

[774] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 28, para. 53.

all circumstances, including armed conflict.[775] The same applies, *mutatis mutandis*, to consular officials.

(15) In the *United States Diplomatic and Consular Staff in Tehran* case, ICJ stressed that "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions",[776] and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

> The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.[777]

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.[778] On the other hand, no reference need be made in article 50, paragraph 2 (*b*), to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, i.e. the international organization concerned.

### *Article 51. Proportionality*

**Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.**

*Commentary*

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the *"Naulilaa"* case:

> even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them.[779]

(3) In the *Air Service Agreement* arbitration,[780] the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France's refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States' countermeasure which suspended Air France flights to Los Angeles altogether. The tribunal nonetheless held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France". In particular, the majority said:

> It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule … It has been observed, generally, that judging the "proportionality" of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation. [781]

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagymaros Project* case.[782] ICJ, having accepted that

[775] See, e.g., Vienna Convention on Diplomatic Relations, arts. 22, 24, 29, 44 and 45.

[776] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), p. 38, para. 83.

[777] *Ibid*., p. 40, para. 86. Cf. article 45, subparagraph (*a*), of the Vienna Convention on Diplomatic Relations; article 27, paragraph 1 (*a*), of the Vienna Convention on Consular Relations (premises, property and archives to be protected "even in case of armed conflict").

[778] See articles 9, 11, 26, 36, paragraph 2, 43 (*b*) and 47, paragraph 2 (*a*), of the Vienna Convention on Diplomatic Relations; and articles 10, paragraph 2, 12, 23, 25 (*b*) and (*c*) and article 35, paragraph (3), of the Vienna Convention on Consular Relations.

[779] *"Naulilaa"* (see footnote 337 above), p. 1028.

[780] *Air Service Agreement* (see footnote 28 above), para. 83.

[781] *Ibid*.; Reuter, dissenting, accepted the tribunal's legal analysis of proportionality but suggested that there were "serious doubts on the proportionality of the counter-measures taken by the United States, which the tribunal has been unable to assess definitely" (p. 448).

[782] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 56, paras. 85 and 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 1977, went on to say:

> In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.
>
> In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:
>
> "[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user [sic] of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others"...
>
> Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well ...
>
> The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube—with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect the proportionality which is required by international law ...
>
> The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate.

Thus, the Court took into account the quality or character of the rights in question as a matter of principle and (like the tribunal in the *Air Service Agreement* case) did not assess the question of proportionality only in quantitative terms.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.[783] The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but "taking into account" two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to "the rights in question" has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

[783] E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale* (Milan, Giuffrè, 2000).

### *Article 52. Conditions relating to resort to countermeasures*

**1. Before taking countermeasures, an injured State shall:**

**(*a*) call upon the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;**

**(*b*) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.**

**2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.**

**3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:**

**(*a*) the internationally wrongful act has ceased; and**

**(*b*) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.**

**4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.**

*Commentary*

(1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However, this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.[784] At the same time, it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

(3) The system of article 52 builds upon the observations of the tribunal in the *Air Service Agreement* arbitration.[785] The first requirement, set out in *paragraph 1* (a), is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as "*sommation*") was stressed both by the tribunal in the *Air Service Agreement* arbitration[786] and by ICJ in the *Gabčíkovo-Nagymaros Project* case.[787] It also appears to reflect a general practice.[788]

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with paragraph 1 (*a*).

(5) *Paragraph 1* (b) requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs (*a*) and (*b*) of paragraph 1 is not strict. Notifications could be made close to each other or even at the same time.

(6) Under *paragraph 2*, however, the injured State may take "such urgent countermeasures as are necessary to preserve its rights" even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefore may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by paragraph 1 (*b*) might frustrate its own purpose. Hence, paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within paragraph 2, depending on the circumstances.

(7) *Paragraph 3* deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in paragraph 3 are met, the injured State may not take countermeasures; if already taken, they must be suspended "without undue delay". The phrase "without undue delay" allows a limited tolerance for the arrangements required to suspend the measures in question.

(8) A dispute is not "pending before a court or tribunal" for the purposes of paragraph 3 (*b*) unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an *ad hoc* tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both parties are cooperating in the appointment of the members of the tribunal.[789] Paragraph 3 is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.[790] The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will

[784] See above, paragraph (7) of the commentary to the present chapter.

[785] *Air Service Agreement* (see footnote 28 above), pp. 445–446, paras. 91 and 94–96.

[786] *Ibid*., p. 444, paras. 85–87.

[787] *Gabčíkovo-Nagymaros Project* (see footnote 27 above), p. 56, para. 84.

[788] A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali* (Milan, Giuffrè, 1997).

[789] Hence, paragraph 5 of article 290 of the United Nations Convention on the Law of the Sea provides for ITLOS to deal with provisional measures requests "[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted".

[790] The binding effect of provisional measures orders under Part XI of the United Nations Convention on the Law of the Sea is assured by paragraph 6 of article 290. For the binding effect of provisional measures orders under Article 41 of the Statute of ICJ, see the decision in *LaGrand, Judgment* (footnote 119 above), pp. 501–504, paras. 99–104.

make countermeasures unnecessary pending the decision of the tribunal. The reference to a "court or tribunal" is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.[791]

(9) *Paragraph 4* of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

### *Article 53. Termination of countermeasures*

**Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.**

*Commentary*

(1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.

(2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

[791] Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, the State of nationality may not bring an international claim on behalf of a claimant individual or company "in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute" (art. 27, para. 1); see C. H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) pp. 397–414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See paragraph (2) of the commentary to article 42.

### *Article 54. Measures taken by States other than an injured State*

**This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.**

*Commentary*

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, "injured" States, as defined in article 42, are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48, paragraph 2, such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus, with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.[792]

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organizations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the Charter of the United Nations, is not covered by the articles.[793] More generally, the articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.[794]

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts). Examples include the following:

[792] See, e.g., M. Akehurst, "Reprisals by third States", BYBIL, *1970*, vol. 44, p. 1; J. I. Charney, "Third State remedies in international law", *Michigan Journal of International Law*, vol. 10, No. 1 (1989), p. 57; Hutchinson, *loc. cit.* (footnote 672 above); Sicilianos, *op. cit.* (footnote 735 above), pp. 110–175; B. Simma, "From bilateralism to community interest in international law", *Collected Courses ..., 1994–VI* (The Hague, Martinus Nijhoff, 1997), vol. 250, p. 217; and J. A. Frowein, "Reactions by not directly affected States to breaches of public international law", *Collected Courses ..., 1994–IV* (Dordrecht, Martinus Nijhoff, 1995), vol. 248, p. 345.

[793] See article 59 and commentary.

[794] See article 57 and commentary.

• *United States-Uganda (1978).* In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.[795] The legislation recited that "[t]he Government of Uganda … has committed genocide against Ugandans" and that the "United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide".[796]

• *Certain Western countries-Poland and the Soviet Union (1981).* On 13 December 1981, the Polish Government imposed martial law and subsequently suppressed demonstrations and detained many dissidents.[797] The United States and other Western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.[798] The suspension procedures provided for in the respective treaties were disregarded.[799]

• *Collective measures against Argentina (1982).* In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.[800] Following a request by the United Kingdom, European Community members, Australia, Canada and New Zealand adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the General Agreement on Tariffs and Trade. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (*b*) (iii) of the Agreement.[801] The embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,[802] for which security exceptions of the Agreement did not apply.

• *United States-South Africa (1986).* When in 1985, the Government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.[803] Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African Airlines on United States territory.[804] This immediate suspension was contrary to the terms of the 1947 United States of America and Union of South Africa Agreement relating to air services between their respective territories[805] and was justified as a measure which should encourage the Government of South Africa "to adopt reforms leading to the establishment of a non-racial democracy".[806]

• *Collective measures against Iraq (1990).* On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion. European Community member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.[807] This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.

• *Collective measures against the Federal Republic of Yugoslavia (1998).* In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.[808] For a number of countries, such as France, Germany and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.[809] Because of doubts about the legitimacy of the action, the British Government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that "President Milosevic's ... worsening record on human rights means that, on moral and political grounds, he has forfeited the right of his Government to insist upon the 12 months notice which would normally ap-

[795] Uganda Embargo Act, Public Law 95-435 of 10 October 1978, *United States Statutes at Large 1978*, vol. 92, part 1 (Washington, D.C., United States Government Printing Office, 1980), pp. 1051–1053.

[796] *Ibid*., sects. 5(*a*) and (*b*).

[797] RGDIP, vol. 86 (1982), pp. 603–604.

[798] *Ibid*., p. 606.

[799] See, e.g., article 15 of the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People's Republic of 1972 (*United States Treaties and Other International Agreements*, vol. 23, part 4 (1972), p. 4269); and article 17 of the United States-Union of Soviet Socialist Republics Civil Air Transport Agreement of 1966, ILM, vol. 6, No. 1 (January 1967), p. 82 and vol. 7, No. 3 (May 1968), p. 571.

[800] Security Council resolution 502 (1982) of 3 April 1982.

[801] Western States' reliance on this provision was disputed by other GATT members; cf. communiqué of Western countries, GATT document L. 5319/Rev.1 and the statements by Spain and Brazil, GATT document C/M/157, pp. 5–6. For an analysis, see M. J. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Unilateral Suspension of GATT Obligations as Reprisal (English summary)) (Berlin, Springer, 1996), pp. 328–334.

[802] The treaties are reproduced in *Official Journal of the European Communities*, No. L 298 of 26 November 1979, p. 2; and No. L 275 of 18 October 1980, p. 14.

[803] Security Council resolution 569 (1985) of 26 July 1985. For further references, see Sicilianos, *op. cit.* (footnote 735 above), p. 165.

[804] For the text of this provision, see ILM, vol. 26, No. 1 (January 1987), p. 79 (sect. 306).

[805] United Nations, *Treaty Series*, vol. 66, p. 239 (art. VI).

[806] For the implementation order, see ILM (footnote 804 above), p. 105.

[807] See, e.g., President Bush's Executive Orders of 2 August 1990, reproduced in AJIL, vol. 84, No. 4 (October 1990), pp. 903–905.

[808] Common positions of 7 May and 29 June 1998, *Official Journal of the European Communities*, No. L 143 of 14 May 1998, p. 1 and No. L 190 of 4 July 1998, p. 3; implemented through Council Regulations 1295/98, *ibid*., No. L 178 of 23 June 1998, p. 33 and 1901/98, *ibid*., No. L 248 of 8 September 1998, p. 1.

[809] See, e.g., United Kingdom, *Treaty Series* No. 10 (1960) (London, HM Stationery Office, 1960); and *Recueil des Traités et Accords de la France*, 1967, No. 69.

ply".[810] The Federal Republic of Yugoslavia protested these measures as "unlawful, unilateral and an example of the policy of discrimination".[811]

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

• *Netherlands-Suriname (1982).* In 1980, a military Government seized power in Suriname. In response to a crackdown by the new Government on opposition movements in December 1982, the Dutch Government suspended a bilateral treaty on development assistance under which Suriname was entitled to financial subsidies.[812] While the treaty itself did not contain any suspension or termination clauses, the Dutch Government stated that the human rights violations in Suriname constituted a fundamental change of circumstances which gave rise to a right of suspension.[813]

• *European Community member States-the Federal Republic of Yugoslavia (1991).* In the autumn of 1991, in response to resumption of fighting within the Federal Republic of Yugoslavia, European Community members suspended and later denounced the 1983 Cooperation Agreement with Yugoslavia.[814] This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in resolution 713 (1991) of 25 September 1991. The reaction was incompatible with the terms of the Cooperation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, European Community member States explicitly mentioned the threat to peace and security in the region. But as in the case of Suriname, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.[815]

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered "injured States" in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.[816]

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The article speaks of "lawful measures" rather than "countermeasures" so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.

## PART FOUR

## GENERAL PROVISIONS

This Part contains a number of general provisions applicable to the articles as a whole, specifying either their scope or certain matters not dealt with. First, article 55 makes it clear by reference to the *lex specialis* principle that the articles have a residual character. Where some matter otherwise dealt with in the articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency. Correlatively, article 56 makes it clear that the articles are not exhaustive, and that they do not affect other applicable rules of international law on matters not dealt with. There follow three saving clauses. Article 57 excludes from the scope of the articles questions concerning the responsibility of international organizations and of States for the acts of international organizations. The articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State, and this is made clear by article 58. Finally, article 59 reserves the effects of the Charter of the United Nations itself.

[810] BYBIL, *1998*, vol. 69, p. 581; see also BYBIL, *1999*, vol. 70, pp. 555–556.

[811] Statement of the Government of the Federal Republic of Yugoslavia on the suspension of flights of Yugoslav Airlines of 10 October 1998. See M. Weller, *The Crisis in Kosovo 1989-1999* (Cambridge, Documents & Analysis Publishing, 1999), p. 227.

[812] *Tractatenblad van het Koninkrijk der Nederlanden*, No. 140 (1975). See H.-H. Lindemann, "The repercussions resulting from the violation of human rights in Surinam on the contractual relations between the Netherlands and Surinam", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 44 (1984), p. 64, at pp. 68–69.

[813] R. C. R. Siekmann, "Netherlands State practice for the parliamentary year 1982–1983", NYIL, 1984, vol. 15, p. 321.

[814] *Official Journal of the European Communities*, No. L 41 of 14 February 1983, p. 1; No. L 315 of 15 November 1991, p. 1, for the suspension; and No. L 325 of 27 November 1991, p. 23, for the denunciation.

[815] See also the decision of the European Court of Justice in *A. Racke GmbH and Co.* v. *Hauptzollamt Mainz*, case C-162/96, *Reports of cases before the Court of Justice and the Court of First Instance*, 1998-6, p. I–3655, at pp. 3706–3708, paras. 53–59.

[816] Cf. *Military and Paramilitary Activities in and against Nicaragua* (footnote 36 above) where ICJ noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack (p. 105, para. 199).

### *Article 55.* Lex specialis

**These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.**

*Commentary*

(1) When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, i.e. whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.

(2) Article 55 provides that the articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*. Although it may provide an important indication, this is only one of a number of possible approaches towards determining which of several rules potentially applicable is to prevail or whether the rules simply coexist. Another gives priority, as between the parties, to the rule which is later in time.[817] In certain cases the consequences that follow from a breach of some overriding rule may themselves have a peremptory character. For example, States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law. Thus, the assumption of article 55 is that the special rules in question have at least the same legal rank as those expressed in the articles. On that basis, article 55 makes it clear that the present articles operate in a residual way.

(3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases, it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be "determined" by the special rule and the principle embodied in article 55 will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the WTO Understanding on Rules and Procedures governing the Settlement of Disputes as it relates to certain remedies.[818] An example of the latter is article 41 of Protocol No. 11 to the European Convention on Human Rights.[819] Both concern matters dealt with in Part Two of the articles. The same considerations apply to Part One. Thus, a particular treaty might impose obligations on a State but define the "State" for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.[820] Or a treaty might exclude a State from relying on *force majeure* or necessity.

(4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation. For example, in the *Neumeister* case, the European Court of Human Rights held that the specific obligation in article 5, paragraph 5, of the European Convention on Human Rights for compensation for unlawful arrest or detention did not prevail over the more general provision for compensation in article 50. In the Court's view, to have applied the *lex specialis* principle to article 5, paragraph 5, would have led to "consequences incompatible with the aim and object of the Convention".[821] It was sufficient, in applying article 50, to take account of the specific provision.[822]

(5) Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. PCIJ referred to the notion of a self-contained regime in the *S.S. "Wimbledon"* case with respect to the transit provisions concerning the Kiel Canal in the Treaty of Versailles,[823]

[817] See paragraph 3 of article 30 of the 1969 Vienna Convention.

[818] See Marrakesh Agreement establishing the World Trade Organization, annex 2, especially art. 3, para. 7, which provides for compensation "only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". For WTO purposes, "compensation" refers to the future conduct, not past conduct, and involves a form of countermeasure. See article 22 of the Understanding. On the distinction between cessation and reparation for WTO purposes, see, e.g., Report of the Panel, Australia–Subsidies Provided to Producers and Exporters of Automotive Leather (footnote 431 above).

[819] See paragraph (2) of the commentary to article 32.

[820] Thus, article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment only applies to torture committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". This is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II. Cf. "federal" clauses, allowing certain component units of the State to be excluded from the scope of a treaty or limiting obligations of the federal State with respect to such units (e.g. article 34 of the Convention for the Protection of the World Cultural and Natural Heritage).

[821] *Neumeister* v. *Austria, Eur. Court H.R., Series A, No. 17* (1974), paras. 28–31, especially para. 30.

[822] See also *Mavrommatis* (footnote 236 above), pp. 29–33; *Marcu Colleanu* v. *German State*, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix* (Paris, Sirey, 1930), vol. IX, p. 216 (1929); WTO, Report of the Panel, Turkey–Restrictions on Imports of Textile and Clothing Products (footnote 130 above), paras. 9.87–9.95; *Case concerning a dispute between Argentina and Chile concerning the Beagle Channel*, UNRIAA, vol. XXI (Sales No. E/F. 95.V.2), p. 53, at p. 100, para. 39 (1977). See further C. W. Jenks, "The conflict of law-making treaties", BYBIL, *1953*, vol. 30, p. 401; M. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven Press, 1994), pp. 200–206; and P. Reuter, *Introduction to the Law of Treaties* (footnote 300 above), para. 201.

[823] *S.S.* "*Wimbledon"* (see footnote 34 above), pp. 23–24.

as did ICJ in the *United States Diplomatic and Consular Staff in Tehran* case with respect to remedies for abuse of diplomatic and consular privileges.[824]

(6) The principle stated in article 55 applies to the articles as a whole. This point is made clear by the use of language ("the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State") which reflects the content of each of Parts One, Two and Three.

### *Article 56. Questions of State responsibility not regulated by these articles*

**The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.**

*Commentary*

(1) The present articles set out by way of codification and progressive development the general secondary rules of State responsibility. In that context, article 56 has two functions. First, it preserves the application of the rules of customary international law concerning State responsibility on matters not covered by the articles. Secondly, it preserves other rules concerning the effects of a breach of an international obligation which do not involve issues of State responsibility but stem from the law of treaties or other areas of international law. It complements the *lex specialis* principle stated in article 55. Like article 55, it is not limited to the legal consequences of wrongful acts but applies to the whole regime of State responsibility set out in the articles.

(2) As to the first of these functions, the articles do not purport to state all the consequences of an internationally wrongful act even under existing international law and there is no intention of precluding the further development of the law on State responsibility. For example, the principle of law expressed in the maxim *ex injuria jus non oritur* may generate new legal consequences in the field of responsibility.[825] In this respect, article 56 mirrors the preambular paragraph of the 1969 Vienna Convention which affirms that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". However, matters of State responsibility are not only regulated by customary international law but also by some treaties; hence article 56 refers to the "applicable rules of international law".

(3) A second function served by article 56 is to make it clear that the present articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include the invalidity of a treaty procured by an unlawful use of force,[826] the exclusion of reliance on a fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party,[827] or the termination of the international obligation violated in the case of a material breach of a bilateral treaty.[828]

### *Article 57. Responsibility of an international organization*

**These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.**

*Commentary*

(1) Article 57 is a saving clause which reserves two related issues from the scope of the articles. These concern, first, any question involving the responsibility of international organizations, and secondly, any question concerning the responsibility of any State for the conduct of an international organization.

(2) In accordance with the articles prepared by the Commission on other topics, the expression "international organization" means an "intergovernmental organization".[829] Such an organization possesses separate legal personality under international law,[830] and is responsible for its own acts, i.e. for acts which are carried out by the organization through its own organs or officials.[831] By contrast, where a number of States act together through their own organs as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, as article 47 confirms, each State remains responsible for its own conduct.

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[824] *United States Diplomatic and Consular Staff in Tehran* (see footnote 59 above), at p. 40, para. 86. See paragraph (15) of the commentary to article 50 and also B. Simma, "Self-contained regimes", NYIL, 1985, vol. 16, p. 111.

[825] Another possible example, related to the determination whether there has been a breach of an international obligation, is the so-called principle of "approximate application", formulated by Sir Hersch Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23, at p. 46. In the *Gabčíkovo-Nagymaros Project* case (see footnote 27 above), the Court said that "even if such a principle existed, it could by definition only be employed within the limits of the treaty in question" (p. 53, para. 76). See also S. Rosenne, *Breach of Treaty* (footnote 411 above), pp. 96–101.

[826] 1969 Vienna Convention, art. 52.

[827] *Ibid*., art. 62, para. 2 (*b*).

[828] *Ibid*., art. 60, para 1.

[829] See article 2, paragraph 1 (*i*), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention").

[830] A firm foundation for the international personality of the United Nations is laid in the advisory opinion of the Court in *Reparation for Injuries* (see footnote 38 above), at p. 179.

[831] As the Court has observed, "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts", *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (see footnote 56 above).

(3) Just as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international organization and a State. The former situation is covered by article 6. As to the latter situation, if a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State, and will fall outside the scope of the articles. As to the converse situation, in practice there do not seem to be convincing examples of organs of international organizations which have been "placed at the disposal of" a State in the sense of article 6,[832] and there is no need to provide expressly for the possibility.

(4) Article 57 also excludes from the scope of the articles issues of the responsibility of a State for the acts of an international organization, i.e. those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization. Formally, such issues could fall within the scope of the present articles since they concern questions of State responsibility akin to those dealt with in chapter IV of Part One. But they raise controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which are better dealt with in the context of the law of international organizations.[833]

(5) On the other hand article 57 does not exclude from the scope of the articles any question of the responsibility of a State for its own conduct, i.e. for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization. In this respect the scope of article 57 is narrow. It covers only what is sometimes referred to as the derivative or secondary liability of member States for the acts or debts of an international organization.[834]

### *Article 58. Individual responsibility*

**These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.**

*Commentary*

(1) Article 58 makes clear that the articles as a whole do not address any question of the individual responsibility under international law of any person acting on behalf of a State. It clarifies a matter which could be inferred in any case from the fact that the articles only address issues relating to the responsibility of States.

(2) The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of the Second World War. It was included in the London Charter of 1945 which established the Nuremberg Tribunal[835] and was subsequently endorsed by the General Assembly.[836] It underpins more recent developments in the field of international criminal law, including the two *ad hoc* tribunals and the Rome Statute of the International Criminal Court.[837] So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.[838] As a saving clause, article 58 is not intended to exclude that possibility; hence the use of the general term "individual responsibility".

(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.[839] The

[832] Cf. *Yearbook ... 1974*, vol. II (Part One), pp. 286–290. The High Commissioner for the Free City of Danzig was appointed by the League of Nations Council and was responsible to it; see *Treatment of Polish Nationals* (footnote 75 above). Although the High Commissioner exercised powers in relation to Danzig, it is doubtful that he was placed at the disposal of Danzig within the meaning of article 6. The position of the High Representative, appointed pursuant to annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995, is also unclear. The Constitutional Court of Bosnia and Herzegovina has held that the High Representative has a dual role, both as an international agent and as an official in certain circumstances acting in and for Bosnia and Herzegovina; in the latter respect, the High Representative's acts are subject to constitutional control. See *Case U 9/00 on the Law on the State Border Service*, Official Journal of Bosnia and Herzegovina, No. 1/01 of 19 January 2001.

[833] This area of international law has acquired significance following controversies, *inter alia*, over the International Tin Council: *J. H. Rayner (Mincing Lane) Ltd.* v. *Department of Trade and Industry*, case 2 A.C. 418 (1990) (England, House of Lords); *Maclaine Watson and Co., Ltd.* v. *Council and Commission of the European Communities*, case C-241/87, *Reports of cases before the Court of Justice and the Court of First Instance*, 1990-5, p. I–1797; and the Arab Organization for Industrialization (*Westland Helicopters Ltd.* v. *Arab Organization for Industrialization*, ILR, vol. 80, p. 595 (1985) (International Chamber of Commerce Award); *Arab Organization for Industrialization* v. *Westland Helicopters Ltd., ibid*., p. 622 (1987) (Switzerland, Federal Supreme Court); *Westland Helicopters Ltd.* v. *Arab Organization for Industrialization, ibid*., vol. 108, p. 564 (1994) (England, High Court). See also *Waite and Kennedy* v. *Germany*, *Eur. Court H.R.*, *Reports*, 1999–I, p. 393 (1999).

[834] See the work of the Institute of International Law under R. Higgins, *Yearbook of the Institute of International Law*, vol. 66–I (1995), p. 251, and vol. 66–II (1996), p. 444. See also P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels, Bruylant Editions de l'Université de Bruxelles, 1998). See further WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (footnote 130).

[835] See footnote 636 above.

[836] General Assembly resolution 95 (I) of 11 December 1946. See also the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, elaborated by the International Law Commission, *Yearbook ... 1950*, vol. II, p. 374, document A/1316.

[837] See paragraph (6) of the commentary to chapter III of Part Two.

[838] See, e.g., article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, dealing with compensation for victims of torture.

[839] See, e.g., *Streletz, Kessler and Krenz* v. *Germany* (application Nos. 34044/96, 35532/97 and 44801/98), judgment of 22 March 2001, *Eur. Court H.R.*, *Reports*, 2001–II: "If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State responsibility the applicants individually bore criminal responsibility at the material time" (para. 104).

State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.[840] Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that: "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.[841]

(4) Article 58 reflects this situation, making it clear that the articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term "individual responsibility" has acquired an accepted meaning in the light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

[840] Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see paragraph (5) of the commentary to article 36.

[841] See, e.g., the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III (footnote 836 above), p. 375; and article 27 of the Rome Statute of the International Criminal Court.

### *Article 59. Charter of the United Nations*

**These articles are without prejudice to the Charter of the United Nations.**

*Commentary*

(1) In accordance with Article 103 of the Charter of the United Nations, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". The focus of Article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the articles, as for example in the *Lockerbie* cases.[842] More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the articles cannot affect and are without prejudice to the Charter of the United Nations. The articles are in all respects to be interpreted in conformity with the Charter.

[842] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3; *(Libyan Arab Jamahiriya* v. *United States of America), ibid.*, p. 114.

# UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage Paris, 17 October 2003*

The General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) meeting in Paris at its thirty-second session in 2003,

Recalling the tragic destruction of the Buddhas of Bamiyan that affected the international community as a whole,

Expressing serious concern about the growing number of acts of intentional destruction of cultural heritage,

Referring to Article I(2)(c) of the Constitution of UNESCO that entrusts UNESCO with the task of maintaining, increasing and diffusing knowledge by "assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions",

Recalling the principles of all UNESCO's conventions, recommendations, declarations and charters for the protection of cultural heritage,

Mindful that cultural heritage is an important component of the cultural identity of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on human dignity and human rights,

Reiterating one of the fundamental principles of the Preamble of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict providing that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world",

* Declaration adopted by the thirty-second session of the UNESCO General Conference, Paris, 17 October 2003. The declaration is available on UNESCO's website: <http://www.unesco.org/culture/laws/intentional/declare.pdf>.

Recalling the principles concerning the protection of cultural heritage in the event of armed conflict established in the 1899 and 1907 Hague Conventions and, in particular, in Articles 27 and 56 of the Regulations of the 1907 Fourth Hague Convention, as well as other subsequent agreements,

Mindful of the development of rules of customary international law as also affirmed by the relevant case-law, related to the protection of cultural heritage in peacetime as well as in the event of armed conflict,

Also recalling Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute of the International Criminal Court, and, as appropriate, Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia, related to the intentional destruction of cultural heritage,

Reaffirming that issues not fully covered by the present Declaration and other international instruments concerning cultural heritage will continue to be governed by the principles of international law, the principles of humanity and the dictates of public conscience,

*Adopts and solemnly proclaims* the present Declaration:

**I - Recognition of the importance of cultural heritage**

The international community recognizes the importance of the protection of cultural heritage and reaffirms its commitment to fight against its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations.

**II – Scope**

1. The present Declaration addresses intentional destruction of cultural heritage including cultural heritage linked to a natural site.
2. For the purposes of this Declaration "intentional destruction" means an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law.

**III – Measures to combat intentional destruction of cultural heritage**

1. States should take all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, wherever such heritage is located.

2. States should adopt the appropriate legislative, administrative, educational and technical measures, within the framework of their economic resources, to protect cultural heritage and should revise them periodically with a view to adapting them to the evolution of national and international cultural heritage protection standards.
3. States should endeavour, by all appropriate means, to ensure respect for cultural heritage in society, particularly through educational, awareness-raising and information programmes.
4. States should:
   (a) Become parties to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 and 1999 Protocols and the Additional Protocols I and II to the four 1949 Geneva Conventions, if they have not yet done so;
   (b) Promote the elaboration and the adoption of legal instruments providing a higher standard of protection of cultural heritage, and
   (c) Promote a coordinated application of existing and future instruments relevant to the protection of cultural heritage.

**IV – Protection of cultural heritage when conducting peacetime activities**

When conducting peacetime activities, States should take all appropriate measures to conduct them in such a manner as to protect cultural heritage and, in particular, in conformity with the principles and objectives of the 1972 Convention for the Protection of the World Cultural and Natural Heritage, of the 1956 Recommendation on International Principles Applicable to Archaeological Excavations, the 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, the 1972 Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage and the 1976 Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas.

**V – Protection of cultural heritage in the event of armed conflict, including the case of occupation**

When involved in an armed conflict, be it of an international or non-international character, including the case of occupation, States should take all appropriate measures to conduct their activities in such a manner as to protect cultural heritage, in conformity with customary international law and

the principles and objectives of international agreements and UNESCO recommendations concerning the protection of such heritage during hostilities.

**VI – State responsibility**

A State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law.

**VII – Individual criminal responsibility**

States should take all appropriate measures, in accordance with international law, to establish jurisdiction over, and provide effective criminal sanctions against, those persons who commit, or order to be committed, acts of intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization.

**VIII – Cooperation for the protection of cultural heritage**

1. States should cooperate with each other and with UNESCO to protect cultural heritage from intentional destruction. Such cooperation should entail at least :

(i) provision and exchange of information regarding circumstances entailing the risk of intentional destruction of cultural heritage;
(ii) consultation in the event of actual or impending destruction of cultural heritage;
(iii) consideration of assistance to States, as requested by them, in the promotion of educational programmes, awareness-raising and capacity-building for the prevention and repression of any intentional destruction of cultural heritage;
(iv) judicial and administrative assistance, as requested by interested States, in the repression of any intentional destruction of cultural heritage.

2. For the purposes of more comprehensive protection, each State is encouraged to take all appropriate measures, in accordance with international law, to cooperate with other States concerned with a view to establishing

jurisdiction over, and providing effective criminal sanctions against, those persons who have committed or have ordered to be committed acts referred to above (VII - Individual criminal responsibility) and who are found present on its territory, regardless of their nationality and the place where such act occurred.

**IX – Human rights and international humanitarian law**

In applying this Declaration, States recognize the need to respect international rules related to the criminalization of gross violations of human rights and international humanitarian law, in particular, when intentional destruction of cultural heritage is linked to those violations.

**X – Public awareness**

States should take all appropriate measures to ensure the widest possible dissemination of this Declaration to the general public and to target groups, inter alia, by organizing public awareness-raising campaigns.

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# CONSÉQUENCES JURIDIQUES DE L'ÉDIFICATION D'UN MUR DANS LE TERRITOIRE PALESTINIEN OCCUPÉ

**AVIS CONSULTATIF DU 9 JUILLET 2004**

# 2004

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

**ADVISORY OPINION OF 9 JULY 2004**

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AVIS CONSULTATIF

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9 JULY 2004

ADVISORY OPINION

INTERNATIONAL COURT OF JUSTICE

YEAR 2004

2004
9 July
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No. 131

**9 July 2004**

# LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY

*Jurisdiction of the Court to give the advisory opinion requested.*

*Article 65, paragraph 1, of the Statute — Article 96, paragraph 1, of the Charter — Power of General Assembly to request advisory opinions — Activities of Assembly.*

*Events leading to the adoption of General Assembly resolution ES-10/14 requesting the advisory opinion.*

*Contention that General Assembly acted* ultra vires *under the Charter — Article 12, paragraph 1, and Article 24 of the Charter — United Nations practice concerning the interpretation of Article 12, paragraph 1, of Charter — General Assembly did not exceed its competence.*

*Request for opinion adopted by the Tenth Emergency Special Session of the General Assembly — Session convened pursuant to resolution 377 A (V) ("Uniting for Peace") — Conditions set by that resolution — Regularity of procedure followed.*

*Alleged lack of clarity of the terms of the question — Purportedly abstract nature of the question — Political aspects of the question — Motives said to have inspired the request and opinion's possible implications — "Legal" nature of question unaffected.*

*Court having jurisdiction to give advisory opinion requested.*

* *

*Discretionary power of Court to decide whether it should give an opinion.*

*Article 65, paragraph 1, of Statute — Relevance of lack of consent of a State concerned — Question cannot be regarded only as a bilateral matter between Israel and Palestine but is directly of concern to the United Nations — Possible effects of opinion on a political, negotiated solution to the Israeli-Palestinian conflict — Question representing only one aspect of Israeli-Palestinian conflict — Sufficiency of information and evidence available to Court — Useful purpose*

*of opinion* — Nullus commodum capere potest de sua injuria propria — *Opinion to be given to the General Assembly, not to a specific State or entity.*

*No "compelling reason" for Court to use its discretionary power not to give an advisory opinion.*

* *

*"Legal consequences" of the construction of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem — Scope of question posed — Request for opinion limited to the legal consequences of the construction of those parts of the wall situated in Occupied Palestinian Territory — Use of the term "wall".*

*Historical background.*

*Description of the wall.*

* *

*Applicable law.*

*United Nations Charter — General Assembly resolution 2625 (XXV) — Illegality of any territorial acquisition resulting from the threat or use of force — Right of peoples to self-determination.*

*International humanitarian law — Regulations annexed to the Fourth Hague Convention of 1907 — Fourth Geneva Convention of 1949 — Applicability of Fourth Geneva Convention in the Occupied Palestinian Territory — Human rights law — International Covenant on Civil and Political Rights — International Covenant on Economic, Social and Cultural Rights — Convention on the Rights of the Child — Relationship between international humanitarian law and human rights law — Applicability of human rights instruments outside national territory — Applicability of those instruments in the Occupied Palestinian Territory.*

* *

*Settlements established by Israel in breach of international law in the Occupied Palestinian Territory — Construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent — Risk of situation tantamount to* de facto *annexation — Construction of the wall severely impedes the exercise by the Palestinian people of its right to self-determination and is therefore a breach of Israel's obligation to respect that right.*

*Applicable provisions of international humanitarian law and human rights instruments relevant to the present case — Destruction and requisition of properties — Restrictions on freedom of movement of inhabitants of the Occupied Palestinian Territory — Impediments to the exercise by those concerned of the right to work, to health, to education and to an adequate standard of living — Demographic changes in the Occupied Palestinian Territory — Provisions of international humanitarian law enabling account to be taken of military exigencies — Clauses in human rights instruments qualifying rights guaranteed or providing for derogation — Construction of the wall and its associated régime cannot be justified by military exigencies or by the requirements of national security or public order — Breach by Israel of various of its obligations under*

*the applicable provisions of international humanitarian law and human rights instruments.*

*Self-defence — Article 51 of the Charter — Attacks against Israel not imputable to a foreign State — Threat invoked to justify the construction of the wall originating within a territory over which Israel exercises control — Article 51 not relevant in the present case.*

*State of necessity — Customary international law — Conditions — Construction of the wall not the only means to safeguard Israel's interests against the peril invoked.*

*Construction of the wall and its associated régime are contrary to international law.*

* *

*Legal consequences of the violation by Israel of its obligations.*

*Israel's international responsibility — Israel obliged to comply with the international obligations it has breached by the construction of the wall — Israel obliged to put an end to the violation of its international obligations — Obligation to cease forthwith the works of construction of the wall, to dismantle it forthwith and to repeal or render ineffective forthwith the legislative and regulatory acts relating to its construction, save where relevant for compliance by Israel with its obligation to make reparation for the damage caused — Israel obliged to make reparation for the damage caused to all natural or legal persons affected by construction of the wall.*

*Legal consequences for States other than Israel* — Erga omnes *character of certain obligations violated by Israel — Obligation for all States not to recognize the illegal situation resulting from construction of the wall and not to render aid or assistance in maintaining the situation created by such construction — Obligation for all States, while respecting the Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end — Obligation for all States parties to the Fourth Geneva Convention, while respecting the Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention — Need for the United Nations, and especially the General Assembly and the Security Council, to consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and its associated régime, taking due account of the Advisory Opinion.*

* *

*Construction of the wall must be placed in a more general context — Obligation of Israel and Palestine scrupulously to observe international humanitarian law — Implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973) — "Roadmap" — Need for efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, with peace and security for all in the region.*

## ADVISORY OPINION

*Present:* *President* SHI; *Vice-President* RANJEVA; *Judges* GUILLAUME, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA; *Registrar* COUVREUR.

On the legal consequences of the construction of a wall in the Occupied Palestinian Territory,

THE COURT,

composed as above,

*gives the following Advisory Opinion:*

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution ES-10/14 adopted by the General Assembly of the United Nations (hereinafter the "General Assembly") on 8 December 2003 at its Tenth Emergency Special Session. By a letter dated 8 December 2003 and received in the Registry by facsimile on 10 December 2003, the original of which reached the Registry subsequently, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of resolution ES-10/14 were enclosed with the letter. The resolution reads as follows:

> "*The General Assembly*,
>
> *Reaffirming* its resolution ES-10/13 of 21 October 2003,
>
> *Guided* by the principles of the Charter of the United Nations,
>
> *Aware* of the established principle of international law on the inadmissibility of the acquisition of territory by force,
>
> *Aware also* that developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples is among the purposes and principles of the Charter of the United Nations,
>
> *Recalling* relevant General Assembly resolutions, including resolution 181 (II) of 29 November 1947, which partitioned mandated Palestine into two States, one Arab and one Jewish,
>
> *Recalling also* the resolutions of the tenth emergency special session of the General Assembly,
>
> *Recalling further* relevant Security Council resolutions, including resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 267 (1969) of 3 July 1969, 298 (1971) of 25 September 1971, 446 (1979) of 22 March 1979, 452 (1979) of 20 July 1979, 465 (1980) of 1 March 1980, 476 (1980) of 30 June 1980, 478 (1980) of 20 August 1980, 904 (1994) of 18 March 1994, 1073 (1996) of 28 September 1996, 1397 (2002) of 12 March 2002 and 1515 (2003) of 19 November 2003,

*Reaffirming* the applicability of the Fourth Geneva Convention[1] as well as Additional Protocol I to the Geneva Conventions[2] to the Occupied Palestinian Territory, including East Jerusalem,

*Recalling* the Regulations annexed to the Hague Convention Respecting the Laws and Customs of War on Land of 1907[3],

*Welcoming* the convening of the Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, at Geneva on 15 July 1999,

*Expressing its support* for the declaration adopted by the reconvened Conference of High Contracting Parties at Geneva on 5 December 2001,

*Recalling in particular* relevant United Nations resolutions affirming that Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, are illegal and an obstacle to peace and to economic and social development as well as those demanding the complete cessation of settlement activities,

*Recalling* relevant United Nations resolutions affirming that actions taken by Israel, the occupying Power, to change the status and demographic composition of Occupied East Jerusalem have no legal validity and are null and void,

*Noting* the agreements reached between the Government of Israel and the Palestine Liberation Organization in the context of the Middle East peace process,

*Gravely concerned* at the commencement and continuation of construction by Israel, the occupying Power, of a wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1949 (Green Line) and which has involved the confiscation and destruction of Palestinian land and resources, the disruption of the lives of thousands of protected civilians and the de facto annexation of large areas of territory, and underlining the unanimous opposition by the international community to the construction of that wall,

*Gravely concerned also* at the even more devastating impact of the projected parts of the wall on the Palestinian civilian population and on the prospects for solving the Palestinian-Israeli conflict and establishing peace in the region,

*Welcoming* the report of 8 September 2003 of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967[4], in particular the section regarding the wall,

---

[1] United Nations, *Treaty Series*, Vol. 75, No. 973.
[2] *Ibid.*, Vol. 1125, No. 17512.
[3] See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).
[4] E/CN.4/2004/6.

*Affirming* the necessity of ending the conflict on the basis of the two-State solution of Israel and Palestine living side by side in peace and security based on the Armistice Line of 1949, in accordance with relevant Security Council and General Assembly resolutions,

*Having received with appreciation* the report of the Secretary-General, submitted in accordance with resolution ES-10/13[5],

*Bearing in mind* that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences,

*Decides*, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to urgently render an advisory opinion on the following question:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

[5] A/ES-10/248."

Also enclosed with the letter were the certified English and French texts of the report of the Secretary-General dated 24 November 2003, prepared pursuant to General Assembly resolution ES-10/13 (A/ES-10/248), to which resolution ES-10/14 makes reference.

2. By letters dated 10 December 2003, the Registrar notified the request for an advisory opinion to all States entitled to appear before the Court, in accordance with Article 66, paragraph 1, of the Statute.

3. By a letter dated 11 December 2003, the Government of Israel informed the Court of its position on the request for an advisory opinion and on the procedure to be followed.

4. By an Order of 19 December 2003, the Court decided that the United Nations and its Member States were likely, in accordance with Article 66, paragraph 2, of the Statute, to be able to furnish information on all aspects raised by the question submitted to the Court for an advisory opinion and fixed 30 January 2004 as the time-limit within which written statements might be submitted to it on the question in accordance with Article 66, paragraph 4, of the Statute. By the same Order, the Court further decided that, in the light of resolution ES-10/14 and the report of the Secretary-General transmitted with the request, and taking into account the fact that the General Assembly had granted Palestine a special status of observer and that the latter was co-sponsor of the draft resolution requesting the advisory opinion, Palestine might also submit a written statement on the question within the above time-limit.

5. By the aforesaid Order, the Court also decided, in accordance with

Article 105, paragraph 4, of the Rules of Court, to hold public hearings during which oral statements and comments might be presented to it by the United Nations and its Member States, regardless of whether or not they had submitted written statements, and fixed 23 February 2004 as the date for the opening of the said hearings. By the same Order, the Court decided that, for the reasons set out above (see paragraph 4), Palestine might also take part in the hearings. Lastly, it invited the United Nations and its Member States, as well as Palestine, to inform the Registry, by 13 February 2004 at the latest, if they were intending to take part in the above-mentioned hearings. By letters of 19 December 2004, the Registrar informed them of the Court's decisions and transmitted to them a copy of the Order.

6. Ruling on requests submitted subsequently by the League of Arab States and the Organization of the Islamic Conference, the Court decided, in accordance with Article 66 of its Statute, that those two international organizations were likely to be able to furnish information on the question submitted to the Court, and that consequently they might for that purpose submit written statements within the time-limit fixed by the Court in its Order of 19 December 2003 and take part in the hearings.

7. Pursuant to Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question.

8. By a reasoned Order of 30 January 2004 regarding its composition in the case, the Court decided that the matters brought to its attention by the Government of Israel in a letter of 31 December 2003, and in a confidential letter of 15 January 2004 addressed to the President pursuant to Article 34, paragraph 2, of the Rules of Court, were not such as to preclude Judge Elaraby from sitting in the case.

9. Within the time-limit fixed by the Court for that purpose, written statements were filed by, in order of their receipt: Guinea, Saudi Arabia, League of Arab States, Egypt, Cameroon, Russian Federation, Australia, Palestine, United Nations, Jordan, Kuwait, Lebanon, Canada, Syria, Switzerland, Israel, Yemen, United States of America, Morocco, Indonesia, Organization of the Islamic Conference, France, Italy, Sudan, South Africa, Germany, Japan, Norway, United Kingdom, Pakistan, Czech Republic, Greece, Ireland on its own behalf, Ireland on behalf of the European Union, Cyprus, Brazil, Namibia, Malta, Malaysia, Netherlands, Cuba, Sweden, Spain, Belgium, Palau, Federated States of Micronesia, Marshall Islands, Senegal, Democratic People's Republic of Korea. Upon receipt of those statements, the Registrar transmitted copies thereof to the United Nations and its Member States, to Palestine, to the League of Arab States and to the Organization of the Islamic Conference.

10. Various communications were addressed to these latter by the Registry, concerning in particular the measures taken for the organization of the oral proceedings. By communications of 20 February 2004, the Registry transmitted a detailed timetable of the hearings to those of the latter who, within the time-limit fixed for that purpose by the Court, had expressed their intention of taking part in the aforementioned proceedings.

11. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements accessible to the public, with effect from the opening of the oral proceedings.

12. In the course of hearings held from 23 to 25 February 2004, the Court heard oral statements, in the following order, by:

*for Palestine:* H.E. Mr. Nasser Al-Kidwa, Ambassador, Permanent Observer of Palestine to the United Nations,

Ms Stephanie Koury, Member, Negotiations Support Unit, Counsel,
Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institute of International Law, Counsel and Advocate,
Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law, Counsel and Advocate,
Mr. Vaughan Lowe, Chichele Professor of International Law, University of Oxford, Counsel and Advocate,
Mr. Jean Salmon, Professor Emeritus of International Law, Université libre de Bruxelles, Member of the Institute of International Law, Counsel and Advocate;

*for the Republic of South Africa:* H.E. Mr. Aziz Pahad, Deputy Minister for Foreign Affairs, Head of Delegation,
Judge M. R. W. Madlanga, S.C.;

*for the People's Democratic Republic of Algeria:* Mr. Ahmed Laraba, Professor of International Law;

*for the Kingdom of Saudi Arabia:* H.E. Mr. Fawzi A. Shobokshi, Ambassador and Permanent Representative of the Kingdom of Saudi Arabia to the United Nations in New York, Head of Delegation;

*for the People's Republic of Bangladesh:* H.E. Mr. Liaquat Ali Choudhury, Ambassador of the People's Republic of Bangladesh to the Kingdom of the Netherlands;

*for Belize:* Mr. Jean-Marc Sorel, Professor at the University of Paris I (Panthéon-Sorbonne);

*for the Republic of Cuba:* H.E. Mr. Abelardo Moreno Fernández, Deputy Minister for Foreign Affairs;

*for the Republic of Indonesia:* H.E. Mr. Mohammad Jusuf, Ambassador of the Republic of Indonesia to the Kingdom of the Netherlands, Head of Delegation;

*for the Hashemite Kingdom of Jordan:* H.R.H. Ambassador Zeid Ra'ad Zeid Al-Hussein, Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, New York, Head of Delegation,
Sir Arthur Watts, K.C.M.G., Q.C., Senior Legal

Adviser to the Government of the Hashemite Kingdom of Jordan;

*for the Republic of Madagascar:* H.E. Mr. Alfred Rambeloson, Permanent Representative of Madagascar to the Office of the United Nations at Geneva and to the Specialized Agencies, Head of Delegation;

*for Malaysia:* H.E. Datuk Seri Syed Hamid Albar, Foreign Minister of Malaysia, Head of Delegation;

*for the Republic of Senegal:* H.E. Mr. Saliou Cissé, Ambassador of the Republic of Senegal to the Kingdom of the Netherlands, Head of Delegation;

*for the Republic of the Sudan:* H.E. Mr. Abuelgasim A. Idris, Ambassador of the Republic of the Sudan to the Kingdom of the Netherlands;

*for the League of Arab States:* Mr. Michael Bothe, Professor of Law, Head of the Legal Team;

*for the Organization of the Islamic Conference:* H.E. Mr. Abdelouahed Belkeziz, Secretary General of the Organization of the Islamic Conference,
Ms Monique Chemillier-Gendreau, Professor of Public Law, University of Paris VII-Denis Diderot, as Counsel.

* * *

13. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why it should decline to exercise any such jurisdiction (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10).

* *

14. The Court will thus first address the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 December 2003. The competence of the Court in this regard is based on Article 65, paragraph 1, of its Statute, according to which the Court "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request". The Court has already had occasion to indicate that:

> "It is . . . a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ." (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982,* pp. 333-334, para. 21.)

15. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ or agency having competence to make it. In the present instance, the Court notes that the General Assembly, which seeks the advisory opinion, is authorized to do so by Article 96, paragraph 1, of the Charter, which provides: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

16. Although the above-mentioned provision states that the General Assembly may seek an advisory opinion "on any legal question", the Court has sometimes in the past given certain indications as to the relationship between the question the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 70; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 232 and 233, paras. 11 and 12).

17. The Court will so proceed in the present case. The Court would observe that Article 10 of the Charter has conferred upon the General Assembly a competence relating to "any questions or any matters" within the scope of the Charter, and that Article 11, paragraph 2, has specifically provided it with competence on "questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . ." and to make recommendations under certain conditions fixed by those Articles. As will be explained below, the question of the construction of the wall in the Occupied Palestinian Territory was brought before the General Assembly by a number of Member States in the context of the Tenth Emergency Special Session of the Assembly, convened to deal with what the Assembly, in its resolution ES-10/2 of 25 April 1997, considered to constitute a threat to international peace and security.

*

18. Before further examining the problems of jurisdiction that have been raised in the present proceedings, the Court considers it necessary to describe the events that led to the adoption of resolution ES-10/14, by which the General Assembly requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

19. The Tenth Emergency Special Session of the General Assembly, at which that resolution was adopted, was first convened following the rejection by the Security Council, on 7 March and 21 March 1997, as a result of negative votes by a permanent member, of two draft resolutions concerning certain Israeli settlements in the Occupied Palestinian Territory (see, respectively, S/1997/199 and S/PV.3747, and S/1997/241 and S/PV.3756). By a letter of 31 March 1997, the Chairman of the Arab Group then requested "that an emergency special session of the General Assembly be convened pursuant to resolution 377 A (V) entitled 'Uniting

for Peace' " with a view to discussing "Illegal Israeli actions in occupied East Jerusalem and the rest of the Occupied Palestinian Territory" (letter dated 31 March 1997 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General, A/ES-10/1, 22 April 1997, Annex). The majority of Members of the United Nations having concurred in this request, the first meeting of the Tenth Emergency Special Session of the General Assembly took place on 24 April 1997 (see A/ES-10/1, 22 April 1997). Resolution ES-10/2 was adopted the following day; the General Assembly thereby expressed its conviction that:

> "the repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to international peace and security",

and condemned the "illegal Israeli actions" in occupied East Jerusalem and the rest of the Occupied Palestinian Territory, in particular the construction of settlements in that territory. The Tenth Emergency Special Session was then adjourned temporarily and has since been reconvened 11 times (on 15 July 1997, 13 November 1997, 17 March 1998, 5 February 1999, 18 October 2000, 20 December 2001, 7 May 2002, 5 August 2002, 19 September 2003, 20 October 2003 and 8 December 2003).

20. By a letter dated 9 October 2003, the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, requested an immediate meeting of the Security Council to consider the "grave and ongoing Israeli violations of international law, including international humanitarian law, and to take the necessary measures in this regard" (letter of 9 October 2003 from the Permanent Representative of the Syrian Arab Republic to the United Nations to the President of the Security Council, S/2003/973, 9 October 2003). This letter was accompanied by a draft resolution for consideration by the Council, which condemned as illegal the construction by Israel of a wall in the Occupied Palestinian Territory departing from the Armistice Line of 1949. The Security Council held its 4841st and 4842nd meetings on 14 October 2003 to consider the item entitled "The situation in the Middle East, including the Palestine question". It then had before it another draft resolution proposed on the same day by Guinea, Malaysia, Pakistan and the Syrian Arab Republic, which also condemned the construction of the wall. This latter draft resolution was put to a vote after an open debate and was not adopted owing to the negative vote of a permanent member of the Council (S/PV.4841 and S/PV.4842).

On 15 October 2003, the Chairman of the Arab Group, on behalf of

the States Members of the League of Arab States, requested the resumption of the Tenth Emergency Special Session of the General Assembly to consider the item of "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory" (A/ES-10/242); this request was supported by the Non-Aligned Movement (A/ES-10/243) and the Organization of the Islamic Conference Group at the United Nations (A/ES-10/244). The Tenth Emergency Special Session resumed its work on 20 October 2003.

21. On 27 October 2003, the General Assembly adopted resolution ES-10/13, by which it demanded that

> "Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure of the Armistice Line of 1949 and is in contradiction to relevant provisions of international law" (para. 1).

In paragraph 3, the Assembly requested the Secretary-General

> "to report on compliance with the . . . resolution periodically, with the first report on compliance with paragraph 1 [of that resolution] to be submitted within one month . . .".

The Tenth Emergency Special Session was temporarily adjourned and, on 24 November 2003, the report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13 (hereinafter the "report of the Secretary-General") was issued (A/ES-10/248).

22. Meanwhile, on 19 November 2003, the Security Council adopted resolution 1515 (2003), by which it "*Endorse[d]* the Quartet Performance-based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict". The Quartet consists of representatives of the United States of America, the European Union, the Russian Federation and the United Nations. That resolution

> "*Call[ed] on* the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of two States living side by side in peace and security."

Neither the "Roadmap" nor resolution 1515 (2003) contained any specific provision concerning the construction of the wall, which was not discussed by the Security Council in this context.

23. Nineteen days later, on 8 December 2003, the Tenth Emergency Special Session of the General Assembly again resumed its work, following a new request by the Chairman of the Arab Group, on behalf of the States Members of the League of Arab States, and pursuant to resolution ES-10/13 (letter dated 1 December 2003 to the President of the General Assembly from the Chargé d'affaires a.i. of the Permanent Mission

of Kuwait to the United Nations, A/ES-10/249, 2 December 2003). It was during the meeting convened on that day that resolution ES-10/14 requesting the present advisory opinion was adopted.

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24. Having thus recalled the sequence of events that led to the adoption of resolution ES-10/14, the Court will now turn to the questions of jurisdiction that have been raised in the present proceedings. First, Israel has alleged that, given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the Charter when it requested an advisory opinion on the legal consequences of the construction of the wall in the Occupied Palestinian Territory.

25. The Court has already indicated that the subject of the present request for an advisory opinion falls within the competence of the General Assembly under the Charter (see paragraphs 15-17 above). However, Article 12, paragraph 1, of the Charter provides that:

> "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

A request for an advisory opinion is not in itself a "recommendation" by the General Assembly "with regard to [a] dispute or situation". It has however been argued in this case that the adoption by the General Assembly of resolution ES-10/14 was *ultra vires* as not in accordance with Article 12. The Court thus considers that it is appropriate for it to examine the significance of that Article, having regard to the relevant texts and the practice of the United Nations.

26. Under Article 24 of the Charter the Security Council has "primary responsibility for the maintenance of international peace and security". In that regard it can impose on States "an explicit obligation of compliance if for example it issues an order or command . . . under Chapter VII" and can, to that end, "require enforcement by coercive action" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 163). However, the Court would emphasize that Article 24 refers to a primary, but not necessarily exclusive, competence. The General Assembly does have the power, *inter alia*, under Article 14 of the Charter, to "recommend measures for the peaceful adjustment" of various situations *(ibid.)*.

> "[T]he only limitation which Article 14 imposes on the General

Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so." (*I.C.J. Reports 1962*, p. 163.)

27. As regards the practice of the United Nations, both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda. Thus the Assembly during its fourth session refused to recommend certain measures on the question of Indonesia, on the ground, *inter alia*, that the Council remained seised of the matter (*Official Records of the General Assembly, Fourth Session,* Ad Hoc *Political Committee, Summary Records of Meetings, 27 September-7 December 1949*, 56th Meeting, 3 December 1949, p. 339, para. 118). As for the Council, on a number of occasions it deleted items from its agenda in order to enable the Assembly to deliberate on them (for example, in respect of the Spanish question (*Official Records of the Security Council, First Year: Second Series, No. 21*, 79th Meeting, 4 November 1946, p. 498), in connection with incidents on the Greek border (*Official Records of the Security Council, Second Year, No. 89*, 202nd Meeting, 15 September 1947, pp. 2404-2405) and in regard to the Island of Taiwan (Formosa) (*Official Records of the Security Council, Fifth Year, No. 48*, 506th Meeting, 29 September 1950, p. 5)). In the case of the Republic of Korea, the Council decided on 31 January 1951 to remove the relevant item from the list of matters of which it was seised in order to enable the Assembly to deliberate on the matter (*Official Records of the Security Council, Sixth Year*, S/PV.531, 531st Meeting, 31 January 1951, pp. 11-12, para. 57).

However, this interpretation of Article 12 has evolved subsequently. Thus the General Assembly deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo (resolutions 1955 (XV) and 1600 (XVI)) and in 1963 in respect of the Portuguese colonies (resolution 1913 (XVIII)) while those cases still appeared on the Council's agenda, without the Council having adopted any recent resolution concerning them. In response to a question posed by Peru during the twenty-third session of the General Assembly, the Legal Counsel of the United Nations confirmed that the Assembly interpreted the words "is exercising the functions" in Article 12 of the Charter as meaning "is exercising the functions at this moment" (General Assembly, Twenty-third Session, Third Committee, 1637th meeting, A/C.3/SR.1637, para. 9). Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and

Somalia). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.

28. The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.

The Court is accordingly of the view that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter. The Court concludes that by submitting that request the General Assembly did not exceed its competence.

29. It has however been contended before the Court that the present request for an advisory opinion did not fulfil the essential conditions set by resolution 377 A (V), under which the Tenth Emergency Special Session was convened and has continued to act. In this regard, it has been said, first, that "The Security Council was never seised of a draft resolution proposing that the Council itself should request an advisory opinion from the Court on the matters now in contention", and, that specific issue having thus never been brought before the Council, the General Assembly could not rely on any inaction by the Council to make such a request. Secondly, it has been claimed that, in adopting resolution 1515 (2003), which endorsed the "Roadmap", before the adoption by the General Assembly of resolution ES-10/14, the Security Council continued to exercise its responsibility for the maintenance of international peace and security and that, as a result, the General Assembly was not entitled to act in its place. The validity of the procedure followed by the Tenth Emergency Special Session, especially the Session's "rolling character" and the fact that its meeting was convened to deliberate on the request for the advisory opinion at the same time as the General Assembly was meeting in regular session, has also been questioned.

30. The Court would recall that resolution 377 A (V) states that:

> "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures . . .".

The procedure provided for by that resolution is premised on two conditions, namely that the Council has failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members, and that the situa-

tion is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression. The Court must accordingly ascertain whether these conditions were fulfilled as regards the convening of the Tenth Emergency Special Session of the General Assembly, in particular at the time when the Assembly decided to request an advisory opinion from the Court.

31. In the light of the sequence of events described in paragraphs 18 to 23 above, the Court observes that, at the time when the Tenth Emergency Special Session was convened in 1997, the Council had been unable to take a decision on the case of certain Israeli settlements in the Occupied Palestinian Territory, due to negative votes of a permanent member; and that, as indicated in resolution ES-10/2 (see paragraph 19 above), there existed a threat to international peace and security.

The Court further notes that, on 20 October 2003, the Tenth Emergency Special Session of the General Assembly was reconvened on the same basis as in 1997 (see the statements by the representatives of Palestine and Israel, A/ES-10/PV.21, pp. 2 and 5), after the rejection by the Security Council, on 14 October 2003, again as a result of the negative vote of a permanent member, of a draft resolution concerning the construction by Israel of the wall in the Occupied Palestinian Territory. The Court considers that the Security Council again failed to act as contemplated in resolution 377 A (V). It does not appear to the Court that the situation in this regard changed between 20 October 2003 and 8 December 2003, since the Council neither discussed the construction of the wall nor adopted any resolution in that connection. Thus, the Court is of the view that, up to 8 December 2003, the Council had not reconsidered the negative vote of 14 October 2003. It follows that, during that period, the Tenth Emergency Special Session was duly reconvened and could properly be seised, under resolution 377 A (V), of the matter now before the Court.

32. The Court would also emphasize that, in the course of this Emergency Special Session, the General Assembly could adopt any resolution falling within the subject-matter for which the Session had been convened, and otherwise within its powers, including a resolution seeking the Court's opinion. It is irrelevant in that regard that no proposal had been made to the Security Council to request such an opinion.

33. Turning now to alleged further procedural irregularities of the Tenth Emergency Special Session, the Court does not consider that the "rolling" character of that Session, namely the fact of its having been convened in April 1997 and reconvened 11 times since then, has any relevance with regard to the validity of the request by the General Assembly. The Court observes in that regard that the Seventh Emergency Special Session of the General Assembly, having been convened on 22 July 1980, was subsequently reconvened four times (on 20 April 1982, 25 June 1982, 16 August 1982 and 24 September 1982), and that the validity of

resolutions or decisions of the Assembly adopted under such circumstances was never disputed. Nor has the validity of any previous resolutions adopted during the Tenth Emergency Special Session been challenged.

34. The Court also notes the contention by Israel that it was improper to reconvene the Tenth Emergency Special Session at a time when the regular session of the General Assembly was in progress. The Court considers that, while it may not have been originally contemplated that it would be appropriate for the General Assembly to hold simultaneous emergency and regular sessions, no rule of the Organization has been identified which would be thereby violated, so as to render invalid the resolution adopting the present request for an advisory opinion.

35. Finally, the Tenth Emergency Special Session appears to have been convened in accordance with Rule 9 *(b)* of the Rules of Procedure of the General Assembly, and the relevant meetings have been convened in pursuance of the applicable rules. As the Court stated in its Advisory Opinion of 21 June 1971 concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, a

> "resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted" (*I.C.J. Reports 1971*, p. 22, para. 20).

In view of the foregoing, the Court cannot see any reason why that presumption is to be rebutted in the present case.

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36. The Court now turns to a further issue related to jurisdiction in the present proceedings, namely the contention that the request for an advisory opinion by the General Assembly is not on a "legal question" within the meaning of Article 96, paragraph 1, of the Charter and Article 65, paragraph 1, of the Statute of the Court. It has been contended in this regard that, for a question to constitute a "legal question" for the purposes of these two provisions, it must be reasonably specific, since otherwise it would not be amenable to a response by the Court. With regard to the request made in the present advisory proceedings, it has been argued that it is not possible to determine with reasonable certainty the legal meaning of the question asked of the Court for two reasons.

First, it has been argued that the question regarding the "legal consequences" of the construction of the wall only allows for two possible interpretations, each of which would lead to a course of action that is

precluded for the Court. The question asked could first be interpreted as a request for the Court to find that the construction of the wall is illegal, and then to give its opinion on the legal consequences of that illegality. In this case, it has been contended, the Court should decline to respond to the question asked for a variety of reasons, some of which pertain to jurisdiction and others rather to the issue of propriety. As regards jurisdiction, it is said that, if the General Assembly had wished to obtain the view of the Court on the highly complex and sensitive question of the legality of the construction of the wall, it should have expressly sought an opinion to that effect (cf. *Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10*, p. 17). A second possible interpretation of the request, it is said, is that the Court should assume that the construction of the wall is illegal, and then give its opinion on the legal consequences of that assumed illegality. It has been contended that the Court should also decline to respond to the question on this hypothesis, since the request would then be based on a questionable assumption and since, in any event, it would be impossible to rule on the legal consequences of illegality without specifying the nature of that illegality.

Secondly, it has been contended that the question asked of the Court is not of a "legal" character because of its imprecision and abstract nature. In particular, it has been argued in this regard that the question fails to specify whether the Court is being asked to address legal consequences for "the General Assembly or some other organ of the United Nations", "Member States of the United Nations", "Israel", "Palestine" or "some combination of the above, or some different entity".

37. As regards the alleged lack of clarity of the terms of the General Assembly's request and its effect on the "legal nature" of the question referred to the Court, the Court observes that this question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the "Fourth Geneva Convention") and relevant Security Council and General Assembly resolutions. The question submitted by the General Assembly has thus, to use the Court's phrase in its Advisory Opinion on *Western Sahara*, "been framed in terms of law and raise[s] problems of international law"; it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character (see *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

38. The Court would point out that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncer-

tainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.

In the past, both the Permanent Court and the present Court have observed in some cases that the wording of a request for an advisory opinion did not accurately state the question on which the Court's opinion was being sought (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16 (I)*, pp. 14-16), or did not correspond to the "true legal question" under consideration (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 87-89, paras. 34-36). The Court noted in one case that "the question put to the Court is, on the face of it, at once infelicitously expressed and vague" (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46).

Consequently, the Court has often been required to broaden, interpret and even reformulate the questions put (see the three Opinions cited above; see also *Jaworzina, Advisory Opinion, 1923, P.C.I.J., Series B, No. 8*; *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 25; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 157-162).

In the present instance, the Court will only have to do what it has often done in the past, namely "identify the existing principles and rules, interpret them and apply them . . ., thus offering a reply to the question posed based on law" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, p. 234, para. 13).

39. In the present instance, if the General Assembly requests the Court to state the "legal consequences" arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law. Thus, the Court is first called upon to determine whether such rules and principles have been and are still being breached by the construction of the wall along the planned route.

40. The Court does not consider that what is contended to be the abstract nature of the question posed to it raises an issue of jurisdiction. Even when the matter was raised as an issue of propriety rather than one of jurisdiction, in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, the Court took the position that to contend that it should not deal with a question couched in abstract terms is "a mere affirmation devoid of any justification" and that "the Court may give an advisory opinion on any legal question, abstract or otherwise" (*I.C.J. Reports 1996 (I)*, p. 236, para. 15, referring to *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61; *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 51; and *Legal Con-*

*sequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27, para. 40). In any event, the Court considers that the question posed to it in relation to the legal consequences of the construction of the wall is not an abstract one, and moreover that it would be for the Court to determine for whom any such consequences arise.

41. Furthermore, the Court cannot accept the view, which has also been advanced in the present proceedings, that it has no jurisdiction because of the "political" character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects,

> "as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute' (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155)." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 13.)

In its Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court indeed emphasized that,

> "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate . . ." (*I.C.J. Reports 1980*, p. 87, para. 33).

Moreover, the Court has affirmed in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that

> "the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion" (*I.C.J. Reports 1996 (I)*, p. 234, para. 13).

The Court is of the view that there is no element in the present proceedings which could lead it to conclude otherwise.

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42. The Court accordingly has jurisdiction to give the advisory opinion requested by resolution ES-10/14 of the General Assembly.

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43. It has been contended in the present proceedings, however, that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly's request that would render the exercise of the Court's jurisdiction improper and inconsistent with the Court's judicial function.

44. The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that "The Court *may* give an advisory opinion . . ." (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 234-235, para. 14). The Court however is mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.) Given its responsibilities as the "principal judicial organ of the United Nations" (Article 92 of the Charter), the Court should in principle not decline to give an advisory opinion. In accordance with its consistent jurisprudence, only "compelling reasons" should lead the Court to refuse its opinion (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; see also, for example, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29.)

The present Court has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion. Its decision not to give the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* requested by the World Health Organization was based on the Court's lack of jurisdiction, and not on considerations of judicial propriety (see *I.C.J. Reports 1996 (I)*, p. 235, para. 14). Only on one occasion did the Court's predecessor, the Permanent Court of International Justice, take the view that it should

not reply to a question put to it (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*), but this was due to

> "the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way" (*Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 235-236, para. 14).

45. These considerations do not release the Court from the duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function, by reference to the criterion of "compelling reasons" as cited above. The Court will accordingly examine in detail and in the light of its jurisprudence each of the arguments presented to it in this regard.

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46. The first such argument is to the effect that the Court should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction. According to this view, the subject-matter of the question posed by the General Assembly "is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters". Israel has emphasized that it has never consented to the settlement of this wider dispute by the Court or by any other means of compulsory adjudication; on the contrary, it contends that the parties repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that recourse could be had to arbitration. It is accordingly contended that the Court should decline to give the present Opinion, on the basis *inter alia* of the precedent of the decision of the Permanent Court of International Justice on the *Status of Eastern Carelia*.

47. The Court observes that the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion. In an Advisory Opinion of 1950, the Court explained that:

> "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the

> United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also *Western Sahara, I.C.J. Reports 1975*, p. 24, para. 31.)

It followed from this that, in those proceedings, the Court did not refuse to respond to the request for an advisory opinion on the ground that, in the particular circumstances, it lacked jurisdiction. The Court did however examine the opposition of certain interested States to the request by the General Assembly in the context of issues of judicial propriety. Commenting on its 1950 decision, the Court explained in its Advisory Opinion on *Western Sahara* that it had "Thus . . . recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion." The Court continued:

> "In certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent." (*Western Sahara, I.C.J. Reports 1975*, p. 25, paras. 32-33.)

In applying that principle to the request concerning *Western Sahara*, the Court found that a legal controversy did indeed exist, but one which had arisen during the proceedings of the General Assembly and in relation to matters with which the Assembly was dealing. It had not arisen independently in bilateral relations (*ibid.*, p. 25, para. 34).

48. As regards the request for an advisory opinion now before it, the Court acknowledges that Israel and Palestine have expressed radically divergent views on the legal consequences of Israel's construction of the wall, on which the Court has been asked to pronounce. However, as the Court has itself noted, "Differences of views . . . on legal issues have existed in practically every advisory proceeding" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 34).

49. Furthermore, the Court does not consider that the subject-matter

of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine. Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and the Partition Resolution concerning Palestine (see paragraphs 70 and 71 below). This responsibility has been described by the General Assembly as "a permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy" (General Assembly resolution 57/107 of 3 December 2002). Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.

50. The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.

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51. The Court now turns to another argument raised in the present proceedings in support of the view that it should decline to exercise its jurisdiction. Some participants have argued that an advisory opinion from the Court on the legality of the wall and the legal consequences of its construction could impede a political, negotiated solution to the Israeli-Palestinian conflict. More particularly, it has been contended that such an opinion could undermine the scheme of the "Roadmap" (see paragraph 22 above), which requires Israel and Palestine to comply with certain obligations in various phases referred to therein. The requested opinion, it has been alleged, could complicate the negotiations envisaged in the "Roadmap", and the Court should therefore exercise its discretion and decline to reply to the question put.

This is a submission of a kind which the Court has already had to consider several times in the past. For instance, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated:

> "It has . . . been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another." *(I.C.J. Reports 1996 (I)*, p. 237, para. 17; see also *Western Sahara, I.C.J. Reports 1975*, p. 37, para. 73.)

52. One participant in the present proceedings has indicated that the Court, if it were to give a response to the request, should in any event do so keeping in mind

> "two key aspects of the peace process: the fundamental principle that permanent status issues must be resolved through negotiations; and the need during the interim period for the parties to fulfil their security responsibilities so that the peace process can succeed".

53. The Court is conscious that the "Roadmap", which was endorsed by the Security Council in resolution 1515 (2003) (see paragraph 22 above), constitutes a negotiating framework for the resolution of the Israeli-Palestinian conflict. It is not clear, however, what influence the Court's opinion might have on those negotiations: participants in the present proceedings have expressed differing views in this regard. The Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

54. It was also put to the Court by certain participants that the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict, which could not be properly addressed in the present proceedings. The Court does not however consider this a reason for it to decline to reply to the question asked. The Court is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.

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55. Several participants in the proceedings have raised the further

argument that the Court should decline to exercise its jurisdiction because it does not have at its disposal the requisite facts and evidence to enable it to reach its conclusions. In particular, Israel has contended, referring to the Advisory Opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, that the Court could not give an opinion on issues which raise questions of fact that cannot be elucidated without hearing all parties to the conflict. According to Israel, if the Court decided to give the requested opinion, it would be forced to speculate about essential facts and make assumptions about arguments of law. More specifically, Israel has argued that the Court could not rule on the legal consequences of the construction of the wall without enquiring, first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians. This task, which would already be difficult in a contentious case, would be further complicated in an advisory proceeding, particularly since Israel alone possesses much of the necessary information and has stated that it chooses not to address the merits. Israel has concluded that the Court, confronted with factual issues impossible to clarify in the present proceedings, should use its discretion and decline to comply with the request for an advisory opinion.

56. The Court observes that the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance. In its Opinion concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*I.C.J. Reports 1950*, p. 72) and again in its Opinion on the *Western Sahara*, the Court made it clear that what is decisive in these circumstances is

> "whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character" (*Western Sahara, I.C.J. Reports 1975*, pp. 28-29, para. 46).

Thus, for instance, in the proceedings concerning the *Status of Eastern Carelia*, the Permanent Court of International Justice decided to decline to give an Opinion *inter alia* because the question put "raised a question of fact which could not be elucidated without hearing both parties" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, I.C.J. Reports 1950*, p. 72; see *Status of Eastern Carelia, P.C.I.J., Series B, No. 5*, p. 28). On the other hand, in the *Western Sahara* Opinion, the Court observed that it had been provided with very extensive documentary evidence of the relevant facts (*I.C.J. Reports 1975*, p. 29, para. 47).

57. In the present instance, the Court has at its disposal the report of the Secretary-General, as well as a voluminous dossier submitted by him to the Court, comprising not only detailed information on the route of

the wall but also on its humanitarian and socio-economic impact on the Palestinian population. The dossier includes several reports based on on-site visits by special rapporteurs and competent organs of the United Nations. The Secretary-General has further submitted to the Court a written statement updating his report, which supplemented the information contained therein. Moreover, numerous other participants have submitted to the Court written statements which contain information relevant to a response to the question put by the General Assembly. The Court notes in particular that Israel's Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel's concerns in terms of security, and was accompanied by corresponding annexes; many other documents issued by the Israeli Government on those matters are in the public domain.

58. The Court finds that it has before it sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task. There is therefore in the present case no lack of information such as to constitute a compelling reason for the Court to decline to give the requested opinion.

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59. In their written statements, some participants have also put forward the argument that the Court should decline to give the requested opinion on the legal consequences of the construction of the wall because such opinion would lack any useful purpose. They have argued that the advisory opinions of the Court are to be seen as a means to enable an organ or agency in need of legal clarification for its future action to obtain that clarification. In the present instance, the argument continues, the General Assembly would not need an opinion of the Court because it has already declared the construction of the wall to be illegal and has already determined the legal consequences by demanding that Israel stop and reverse its construction, and further, because the General Assembly has never made it clear how it intended to use the opinion.

60. As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action. In its Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court observed: "The object of this request for an Opinion is to guide the United Nations in respect of its own action." (*I.C.J. Reports 1951*, p. 19.) Likewise, in its Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South*

*West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court noted: "The request is put forward by a United Nations organ with reference to its own decisions and it seeks legal advice from the Court on the consequences and implications of these decisions." (*I.C.J. Reports 1971*, p. 24, para. 32.) The Court found on another occasion that the advisory opinion it was to give would "furnish the General Assembly with elements of a legal character relevant to its further treatment of the decolonization of Western Sahara" (*Western Sahara, I.C.J. Reports 1975*, p. 37, para. 72).

61. With regard to the argument that the General Assembly has not made it clear what use it would make of an advisory opinion on the wall, the Court would recall, as equally relevant in the present proceedings, what it stated in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

> "Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

62. It follows that the Court cannot decline to answer the question posed based on the ground that its opinion would lack any useful purpose. The Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly. Furthermore, and in any event, the Court considers that the General Assembly has not yet determined all the possible consequences of its own resolution. The Court's task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly — and the Security Council — may then draw conclusions from the Court's findings.

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63. Lastly, the Court will turn to another argument advanced with regard to the propriety of its giving an advisory opinion in the present proceedings. Israel has contended that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the Court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim *nullus commodum capere potest de sua injuria propria*, which it considers to be as relevant in advisory proceedings as it is in contentious cases. Therefore, Israel concludes, good faith and the principle of "clean hands" provide a compelling reason that should lead the Court to refuse the General Assembly's request.

64. The Court does not consider this argument to be pertinent. As was emphasized earlier, it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific State or entity.

* *

65. In the light of the foregoing, the Court concludes not only that it has jurisdiction to give an opinion on the question put to it by the General Assembly (see paragraph 42 above), but also that there is no compelling reason for it to use its discretionary power not to give that opinion.

* * *

66. The Court will now address the question put to it by the General Assembly in resolution ES-10/14. The Court recalls that the question is as follows:

> "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?"

67. As explained in paragraph 82 below, the "wall" in question is a complex construction, so that that term cannot be understood in a limited physical sense. However, the other terms used, either by Israel ("fence") or by the Secretary-General ("barrier"), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built "in the Occupied Palestinian Territory, including in and around East Jerusalem". As also explained below (see paragraphs 79-84 below), some parts of the complex are being built, or are planned to be built, on the territory of Israel itself; the Court does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall.

68. The question put by the General Assembly concerns the legal consequences of the construction of the wall in the Occupied Palestinian Territory. However, in order to indicate those consequences to the General Assembly the Court must first determine whether or not the construction of that wall breaches international law (see paragraph 39 above). It will

therefore make this determination before dealing with the consequences of the construction.

69. To do so, the Court will first make a brief analysis of the status of the territory concerned, and will then describe the works already constructed or in course of construction in that territory. It will then indicate the applicable law before seeking to establish whether that law has been breached.

* *

70. Palestine was part of the Ottoman Empire. At the end of the First World War, a class "A" Mandate for Palestine was entrusted to Great Britain by the League of Nations, pursuant to paragraph 4 of Article 22 of the Covenant, which provided that:

> "Certain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone."

The Court recalls that in its Advisory Opinion on the *International Status of South West Africa*, speaking of mandates in general, it observed that "The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilization." (*I.C.J. Reports 1950*, p. 132.) The Court also held in this regard that "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] 'a sacred trust of civilization' " (*ibid.*, p. 131).

The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo-Transjordanian Treaty of 20 February 1928.

71. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which "*Recommends* to the United Kingdom . . . and to all other Members of the United Nations the adoption and implementation . . . of the Plan of Partition" of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May

1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.

72. By resolution 62 (1948) of 16 November 1948, the Security Council decided that "an armistice shall be established in all sectors of Palestine" and called upon the parties directly involved in the conflict to seek agreement to this end. In conformity with this decision, general armistice agreements were concluded in 1949 between Israel and the neighbouring States through mediation by the United Nations. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the "Green Line" owing to the colour used for it on maps; hereinafter the "Green Line"). Article III, paragraph 2, provided that "No element of the . . . military or para-military forces of either Party . . . shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines . . ." It was agreed in Article VI, paragraph 8, that these provisions would not be "interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties". It was also stated that "the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto". The Demarcation Line was subject to such rectification as might be agreed upon by the parties.

73. In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).

74. On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of acquisition of territory by war and called for the "Withdrawal of Israel armed forces from territories occupied in the recent conflict", and "Termination of all claims or states of belligerency".

75. From 1967 onwards, Israel took a number of measures in these territories aimed at changing the status of the City of Jerusalem. The Security Council, after recalling on a number of occasions "the principle that acquisition of territory by military conquest is inadmissible", condemned those measures and, by resolution 298 (1971) of 25 September 1971, confirmed in the clearest possible terms that:

> "all legislative and administrative actions taken by Israel to change the status of the City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status".

Later, following the adoption by Israel on 30 July 1980 of the Basic Law making Jerusalem the "complete and united" capital of Israel, the Security Council, by resolution 478 (1980) of 20 August 1980, stated that the enactment of that Law constituted a violation of international law and that "all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem . . . are null and void". It further decided "not to recognize the 'basic law' and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem".

76. Subsequently, a peace treaty was signed on 26 October 1994 between Israel and Jordan. That treaty fixed the boundary between the two States "with reference to the boundary definition under the Mandate as is shown in Annex I *(a)* . . . without prejudice to the status of any territories that came under Israeli military government control in 1967" (Article 3, paragraphs 1 and 2). Annex I provided the corresponding maps and added that, with regard to the "territory that came under Israeli military government control in 1967", the line indicated "is the administrative boundary" with Jordan.

77. Lastly, a number of agreements have been signed since 1993 between Israel and the Palestine Liberation Organization imposing various obligations on each party. Those agreements *inter alia* required Israel to transfer to Palestinian authorities certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military authorities and civil administration. Such transfers have taken place, but, as a result of subsequent events, they remained partial and limited.

78. The Court would observe that, under customary international law as reflected (see paragraph 89 below) in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter "the Hague Regulations of 1907"), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.

The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.

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79. It is essentially in these territories that Israel has constructed or plans to construct the works described in the report of the Secretary-General. The Court will now describe those works, basing itself on that report. For developments subsequent to the publication of that report, the Court will refer to complementary information contained in the Written Statement of the United Nations, which was intended by the Secretary-General to supplement his report (hereinafter "Written Statement of the Secretary-General").

80. The report of the Secretary-General states that "The Government of Israel has since 1996 considered plans to halt infiltration into Israel from the central and northern West Bank . . ." (para. 4). According to that report, a plan of this type was approved for the first time by the Israeli Cabinet in July 2001. Then, on 14 April 2002, the Cabinet adopted a decision for the construction of works, forming what Israel describes as a "security fence", 80 kilometres in length, in three areas of the West Bank.

The project was taken a stage further when, on 23 June 2002, the Israeli Cabinet approved the first phase of the construction of a "continuous fence" in the West Bank (including East Jerusalem). On 14 August 2002, it adopted the line of that "fence" for the work in Phase A, with a view to the construction of a complex 123 kilometres long in the northern West Bank, running from the Salem checkpoint (north of Jenin) to the settlement at Elkana. Phase B of the work was approved in December 2002. It entailed a stretch of some 40 kilometres running east from the Salem checkpoint towards Beth Shean along the northern part of the Green Line as far as the Jordan Valley. Furthermore, on 1 October 2003, the Israeli Cabinet approved a full route, which, according to the report of the Secretary-General, "will form one continuous line stretching 720 kilometres along the West Bank". A map showing completed and planned sections was posted on the Israeli Ministry of Defence website on 23 October 2003. According to the particulars provided on that map, a continuous section (Phase C) encompassing a number of large settlements will link the north-western end of the "security fence" built around Jerusalem with the southern point of Phase A construction at Elkana. According to the same map, the "security fence" will run for 115 kilometres from the Har Gilo settlement near Jerusalem to the Carmel settlement south-east of Hebron (Phase D). According to Ministry of Defence documents, work in this sector is due for completion in 2005. Lastly, there are references in the case file to Israel's planned construction of a "security fence" following the Jordan Valley along the mountain range to the west.

81. According to the Written Statement of the Secretary-General, the first part of these works (Phase A), which ultimately extends for a distance of 150 kilometres, was declared completed on 31 July 2003. It is reported that approximately 56,000 Palestinians would be encompassed in enclaves. During this phase, two sections totalling 19.5 kilometres

were built around Jerusalem. In November 2003 construction of a new section was begun along the Green Line to the west of the Nazlat Issa-Baqa al-Sharqiya enclave, which in January 2004 was close to completion at the time when the Secretary-General submitted his Written Statement.

According to the Written Statement of the Secretary-General, the works carried out under Phase B were still in progress in January 2004. Thus an initial section of this stretch, which runs near or on the Green Line to the village of al-Mutilla, was almost complete in January 2004. Two additional sections diverge at this point. Construction started in early January 2004 on one section that runs due east as far as the Jordanian border. Construction of the second section, which is planned to run from the Green Line to the village of Taysir, has barely begun. The United Nations has, however, been informed that this second section might not be built.

The Written Statement of the Secretary-General further states that Phase C of the work, which runs from the terminus of Phase A, near the Elkana settlement, to the village of Nu'man, south-east of Jerusalem, began in December 2003. This section is divided into three stages. In Stage C1, between *inter alia* the villages of Rantis and Budrus, approximately 4 kilometres out of a planned total of 40 kilometres have been constructed. Stage C2, which will surround the so-called "Ariel Salient" by cutting 22 kilometres into the West Bank, will incorporate 52,000 Israeli settlers. Stage C3 is to involve the construction of two "depth barriers"; one of these is to run north-south, roughly parallel with the section of Stage C1 currently under construction between Rantis and Budrus, whilst the other runs east-west along a ridge said to be part of the route of Highway 45, a motorway under construction. If construction of the two barriers were completed, two enclaves would be formed, encompassing 72,000 Palestinians in 24 communities.

Further construction also started in late November 2003 along the south-eastern part of the municipal boundary of Jerusalem, following a route that, according to the Written Statement of the Secretary-General, cuts off the suburban village of El-Ezariya from Jerusalem and splits the neighbouring Abu Dis in two.

As at 25 January 2004, according to the Written Statement of the Secretary-General, some 190 kilometres of construction had been completed, covering Phase A and the greater part of Phase B. Further construction in Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun.

The Israeli Government has explained that the routes and timetable as described above are subject to modification. In February 2004, for example, an 8-kilometre section near the town of Baqa al-Sharqiya was

demolished, and the planned length of the wall appears to have been slightly reduced.

82. According to the description in the report and the Written Statement of the Secretary-General, the works planned or completed have resulted or will result in a complex consisting essentially of:

(1) a fence with electronic sensors;
(2) a ditch (up to 4 metres deep);
(3) a two-lane asphalt patrol road;
(4) a trace road (a strip of sand smoothed to detect footprints) running parallel to the fence;
(5) a stack of six coils of barbed wire marking the perimeter of the complex.

The complex has a width of 50 to 70 metres, increasing to as much as 100 metres in some places. "Depth barriers" may be added to these works.

The approximately 180 kilometres of the complex completed or under construction as of the time when the Secretary-General submitted his report included some 8.5 kilometres of concrete wall. These are generally found where Palestinian population centres are close to or abut Israel (such as near Qalqiliya and Tulkarm or in parts of Jerusalem).

83. According to the report of the Secretary-General, in its northernmost part, the wall as completed or under construction barely deviates from the Green Line. It nevertheless lies within occupied territories for most of its course. The works deviate more than 7.5 kilometres from the Green Line in certain places to encompass settlements, while encircling Palestinian population areas. A stretch of 1 to 2 kilometres west of Tulkarm appears to run on the Israeli side of the Green Line. Elsewhere, on the other hand, the planned route would deviate eastward by up to 22 kilometres. In the case of Jerusalem, the existing works and the planned route lie well beyond the Green Line and even in some cases beyond the eastern municipal boundary of Jerusalem as fixed by Israel.

84. On the basis of that route, approximately 975 square kilometres (or 16.6 per cent of the West Bank) would, according to the report of the Secretary-General, lie between the Green Line and the wall. This area is stated to be home to 237,000 Palestinians. If the full wall were completed as planned, another 160,000 Palestinians would live in almost completely encircled communities, described as enclaves in the report. As a result of the planned route, nearly 320,000 Israeli settlers (of whom 178,000 in East Jerusalem) would be living in the area between the Green Line and the wall.

85. Lastly, it should be noted that the construction of the wall has been accompanied by the creation of a new administrative régime. Thus in October 2003 the Israeli Defence Forces issued Orders establishing the

part of the West Bank lying between the Green Line and the wall as a "Closed Area". Residents of this area may no longer remain in it, nor may non-residents enter it, unless holding a permit or identity card issued by the Israeli authorities. According to the report of the Secretary-General, most residents have received permits for a limited period. Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit. Access to and exit from the Closed Area can only be made through access gates, which are opened infrequently and for short periods.

* *

86. The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council. However, doubts have been expressed by Israel as to the applicability in the Occupied Palestinian Territory of certain rules of international humanitarian law and human rights instruments. The Court will now consider these various questions.

87. The Court first recalls that, pursuant to Article 2, paragraph 4, of the United Nations Charter:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" (hereinafter "resolution 2625 (XXV)"), in which it emphasized that "No territorial acquisition resulting from the threat or use of force shall be recognized as legal." As the Court stated in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law (see *I.C.J. Reports 1986*, pp. 98-101, paras. 187-190); the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

88. The Court also notes that the principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant

to which "Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] . . . of their right to self-determination." Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.

The Court would recall that in 1971 it emphasized that current developments in "international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]". The Court went on to state that "These developments leave little doubt that the ultimate objective of the sacred trust" referred to in Article 22, paragraph 1, of the Covenant of the League of Nations "was the self-determination . . . of the peoples concerned" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, paras. 52-53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid.*; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29).

89. As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared "to revise the general laws and customs of war" existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the "rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war" (Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court.

The Court also observes that, pursuant to Article 154 of the Fourth Geneva Convention, that Convention is supplementary to Sections II and III of the Hague Regulations. Section III of those Regulations, which concerns "Military authority over the territory of the hostile State", is particularly pertinent in the present case.

90. Secondly, with regard to the Fourth Geneva Convention, differing views have been expressed by the participants in these proceedings. Israel, contrary to the great majority of the other participants, disputes the applicability *de jure* of the Convention to the Occupied Palestinian Territory. In particular, in paragraph 3 of Annex I to the report of the Secretary-General, entitled "Summary Legal Position of the Government of Israel", it is stated that Israel does not agree that the Fourth Geneva Convention "is applicable to the occupied Palestinian Territory", citing "the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt" and inferring that it is "not a territory of a High Contracting Party as required by the Convention".

91. The Court would recall that the Fourth Geneva Convention was ratified by Israel on 6 July 1951 and that Israel is a party to that Convention. Jordan has also been a party thereto since 29 May 1951. Neither of the two States has made any reservation that would be pertinent to the present proceedings.

Furthermore, Palestine gave a unilateral undertaking, by declaration of 7 June 1982, to apply the Fourth Geneva Convention. Switzerland, as depositary State, considered that unilateral undertaking valid. It concluded, however, that it "[was] not — as a depositary — in a position to decide whether" "the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the 'State of Palestine' to accede" *inter alia* to the Fourth Geneva Convention "can be considered as an instrument of accession".

92. Moreover, for the purpose of determining the scope of application of the Fourth Geneva Convention, it should be recalled that under common Article 2 of the four Conventions of 12 August 1949:

> "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof."

93. After the occupation of the West Bank in 1967, the Israeli authorities issued an order No. 3 stating in its Article 35 that:

> "the Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949 relative to the Protection of

> Civilian Persons in Time of War with respect to judicial procedures. In case of conflict between this Order and the said Convention, the Convention shall prevail."

Subsequently, the Israeli authorities have indicated on a number of occasions that in fact they generally apply the humanitarian provisions of the Fourth Geneva Convention within the occupied territories. However, according to Israel's position as briefly recalled in paragraph 90 above, that Convention is not applicable *de jure* within those territories because, under Article 2, paragraph 2, it applies only in the case of occupation of territories falling under the sovereignty of a High Contracting Party involved in an armed conflict. Israel explains that Jordan was admittedly a party to the Fourth Geneva Convention in 1967, and that an armed conflict broke out at that time between Israel and Jordan, but it goes on to observe that the territories occupied by Israel subsequent to that conflict had not previously fallen under Jordanian sovereignty. It infers from this that that Convention is not applicable *de jure* in those territories. According however to the great majority of other participants in the proceedings, the Fourth Geneva Convention is applicable to those territories pursuant to Article 2, paragraph 1, whether or not Jordan had any rights in respect thereof prior to 1967.

94. The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Article 32 provides that:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure; or . . . leads to a result which is manifestly obscure or unreasonable." (See *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23; see, similarly, *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 645, para. 37.)

95. The Court notes that, according to the first paragraph of Article 2 of the Fourth Geneva Convention, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties. If those two conditions are satis-

fied, the Convention applies, in particular, in any territory occupied in the course of the conflict by one of the contracting parties.

The object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties. It is directed simply to making it clear that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.

This interpretation reflects the intention of the drafters of the Fourth Geneva Convention to protect civilians who find themselves, in whatever way, in the hands of the occupying Power. Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.

That interpretation is confirmed by the Convention's *travaux préparatoires*. The Conference of Government Experts convened by the International Committee of the Red Cross (hereinafter, "ICRC") in the aftermath of the Second World War for the purpose of preparing the new Geneva Conventions recommended that these conventions be applicable to any armed conflict "whether [it] is or is not recognized as a state of war by the parties" and "in cases of occupation of territories in the absence of any state of war" (*Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, 14-26 April 1947*, p. 8). The drafters of the second paragraph of Article 2 thus had no intention, when they inserted that paragraph into the Convention, of restricting the latter's scope of application. They were merely seeking to provide for cases of occupation without combat, such as the occupation of Bohemia and Moravia by Germany in 1939.

96. The Court would moreover note that the States parties to the Fourth Geneva Convention approved that interpretation at their Conference on 15 July 1999. They issued a statement in which they "reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". Subsequently, on 5 December 2001, the High Contracting Parties, referring in particular to Article 1 of the Fourth Geneva Convention of 1949, once again reaffirmed the "applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem". They further reminded the Contracting Parties participating in the Conference, the parties to the conflict, and the State of Israel as occupying Power, of their respective obligations.

97. Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be "recognized and respected at all times" by the parties pursuant

to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that "the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem".

98. The Court notes that the General Assembly has, in many of its resolutions, taken a position to the same effect. Thus on 10 December 2001 and 9 December 2003, in resolutions 56/60 and 58/97, it reaffirmed

> "that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967".

99. The Security Council, for its part, had already on 14 June 1967 taken the view in resolution 237 (1967) that "all the obligations of the Geneva Convention relative to the Treatment of Prisoners of War . . . should be complied with by the parties involved in the conflict". Subsequently, on 15 September 1969, the Security Council, in resolution 271 (1969), called upon "Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation".

Ten years later, the Security Council examined "the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967". In resolution 446 (1979) of 22 March 1979, the Security Council considered that those settlements had "no legal validity" and affirmed "*once more* that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem". It called "*once more upon* Israel, as the occupying Power, to abide scrupulously" by that Convention.

On 20 December 1990, the Security Council, in resolution 681 (1990), urged "the Government of Israel to accept the *de jure* applicability of the Fourth Geneva Convention . . . to all the territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention". It further called upon "the high contracting parties to the said Fourth Geneva Convention to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with article 1 thereof".

Lastly, in resolutions 799 (1992) of 18 December 1992 and 904 (1994) of 18 March 1994, the Security Council reaffirmed its position concerning the applicability of the Fourth Geneva Convention in the occupied territories.

100. The Court would note finally that the Supreme Court of Israel, in a judgment dated 30 May 2004, also found that:

> "The military operations of the [Israeli Defence Forces] in Rafah,

> to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907 . . . and the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949."

101. In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.

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102. The participants in the proceedings before the Court also disagree whether the international human rights conventions to which Israel is party apply within the Occupied Palestinian Territory. Annex I to the report of the Secretary-General states:

> "4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace."

Of the other participants in the proceedings, those who addressed this issue contend that, on the contrary, both Covenants are applicable within the Occupied Palestinian Territory.

103. On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.

104. In order to determine whether these texts are applicable in the Occupied Palestinian Territory, the Court will first address the issue of the relationship between international humanitarian law and human rights law and then that of the applicability of human rights instruments outside national territory.

105. In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had occasion to address the first of these issues in relation to the International Covenant on Civil

and Political Rights. In those proceedings certain States had argued that "the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict" (*I.C.J. Reports 1996 (I)*, p. 239, para. 24).

The Court rejected this argument, stating that:

> "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities." (*Ibid.*, p. 240, para. 25.)

106. More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

107. It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.

108. The scope of application of the International Covenant on Civil and Political Rights is defined by Article 2, paragraph 1, thereof, which provides:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction. The Court will thus seek to determine the meaning to be given to this text.

109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos* v. *Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego* v. *Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106/81, *Montero* v. *Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, *Official Records of the General Assembly, Tenth Session, Annexes*, A/2929, Part II, Chap. V, para. 4 (1955)).

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question "whether individuals resident in the occupied territories were indeed subject to Israel's jurisdiction" for purposes of the application of the Covenant (CCPR/C/SR.1675, para. 21). Israel took the position that "the Covenant and similar instruments did not apply directly to the current situation in the occupied territories" (*ibid.*, para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel's attitude and pointed "to the long-standing presence of Israel in [the occupied] territories, Israel's

ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein" (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel's consistent position, to the effect that "the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza . . .", the Committee reached the following conclusion:

> "in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law" (CCPR/CO/78/ISR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.

112. The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction. Thus Article 14 makes provision for transitional measures in the case of any State which "at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge".

It is not without relevance to recall in this regard the position taken by Israel in its reports to the Committee on Economic, Social and Cultural Rights. In its initial report to the Committee of 4 December 1998, Israel provided "statistics indicating the enjoyment of the rights enshrined in the Covenant by Israeli settlers in the occupied Territories". The Committee noted that, according to Israel, "the Palestinian population within the same jurisdictional areas were excluded from both the report and the protection of the Covenant" (E/C.12/1/Add.27, para. 8). The Committee expressed its concern in this regard, to which Israel replied in a further report of 19 October 2001 that it has "consistently maintained that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction" (a formula inspired by the language of the International Covenant on Civil and Political Rights). This position, continued Israel, is "based on the well-established distinction between human rights and humanitarian law under international law". It added: "the Committee's mandate cannot relate to events in the West Bank and the Gaza Strip, inasmuch as they are part and parcel of the context of armed conflict as distinct from a relationship of human rights" (E/1990/6/Add.32, para. 5). In view of these observations, the Committee reiterated

its concern about Israel's position and reaffirmed "its view that the State party's obligations under the Covenant apply to all territories and populations under its effective control" (E/C.12/1/Add.90, paras. 15 and 31).

For the reasons explained in paragraph 106 above, the Court cannot accept Israel's view. It would also observe that the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power. In the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.

113. As regards the Convention on the Rights of the Child of 20 November 1989, that instrument contains an Article 2 according to which "States Parties shall respect and ensure the rights set forth in the . . . Convention to each child within their jurisdiction . . .". That Convention is therefore applicable within the Occupied Palestinian Territory.

* *

114. Having determined the rules and principles of international law relevant to reply to the question posed by the General Assembly, and having ruled in particular on the applicability within the Occupied Palestinian Territory of international humanitarian law and human rights law, the Court will now seek to ascertain whether the construction of the wall has violated those rules and principles.

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115. In this regard, Annex II to the report of the Secretary-General, entitled "Summary Legal Position of the Palestine Liberation Organization", states that "The construction of the Barrier is an attempt to annex the territory contrary to international law" and that "The de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination." This view was echoed in certain of the written statements submitted to the Court and in the views expressed at the hearings. *Inter alia*, it was contended that:

> "The wall severs the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination and constitutes a violation of the legal principle prohibiting the acquisition of territory by the use of force."

In this connection, it was in particular emphasized that "[t]he route of the wall is designed to change the demographic composition of the Occupied Palestinian Territory, including East Jerusalem, by reinforcing the Israeli

settlements" illegally established on the Occupied Palestinian Territory. It was further contended that the wall aimed at "reducing and parcelling out the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination".

116. For its part, Israel has argued that the wall's sole purpose is to enable it effectively to combat terrorist attacks launched from the West Bank. Furthermore, Israel has repeatedly stated that the Barrier is a temporary measure (see report of the Secretary-General, para. 29). It did so *inter alia* through its Permanent Representative to the United Nations at the Security Council meeting of 14 October 2003, emphasizing that "[the fence] does not annex territories to the State of Israel", and that Israel is "ready and able, at tremendous cost, to adjust or dismantle a fence if so required as part of a political settlement" (S/PV.4841, p. 10). Israel's Permanent Representative restated this view before the General Assembly on 20 October and 8 December 2003. On this latter occasion, he added:

> "As soon as the terror ends, the fence will no longer be necessary. The fence is not a border and has no political significance. It does not change the legal status of the territory in any way." (A/ES-10/PV.23, p. 6.)

117. The Court would recall that both the General Assembly and the Security Council have referred, with regard to Palestine, to the customary rule of "the inadmissibility of the acquisition of territory by war" (see paragraphs 74 and 87 above). Thus in resolution 242 (1967) of 22 November 1967, the Security Council, after recalling this rule, affirmed that:

> "the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:
>
> (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
> (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force".

It is on this same basis that the Council has several times condemned the measures taken by Israel to change the status of Jerusalem (see paragraph 75 above).

118. As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a "Palestinian people" is no

longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized "the right of the State of Israel to exist in peace and security" and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, "the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people". The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its "legitimate rights" (Preamble, paras. 4, 7, 8; Article II, para. 2; Article III, paras. 1 and 3; Article XXII, para. 2). The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003).

119. The Court notes that the route of the wall as fixed by the Israeli Government includes within the "Closed Area" (see paragraph 85 above) some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map mentioned in paragraph 80 above that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).

120. As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.

In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.

The Security Council has thus taken the view that such policy and practices "have no legal validity". It has also called upon "Israel, as the occupying Power, to abide scrupulously" by the Fourth Geneva Convention and:

> "to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem

> and, in particular, not to transfer parts of its own civilian population into the occupied Arab territories" (resolution 446 (1979) of 22 March 1979).

The Council reaffirmed its position in resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980. Indeed, in the latter case it described "Israel's policy and practices of settling parts of its population and new immigrants in [the occupied] territories" as a "flagrant violation" of the Fourth Geneva Convention.

The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.

121. Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature (see paragraph 116 above), it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudge the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.

122. The Court recalls moreover that, according to the report of the Secretary-General, the planned route would incorporate in the area between the Green Line and the wall more than 16 per cent of the territory of the West Bank. Around 80 per cent of the settlers living in the Occupied Palestinian Territory, that is 320,000 individuals, would reside in that area, as well as 237,000 Palestinians. Moreover, as a result of the construction of the wall, around 160,000 other Palestinians would reside in almost completely encircled communities (see paragraphs 84, 85 and 119 above).

In other terms, the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council (see paragraphs 75 and 120 above). There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, as will be further explained in paragraph 133 below, to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.

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123. The construction of the wall also raises a number of issues in rela-

tion to the relevant provisions of international humanitarian law and of human rights instruments.

124. With regard to the Hague Regulations of 1907, the Court would recall that these deal, in Section II, with hostilities and in particular with "means of injuring the enemy, sieges, and bombardments". Section III deals with military authority in occupied territories. Only Section III is currently applicable in the West Bank and Article 23 *(g)* of the Regulations, in Section II, is thus not pertinent.

Section III of the Hague Regulations includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to "take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country". Article 46 adds that private property must be "respected" and that it cannot "be confiscated". Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.

125. A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation. It thus states in Article 6:

> "The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.
>
> In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.
>
> In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.
>
> Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention."

Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.

126. These provisions include Articles 47, 49, 52, 53 and 59 of the Fourth Geneva Convention.

According to Article 47:

> "Protected persons who are in occupied territory shall not be

deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

Article 49 reads as follows:

"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

According to Article 52:

"No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited."

Article 53 provides that:

> "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

Lastly, according to Article 59:

> "If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.
>
> Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.
>
> All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.
>
> A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power."

127. The International Covenant on Civil and Political Rights also contains several relevant provisions. Before further examining these, the Court will observe that Article 4 of the Covenant allows for derogation to be made, under various conditions, to certain provisions of that instrument. Israel made use of its right of derogation under this Article by addressing the following communication to the Secretary-General of the United Nations on 3 October 1991:

> "Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.
>
> These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.
>
> In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant.
>
> The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of

> the State and for the protection of life and property, including the exercise of powers of arrest and detention.
>
> In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision."

The Court notes that the derogation so notified concerns only Article 9 of the International Covenant on Civil and Political Rights, which deals with the right to liberty and security of person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remain applicable not only on Israeli territory, but also on the Occupied Palestinian Territory.

128. Among these mention must be made of Article 17, paragraph 1 of which reads as follows: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

Mention must also be made of Article 12, paragraph 1, which provides: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

129. In addition to the general guarantees of freedom of movement under Article 12 of the International Covenant on Civil and Political Rights, account must also be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. The status of the Christian Holy Places in the Ottoman Empire dates far back in time, the latest provisions relating thereto having been incorporated into Article 62 of the Treaty of Berlin of 13 July 1878. The Mandate for Palestine given to the British Government on 24 July 1922 included an Article 13, under which:

> "All responsibility in connection with the Holy Places and religious buildings or sites in Palestine, including that of preserving existing rights and of securing free access to the Holy Places, religious buildings and sites and the free exercise of worship, while ensuring the requirements of public order and decorum, is assumed by the Mandatory . . ."

Article 13 further stated: "nothing in this mandate shall be construed as conferring . . . authority to interfere with the fabric or the management of purely Moslem sacred shrines, the immunities of which are guaranteed".

In the aftermath of the Second World War, the General Assembly, in adopting resolution 181 (II) on the future government of Palestine, devoted an entire chapter of the Plan of Partition to the Holy Places, religious buildings and sites. Article 2 of this Chapter provided, in so far as the Holy Places were concerned:

> "the liberty of access, visit and transit shall be guaranteed, in conformity with existing rights, to all residents and citizens [of the Arab

State, of the Jewish State] and of the City of Jerusalem, as well as to aliens, without distinction as to nationality, subject to requirements of national security, public order and decorum".

Subsequently, in the aftermath of the armed conflict of 1948, the 1949 General Armistice Agreement between Jordan and Israel provided in Article VIII for the establishment of a special committee for "the formulation of agreed plans and arrangements for such matters as either Party may submit to it" for the purpose of enlarging the scope of the Agreement and of effecting improvement in its application. Such matters, on which an agreement of principle had already been concluded, included "free access to the Holy Places".

This commitment concerned mainly the Holy Places located to the east of the Green Line. However, some Holy Places were located west of that Line. This was the case of the Room of the Last Supper and the Tomb of David, on Mount Zion. In signing the General Armistice Agreement, Israel thus undertook, as did Jordan, to guarantee freedom of access to the Holy Places. The Court considers that this undertaking by Israel has remained valid for the Holy Places which came under its control in 1967. This undertaking has further been confirmed by Article 9, paragraph 1, of the 1994 Peace Treaty between Israel and Jordan, by virtue of which, in more general terms, "Each party will provide freedom of access to places of religious and historical significance."

130. As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (Arts. 6 and 7); protection and assistance accorded to the family and to children and young persons (Art. 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right "to be free from hunger" (Art. 11); the right to health (Art. 12); the right to education (Arts. 13 and 14).

131. Lastly, the United Nations Convention on the Rights of the Child of 20 November 1989 includes similar provisions in Articles 16, 24, 27 and 28.

*

132. From the information submitted to the Court, particularly the report of the Secretary-General, it appears that the construction of the wall has led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.

133. That construction, the establishment of a closed area between the Green Line and the wall itself and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of

Israeli citizens and those assimilated thereto). Such restrictions are most marked in urban areas, such as the Qalqiliya enclave or the City of Jerusalem and its suburbs. They are aggravated by the fact that the access gates are few in number in certain sectors and opening hours appear to be restricted and unpredictably applied. For example, according to the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967, "Qalqiliya, a city with a population of 40,000, is completely surrounded by the Wall and residents can only enter and leave through a single military checkpoint open from 7 a.m. to 7 p.m." (Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, submitted in accordance with Commission resolution 1993/2 A and entitled "Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine", E/CN.4/2004/6, 8 September 2003, para. 9.)

There have also been serious repercussions for agricultural production, as is attested by a number of sources. According to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories

> "an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank's most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus grows and hothouses upon which tens of thousands of Palestinians rely for their survival" (Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, A/58/311, 22 August 2003, para. 26).

Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region" and adds that "Many fruit and olive trees had been destroyed in the course of building the barrier" (E/CN.4/2004/6, 8 September 2003, para. 9). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall "cuts off Palestinians from their agricultural lands, wells and means of subsistence" (Report by the Special Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, "The Right to Food", Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31 October 2003, para. 49). In a recent survey conducted by the World Food Programme, it is stated that the situation has aggra-

vated food insecurity in the region, which reportedly numbers 25,000 new beneficiaries of food aid (report of the Secretary-General, para. 25).

It has further led to increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water. This is also attested by a number of different information sources. Thus the report of the Secretary-General states generally that "According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks." (Report of the Secretary-General, para. 23.) The Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that "Palestinians between the Wall and Green Line will effectively be cut off from their land and workplaces, schools, health clinics and other social services." (E/CN.4/2004/6, 8 September 2003, para. 9.) In relation specifically to water resources, the Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights observes that "By constructing the fence Israel will also effectively annex most of the western aquifer system (which provides 51 per cent of the West Bank's water resources)." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) Similarly. in regard to access to health services, it has been stated that, as a result of the enclosure of Qalqiliya, a United Nations hospital in that town has recorded a 40 per cent decrease in its caseload (report of the Secretary-General, para. 24).

At Qalqiliya, according to reports furnished to the United Nations, some 600 shops or businesses have shut down, and 6,000 to 8,000 people have already left the region (E/CN.4/2004/6, 8 September 2003, para. 10; E/CN.4/2004/10/Add.2, 31 October 2003, para. 51). The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights has also observed that "With the fence/wall cutting communities off from their land and water without other means of subsistence, many of the Palestinians living in these areas will be forced to leave." (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) In this respect also the construction of the wall would effectively deprive a significant number of Palestinians of the "freedom to choose [their] residence". In addition, however, in the view of the Court, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements mentioned in paragraph 120 above, is tending to alter the demographic composition of the Occupied Palestinian Territory.

134. To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception

of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child. Lastly, the construction of the wall and its associated régime, by contributing to the demographic changes referred to in paragraphs 122 and 133 above, contravene Article 49, paragraph 6, of the Fourth Geneva Convention and the Security Council resolutions cited in paragraph 120 above.

135. The Court would observe, however, that the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances.

Neither Article 46 of the Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provision of this type. With regard to forcible transfers of population and deportations, which are prohibited under Article 49, paragraph 1, of the Convention, paragraph 2 of that Article provides for an exception in those cases in which "the security of the population or imperative military reasons so demand". This exception however does not apply to paragraph 6 of that Article, which prohibits the occupying Power from deporting or transferring parts of its own civilian population into the territories it occupies. As to Article 53 concerning the destruction of personal property, it provides for an exception "where such destruction is rendered absolutely necessary by military operations".

The Court considers that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.

136. The Court would further observe that some human rights conventions, and in particular the International Covenant on Civil and Political Rights, contain provisions which States parties may invoke in order to derogate, under various conditions, from certain of their conventional obligations. In this respect, the Court would however recall that the communication notified by Israel to the Secretary-General of the United Nations under Article 4 of the International Covenant on Civil and Political Rights concerns only Article 9 of the Covenant, relating to the right to freedom and security of person (see paragraph 127 above); Israel is accordingly bound to respect all the other provisions of that instrument.

The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in Article 17 of the Interna-

tional Covenant on Civil and Political Rights. On the other hand, Article 12, paragraph 3, of that instrument provides that restrictions on liberty of movement as guaranteed under that Article

> "shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order *(ordre public)*, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".

As for the International Covenant on Economic, Social and Cultural Rights, Article 4 thereof contains a general provision as follows:

> "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends. As the Human Rights Committee put it, they "must conform to the principle of proportionality" and "must be the least intrusive instrument amongst those which might achieve the desired result" (CCPR/C/21/Rev.1/Add.9, General Comment No. 27, para. 14). On the basis of the information available to it, the Court finds that these conditions are not met in the present instance.

The Court would further observe that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel's construction of the wall, fail to meet a condition laid down by Article 4 of the International Covenant on Economic, Social and Cultural Rights, that is to say that their implementation must be "solely for the purpose of promoting the general welfare in a democratic society".

137. To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various

of its obligations under the applicable international humanitarian law and human rights instruments.

*

138. The Court has thus concluded that the construction of the wall constitutes action not in conformity with various international legal obligations incumbent upon Israel. However, Annex I to the report of the Secretary-General states that, according to Israel: "the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and Security Council resolutions 1368 (2001) and 1373 (2001)". More specifically, Israel's Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that "the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter"; the Security Council resolutions referred to, he continued, "have clearly recognized the right of States to use force in self-defence against terrorist attacks", and therefore surely recognize the right to use non-forcible measures to that end (A/ES-10/PV.21, p. 6).

139. Under the terms of Article 51 of the Charter of the United Nations:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

140. The Court has, however, considered whether Israel could rely on a state of necessity which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see para-

graphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged. However, the Court will not need to consider that question. As the Court observed in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, "the state of necessity is a ground recognized by customary international law" that "can only be accepted on an exceptional basis"; it "can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met" (*I.C.J. Reports 1997*, p. 40, para. 51). One of those conditions was stated by the Court in terms used by the International Law Commission, in a text which in its present form requires that the act being challenged be "the only way for the State to safeguard an essential interest against a grave and imminent peril" (Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts; see also former Article 33 of the Draft Articles on the International Responsibility of States, with slightly different wording in the English text). In the light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.

141. The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nonetheless to remain in conformity with applicable international law.

142. In conclusion, the Court considers that Israel cannot rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall resulting from the considerations mentioned in paragraphs 122 and 137 above. The Court accordingly finds that the construction of the wall, and its associated régime, are contrary to international law.

* * *

143. The Court having concluded that, by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and by adopting its associated régime, Israel has violated various international obligations incumbent upon it (see paragraphs 114-137 above), it must now, in order to reply to the question posed by the General Assembly, examine the consequences of those violations.

* *

144. In their written and oral observations, many participants in the proceedings before the Court contended that Israel's action in illegally constructing this wall has legal consequences not only for Israel itself, but also for other States and for the United Nations; in its Written Statement, Israel, for its part, presented no arguments regarding the possible legal consequences of the construction of the wall.

145. As regards the legal consequences for Israel, it was contended that Israel has, first, a legal obligation to bring the illegal situation to an end by ceasing forthwith the construction of the wall in the Occupied Palestinian Territory, and to give appropriate assurances and guarantees of non-repetition.

It was argued that, secondly, Israel is under a legal obligation to make reparation for the damage arising from its unlawful conduct. It was submitted that such reparation should first of all take the form of restitution, namely demolition of those portions of the wall constructed in the Occupied Palestinian Territory and annulment of the legal acts associated with its construction and the restoration of property requisitioned or expropriated for that purpose; reparation should also include appropriate compensation for individuals whose homes or agricultural holdings have been destroyed.

It was further contended that Israel is under a continuing duty to comply with all of the international obligations violated by it as a result of the construction of the wall in the Occupied Palestinian Territory and of the associated régime. It was also argued that, under the terms of the Fourth Geneva Convention, Israel is under an obligation to search for and bring before its courts persons alleged to have committed, or to have ordered to be committed, grave breaches of international humanitarian law flowing from the planning, construction and use of the wall.

146. As regards the legal consequences for States other than Israel, it was contended before the Court that all States are under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to co-operate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefor.

Certain participants in the proceedings further contended that the States parties to the Fourth Geneva Convention are obliged to take measures to ensure compliance with the Convention and that, inasmuch as the construction and maintenance of the wall in the Occupied Palestinian Territory constitutes grave breaches of that Convention, the States parties to that Convention are under an obligation to prosecute or extradite the authors of such breaches. It was further observed that

> "the United Nations Security Council should consider flagrant and systematic violation of international law norm[s] and principles by

Israel, particularly . . . international humanitarian law, and take all necessary measures to put an end [to] these violations",

and that the Security Council and the General Assembly must take due account of the advisory opinion to be given by the Court.

* *

147. Since the Court has concluded that the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to various of Israel's international obligations, it follows that the responsibility of that State is engaged under international law.

148. The Court will now examine the legal consequences resulting from the violations of international law by Israel by distinguishing between, on the one hand, those arising for Israel and, on the other, those arising for other States and, where appropriate, for the United Nations. The Court will begin by examining the legal consequences of those violations for Israel.

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149. The Court notes that Israel is first obliged to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory (see paragraphs 114-137 above). Consequently, Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure freedom of access to the Holy Places that came under its control following the 1967 War (see paragraph 129 above).

150. The Court observes that Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 149; *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 44, para. 95; *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82).

151. Israel accordingly has the obligation to cease forthwith the works of construction of the wall being built by it in the Occupied Palestinian Territory, including in and around East Jerusalem. Moreover, in view of the Court's finding (see paragraph 143 above) that Israel's violations of

its international obligations stem from the construction of the wall and from its associated régime, cessation of those violations entails the dismantling forthwith of those parts of that structure situated within the Occupied Palestinian Territory, including in and around East Jerusalem. All legislative and regulatory acts adopted with a view to its construction, and to the establishment of its associated régime, must forthwith be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with the obligations referred to in paragraph 153 below.

152. Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. The Court would recall that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice in the following terms:

> "The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.)

153. Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.

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154. The Court will now consider the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States.

155. The Court would observe that the obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection" (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.

156. As regards the first of these, the Court has already observed (paragraph 88 above) that in the *East Timor* case, it described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character" (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV), already mentioned above (see paragraph 88),

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . ."

157. With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* it stated that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I.C.J. Reports 1996 (I)*, p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.

158. The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or

not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

* * *

161. The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.

162. The Court has reached the conclusion that the construction of the wall by Israel in the Occupied Palestinian Territory is contrary to international law and has stated the legal consequences that are to be drawn from that illegality. The Court considers itself bound to add that this construction must be placed in a more general context. Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic

situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The "Roadmap" approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.

* * *

163. For these reasons,

THE COURT,

(1) Unanimously,

*Finds* that it has jurisdiction to give the advisory opinion requested;

(2) By fourteen votes to one,

*Decides* to comply with the request for an advisory opinion;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal;

(3) *Replies* in the following manner to the question put by the General Assembly:

A. By fourteen votes to one,

The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal;

B. By fourteen votes to one,

Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith

all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal;

C. By fourteen votes to one,

Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal;

D. By thirteen votes to two,

All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judges* Kooijmans, Buergenthal;

E. By fourteen votes to one,

The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Elaraby, Owada, Simma, Tomka;

AGAINST: *Judge* Buergenthal.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this ninth day of July, two thousand and

four, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

*(Signed)* SHI Jiuyong,
President.

*(Signed)* Philippe COUVREUR,
Registrar.

Judges KOROMA, HIGGINS, KOOIJMANS and AL-KHASAWNEH append separate opinions to the Advisory Opinion of the Court; Judge BUERGENTHAL appends a declaration to the Advisory Opinion of the Court; Judges ELARABY and OWADA append separate opinions to the Advisory Opinion of the Court.

*(Initialled)* J.Y.S.
*(Initialled)* Ph.C.

## SEPARATE OPINION OF JUDGE KOROMA

*Construction of wall and annexation — Validity of Court's jurisdiction — Functions of Court in advisory proceedings — Findings on basis of applicable law* — Erga omnes *character of findings — Respect for humanitarian law — Role of General Assembly.*

1. While concurring with the Court's findings that the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime are contrary to international law, I nevertheless consider it necessary to stress the following points.

2. First and foremost, the construction of the wall has involved the annexation of parts of the occupied territory by Israel, the occupying Power, contrary to the fundamental international law principle of the non-acquisition of territory by force. The Court has confirmed the Palestinian territories as occupied territory and Israel is therefore not entitled to embark there on activities of a sovereign nature which will change their status as occupied territory. The essence of occupation is that it is only of a temporary nature and should serve the interests of the population and the military needs of the occupying Power. Accordingly, anything which changes its character, such as the construction of the wall, will be illegal.

3. Understandable though it is that there may be a diversity of legal views and perspectives on the question submitted to the Court, namely, the rights and obligations of an occupying Power in an occupied territory and the remedies available under international law for breaches of those obligations — a question which, in my view, is eminently legal and falls within the advisory jurisdiction of the Court — the objection is not sustainable that the Court lacks competence to rule on such a question, as determined under the United Nations Charter (Art. 96 — functional co-operation on legal questions between the Court and the General Assembly), the Statute of the Court (Art. 65 — discretionary power; and Art. 68 — assimilation with contentious procedures), the Rules of Court (Art. 102, para. 2 — assimilation with contentious proceedings), and the settled jurisprudence of the Court. Also not sustainable is the objection based on judicial propriety, which the Court duly considered in terms of its competence and of fairness in the administration of justice. In this regard, the question put to the Court is not about the Israeli-Palestinian conflict as such, nor its resolution, but rather the legal consequences of the construction of the wall in the occupied territory. In other words, is it permissible under existing law for an occupying Power, unilaterally, to

bring about changes in the character of an occupied territory? An eminently legal question, which, in my view, is susceptible of a legal response and which does not by necessity have to assume the nature of an adjudication of a bilateral dispute; it is a request for elucidation of the applicable law. It is to that question that the Court has responded. It was therefore appropriate for the Court to exercise its advisory jurisdiction in this matter. The jurisdictional basis of the Court's Advisory Opinion is thus firmly anchored in its jurisprudence.

4. The function of the Court in such proceedings is to ascertain and apply the law to the issue at hand. To reach its findings, the Court has applied the relevant rules of the international law of occupation as it pertains to the Palestinian territories. Applying these rules, the Court has found that the territories were occupied territory and thus not open to annexation; that any such annexation would be tantamount to a violation of international law and contrary to international peace. Under the régime of occupation, the division or partition of an occupied territory by the occupying Power is illegal. Moreover, in terms of contemporary international law, every State is under an obligation to refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

5. The Court has also held that the right of self-determination as an established and recognized right under international law applies to the territory and to the Palestinian people. Accordingly, the exercise of such right entitles the Palestinian people to a State of their own as originally envisaged in resolution 181 (II) and subsequently confirmed. The Court has found that the construction of the wall in the Palestinian territory will prevent the realization of such a right and is therefore a violation of it.

6. With respect to humanitarian and human rights law, the Court has rightly adjudged that both these régimes are applicable to the occupied territories; that Israel as the occupying Power is under an obligation to respect the rights of the Palestinian population of the occupied territories. Accordingly, the Court has held that the construction of the wall in the occupied territories violates the régime of humanitarian and human rights law. To put an end to such violations, the Court has rightly called for the immediate cessation of the construction of the wall and the payment of reparation for damages caused by the construction.

7. Equally important is the finding that the international community as a whole bears an obligation towards the Palestinian people as a former mandated territory, on whose behalf the international community holds a "sacred trust", not to recognize any unilateral change in the status of the territory brought about by the construction of the wall.

8. The Court's findings are based on the authoritative rules of inter-

national law and are of an *erga omnes* character. The Court's response provides an authoritative answer to the question submitted to it. Given the fact that all States are bound by those rules and have an interest in their observance, all States are subject to these findings.

9. Just as important is the call upon the parties to the conflict to respect humanitarian law in the ongoing hostilities. While it is understandable that a prolonged occupation would engender resistance, it is nonetheless incumbent on all parties to the conflict to respect international humanitarian law at all times.

10. In making these findings, the Court has performed its role as the supreme arbiter of international legality and safeguard against illegal acts. It is now up to the General Assembly in discharging its responsibilities under the Charter to treat this Advisory Opinion with the respect and seriousness it deserves, not with a view to making recriminations but to utilizing these findings in such a way as to bring about a just and peaceful solution to the Israeli-Palestinian conflict, a conflict which has not only lasted for far too long but has caused enormous suffering to those directly involved and poisoned international relations in general.

*(Signed)* Abdul G. KOROMA.

# SEPARATE OPINION OF JUDGE HIGGINS

*Issues relevant for discretion not addressed by the Court — Elements lacking for a balanced Opinion — Violations of Articles 46 and 52 of the Hague Regulations and Articles 49 and 53 of the Fourth Geneva Convention — Disagreement with passages in the Opinion on self-determination, self-defence and the* erga omnes *principle — limitations of the factual materials relied on.*

1. I agree with the Opinion of the Court as regards its jurisdiction in the present case and believe that paragraphs 14-42 correctly answer the various contrary arguments that have been raised on this point.

2. The question of discretion and propriety is very much harder. Although ultimately I have voted in favour of the decision to give the Opinion, I do think matters are not as straightforward as the Court suggests. It is apparent (not least from the wording of the request to the Court) that an attempt has been made by those seeking the Opinion to assimilate the Opinion on the wall to that obtained from the Court regarding Namibia (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 12). I believe this to be incorrect for several reasons. First and foremost, there was already, at the time of the request for an opinion in 1971 on the legal consequences of certain acts, a series of Court Opinions on South West Africa which made clear what were South Africa's legal obligations (*International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 128; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports 1956*, p. 23). Further, all the legal obligations as mandatory Power lay with South West Africa. There were no legal obligations, still less unfulfilled obligations, which in 1971 lay also upon South-West Africa People's Organization (SWAPO), as the representative of the Namibian people.

3. In the present case, it is the General Assembly, and not the Court, which has made any prior pronouncements in respect of legality. Further, in contrast to how matters stood as regards Namibia in 1971, the larger intractable problem (of which the wall may be seen as an element) cannot be regarded as one in which one party alone has been already classified

by a court as the legal wrongdoer; where it is for it alone to act to restore a situation of legality; and where from the perspective of legal obligation there is nothing remaining for the other "party" to do. That is evident from the long history of the matter, and is attested to by Security Council resolutions 242 (1967) and 1515 (2003) alike.

4. In support of the misconceived analogy — which serves both to assist so far as legal issues of discretion are concerned, as well as wider purposes — counsel have informed the Court that "The problem . . . is a problem between one State — Israel — and the United Nations." (See for example, CR 2004/3, p. 62, para. 31.) Of course, assimilation to the *Namibia* case, and a denial of any dispute save as between Israel and the United Nations, would also avoid the necessity to meet the criteria enunciated by the Court when considering whether it should give an opinion where a dispute exists between two States. But, as will be elaborated below, this cannot be avoided.

5. Moreover, in the *Namibia* Opinion the Assembly sought legal advice on the consequences of its own necessary decisions on the matter in hand. The General Assembly was the organ in which now the power to terminate a League of Nations mandate was located. The Mandate was duly terminated. But Assembly resolutions are in most cases only recommendations. The Security Council, which in certain circumstances can pass binding resolutions under Chapter VII of the Charter, was not the organ with responsibility over mandates. This conundrum was at the heart of the opinion sought of the Court. Here, too, there is no real analogy with the present case.

6. We are thus in different legal terrain — in the familiar terrain where there is a dispute between parties, which fact does not of itself mean that the Court should not exercise its competence, provided certain conditions are met.

7. Since 1948 Israel has been in dispute, first with its Arab neighbours (and other Arab States) and, in more recent years, with the Palestinian Authority. Both Israel's written observations on this aspect (7.4-7.7) and the report of the Secretary-General, with its reference to the "Summary Legal Position" of "each side", attest to this reality. The Court has regarded the special status of Palestine, though not yet an independent State, as allowing it to be invited to participate in these proceedings. There is thus a dispute between two international actors, and the advisory opinion request bears upon one element of it.

8. That of itself does not suggest that the Court should decline to exercise jurisdiction on grounds of propriety. It is but a starting point for the Court's examination of the issue of discretion. A series of advisory opinion cases have explained how the *Status of Eastern Carelia, Advisory Opinion, 1923 (P.C.I.J., Series B, No. 5)* principle should properly be read. Through the *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion* (*I.C.J. Reports 1962*, p. 151); the *Legal Consequences for States of the Continued Presence of*

*South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion* (*I.C.J. Reports 1971*, p. 12); and, most clearly, the *Western Sahara, Advisory Opinion* (*I.C.J. Reports 1975*, p. 12), the *ratio decidendi* of *Status of Eastern Carelia* has been explained. Of these the *Western Sahara* case provides by far the most pertinent guidance, as it involved a dispute between international actors, in which the Court had not itself already given several advisory opinions (cf. the *Namibia* Opinion, which was given against the background of three earlier ones on issues of legality).

9. The Court did not in the *Western Sahara* case suggest that the consent principle to the settlement of disputes in advisory opinions had now lost all relevance for all who are United Nations Members. It was saying no more than the particular factors underlying the *ratio decidendi* of *Status of Eastern Carelia* were not present. But other factors had to be considered to see if propriety is met in giving an advisory opinion when the legal interests of a United Nations Member are the subject of that advice.

10. Indeed, in the *Western Sahara* case the Court, after citing the oft-quoted dictum from *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion,* that an opinion given to a United Nations organ "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*I.C.J. Reports 1950*, p. 71), went on to affirm that nonetheless:

> "lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion.
>
> In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character." (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, paras. 32-33.)

11. What then are the conditions that in the *Western Sahara* case were found to make it appropriate for the Court to give an opinion even where a dispute involving a United Nations Member existed? One such was that a United Nations Member:

> "could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers" (*ibid.*, p. 24, para. 30).

Although the Assembly is not exercising either the powers of a mandate supervisory body (as in *Namibia*) or a body decolonizing a non-self-governing territory (as in *Western Sahara*), the Court correctly recounts at paragraphs 48-50 the long-standing special institutional interest of the United Nations in the dispute, of which the building of the wall now represents an element.

12. There remains, however, a further condition to be fulfilled, which the Court enunciated in the *Western Sahara* case. It states that it was satisfied that:

> "The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory." (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 26-27, para. 39.)

In the present case it is the reverse circumstance that obtains. The request is not in order to secure advice on the Assembly's decolonization duties, but later, on the basis of our Opinion, to exercise powers over the dispute or controversy. Many participants in the oral phase of this case frankly emphasized this objective.

13. The Court has not dealt with this point at all in that part of its Opinion on propriety. Indeed, it is strikingly silent on the matter, avoiding mention of the lines cited above and any response as to their application to the present case. To that extent, this Opinion by its very silence essentially revises, rather than applies, the existing case law.

14. There is a further aspect that has been of concern to me so far as the issue of propriety is concerned. The law, history and politics of the Israel-Palestine dispute is immensely complex. It is inherently awkward for a court of law to be asked to pronounce upon one element within a multifaceted dispute, the other elements being excluded from its view. Context is usually important in legal determinations. So far as the request of the Assembly envisages an opinion on humanitarian law, however, the obligations thereby imposed are (save for their own qualifying provisions) absolute. That is the bedrock of humanitarian law, and those engaged in conflict have always known that it is the price of our hopes for the future that they must, whatever the provocation, fight "with one hand behind their back" and act in accordance with international law. While that factor diminishes relevance of context so far as the obligations of humanitarian law are concerned, it remains true, nonetheless, that

context is important for other aspects of international law that the Court chooses to address. Yet the formulation of the question precludes consideration of that context.

15. Addressing the reality that "the question of the construction of the wall was only one aspect of the Israeli-Palestinian conflict", the Court states that it "is indeed aware that the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give" (para. 54).

16. In fact, it never does so. There is nothing in the remainder of the Opinion that can be said to cover this point. Further, I find the "history" as recounted by the Court in paragraphs 71-76 neither balanced nor satisfactory.

17. What should a court do when asked to deliver an opinion on one element in a larger problem? Clearly, it should not purport to "answer" these larger legal issues. The Court, wisely and correctly, avoids what we may term "permanent status" issues, as well as pronouncing on the rights and wrongs in myriad past controversies in the Israel-Palestine problem. What a court faced with this quandary must do is to provide a balanced opinion, made so by recalling the obligations incumbent upon all concerned.

18. I regret that I do not think this has been achieved in the present Opinion. It is true that in paragraph 162 the Court recalls that "[i]llegal actions and unilateral decisions have been taken on all sides" and that it emphasizes that "both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law". But in my view much, much more was required to avoid the huge imbalance that necessarily flows from being invited to look at only "part of a greater whole", and then to take that circumstance "carefully into account". The call upon both parties to act in accordance with international humanitarian law should have been placed within the *dispositif*. The failure to do so stands in marked contrast with the path that the Court chose to follow in operative clause F of the *dispositif* of the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (*I.C.J. Reports 1996 (I)*, p. 266). Further, the Court should have spelled out what is required of both parties in this "greater whole". This is not difficult — from Security Council resolution 242 (1967) through to Security Council resolution 1515 (2003), the key underlying requirements have remained the same — that Israel is entitled to exist, to be recognized, and to security, and that the Palestinian people are entitled to their territory, to exercise self-determination, and to have their own State. Security Council resolution 1515 (2003) envisages that these long-standing obligations are to be secured, both generally and as to their detail, by negotiation. The perceptible tragedy is that neither side will act to achieve these ends prior to the other so doing. The Court, having decided that it was appropriate to exercise its jurisdiction, should have used the latitude available to it in an advisory opinion case, and reminded both parties not only of their substantive obligations

under international law, but also of the procedural obligation to move forward simultaneously. Further, I believe that, in order to achieve a balanced opinion, this latter element should also have appeared in the *dispositif* itself.

19. I think the Court should also have taken the opportunity to say, in the clearest terms, what regrettably today apparently needs constant reaffirmation even among international lawyers, namely, that the protection of civilians remains an intransgressible obligation of humanitarian law, not only for the occupier but equally for those seeking to liberate themselves from occupation.

20. My vote in favour of subparagraph (2) of the *dispositif* has thus been made with considerable hesitation. I have voted affirmatively in the end because I agree with almost all of what the Court has written in paragraphs 44-64. My regrets are rather about what it has chosen not to write.

* *

21. The way subparagraph (3) (A) of the *dispositif* is formulated does not separate out the various grounds that the Court relied on in reaching its conclusions. I have voted in favour of this subparagraph because I agree that the wall, being built in occupied territory, and its associated régime, entail certain violations of humanitarian law. But I do not agree with several of the other stepping stones used by the Court in reaching this generalized finding, nor with its handling of the source materials.

22. The question put by the General Assembly asks the Court to respond by "considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions" (General Assembly resolution ES-10/14). It might have been anticipated that once the Court finds the Fourth Geneva Convention applicable humanitarian law would be at the heart of this Opinion.

23. The General Assembly has in resolution ES-10/13 determined that the wall contravenes humanitarian law, without specifying which provisions and why. Palestine has informed the Court that it regards Articles 33, 53, 55 and 64 of the Fourth Geneva Convention and Article 52 of the Hague Regulations as violated. Other participants invoked Articles 23 *(g)*, 46, 50 and 52 of the Hague Regulations, and Articles 27, 47, 50, 55, 56 and 59 of the Fourth Convention. For the Special Rapporteur, the wall constitutes a violation of Articles 23 *(g)* and 46 of the Hague Regulations and Articles 47, 49, 50, 53 and 55 of the Fourth Geneva Convention. It might have been expected that an advisory opinion would have contained a detailed analysis, by reference to the texts, the

voluminous academic literature and the facts at the Court's disposal, as to *which* of these propositions is correct. Such an approach would have followed the tradition of using advisory opinions as an opportunity to elaborate and develop international law.

24. It would also, as a matter of balance, have shown not only which provisions Israel has violated, but also which it has not. But the Court, once it has decided which of these provisions are in fact applicable, thereafter refers only to those which Israel has violated. Further, the structure of the Opinion, in which humanitarian law and human rights law are not dealt with separately, makes it in my view extremely difficult to see what exactly has been decided by the Court. Notwithstanding the very general language of subparagraph (3) (A) of the *dispositif*, it should not escape attention that the Court has in the event found violations only of Article 49 of the Fourth Geneva Convention (para. 120), and of Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention (para. 132). I agree with these findings.

25. After its somewhat light treatment of international humanitarian law, the Court turns to human rights law. I agree with the Court's finding about the continued relevance of human rights law in the occupied territories. I also concur in the findings made at paragraph 134 as regards Article 12 of the International Covenant on Civil and Political Rights.

26. At the same time, it has to be noted that there are established treaty bodies whose function it is to examine in detail the conduct of States parties to each of the Covenants. Indeed, the Court's response as regards the International Covenant on Civil and Political Rights notes both the pertinent jurisprudence of the Human Rights Committee and also the concluding observations of the Committee on Israel's duties in the occupied territories.

27. So far as the International Covenant on Economic, Social and Cultural Rights is concerned, the situation is even stranger, given the programmatic requirements for the fulfilment of this category of rights. The Court has been able to do no more than observe, in a single phrase, that the wall and its associated régime

> "impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights . . ." (para. 134).

For both Covenants, one may wonder about the appropriateness of asking for advisory opinions from the Court on compliance by States parties with such obligations, which are monitored, in much greater detail, by a treaty body established for that purpose. It could hardly be an answer that the General Assembly is not setting any more general precedent, because while many, many States are not in compliance with their obligations under the two Covenants, the Court is being asked to look only at the conduct of Israel in this regard.

28. The Court has also relied, for the general determination in sub-paragraph (3) (A) of the *dispositif*, on a finding that Israel is in violation of the law on self-determination. It follows observations on the legally problematic route of the wall and associated demographic risks with the statement: "That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right." (Para. 122.) This appears to me to be a non sequitur.

29. There is a substantial body of doctrine and practice on "self-determination beyond colonialism". The United Nations Declaration on Friendly Relations, 1970 (General Assembly resolution 2625 (XXV)) speaks also of self-determination being applicable in circumstances where peoples are subject to "alien subjugation, domination, and exploitation". The General Assembly has passed many resolutions referring to the latter circumstance, having Afghanistan and the Occupied Arab Territories in mind (for example, General Assembly resolution 3236 (XXIX) of 1974 (Palestine); General Assembly resolution 2144 (XXV) of 1987 (Afghanistan)). The Committee on Human Rights has consistently supported this post-colonial view of self-determination.

30. The Court has for the very first time, without any particular legal analysis, implicitly also adopted this second perspective. I approve of the principle invoked, but am puzzled as to its application in the present case. Self-determination is the right of "All peoples . . . freely [to] determine their political status and freely pursue their economic, social and cultural development" (Art. 1 (1), International Covenant on Civil and Political Rights and also International Covenant on Economic, Social and Cultural Rights). As this Opinion observes (para. 118), it is now accepted that the Palestinian people are a "peoples" for purposes of self-determination. But it seems to me quite detached from reality for the Court to find that it is the wall that presents a "serious impediment" to the exercise of this right. The real impediment is the apparent inability and/or unwillingness of both Israel and Palestine to move in parallel to secure the necessary conditions — that is, at one and the same time, for Israel to withdraw from Arab occupied territory and for Palestine to provide the conditions to allow Israel to feel secure in so doing. The simple point is underscored by the fact that if the wall had never been built, the Palestinians would still not yet have exercised their right to self-determination. It seems to me both unrealistic and unbalanced for the Court to find that the wall (rather than "the larger problem", which is beyond the question put to the Court for an opinion) is a serious obstacle to self-determination.

31. Nor is this finding any more persuasive when looked at from a territorial perspective. As the Court states in paragraph 121, the wall does not at the present time constitute, *per se*, a *de facto* annexation.

"Peoples" necessarily exercise their right to self-determination within their own territory. Whatever may be the detail of any finally negotiated boundary, there can be no doubt, as is said in paragraph 78 of the Opinion, that Israel is in occupation of Palestinian territory. That territory is no more, or less, under occupation because a wall has been built that runs through it. And to bring to an end that circumstance, it is necessary that both sides, simultaneously, accept their responsibilities under international law.

32. After the Court deals with the applicable law, and then applies it, it looks at possible qualifications, exceptions and defences to potential violations.

33. I do not agree with all that the Court has to say on the question of the law of self-defence. In paragraph 139 the Court quotes Article 51 of the Charter and then continues "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." There is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a State. *That* qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*Merits, Judgment, I.C.J. Reports 1986*, p. 14). It there held that military action by irregulars could constitute an armed attack if these were sent by or on behalf of the State and if the activity "because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces" (*ibid.*, p. 103, para. 195). While accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere (R. Higgins, *Problems and Process: International Law and How We Use It*, pp. 250-251).

34. I also find unpersuasive the Court's contention that, as the uses of force emanate from occupied territory, it is not an armed attack "by one State against another". I fail to understand the Court's view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory — a territory which it has found not to have been annexed and is certainly "other than" Israel. Further, Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an unevenhanded sort. The question is surely where responsibility lies for the sending of groups and persons who act against Israeli civilians and the cumulative severity of such action.

35. In the event, however, these reservations have not caused me to vote against subparagraph (3) (A) of the *dispositif*, for two reasons. First, I remain unconvinced that non-forcible measures (such as the building of

a wall) fall within self-defence under Article 51 of the Charter as that provision is normally understood. Second, even if it were an act of self-defence, properly so called, it would need to be justified as necessary and proportionate. While the wall does seem to have resulted in a diminution on attacks on Israeli civilians, the necessity and proportionality for the particular route selected, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained.

36. The latter part of the *dispositif* deals with the legal consequences of the findings made by the Court.

37. I have voted in favour of subparagraph (3) (D) of the *dispositif* but, unlike the Court, I do not think that the specified consequence of the identified violations of international law have anything to do with the concept of *erga omnes* (cf. paras. 154-159 of this Opinion). The Court's celebrated dictum in *Barcelona Traction, Light and Power Company, Limited, Second Phase* (*Judgment, I.C.J. Reports 1970*, p. 32, para. 33) is frequently invoked for more than it can bear. Regrettably, this is now done also in this Opinion, at paragraph 155. That dictum was directed to a very specific issue of jurisdictional *locus standi*. As the International Law Commission has correctly put it in the Commentaries to the draft Articles on the Responsibility of States for Internationally Wrongful Acts (A/56/10 at p. 278), there are certain rights in which, by reason of their importance "all states have a legal interest in their protection". It has nothing to do with imposing substantive obligations on third parties to a case.

38. That an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of *"erga omnes"*. It follows from a finding of an unlawful situation by the Security Council, in accordance with Articles 24 and 25 of the Charter entails "decisions [that] are consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 115). The obligation upon United Nations Members not to recognize South Africa's illegal presence in Namibia, and not to lend support or assistance, relied in no way whatever on *"erga omnes"*. Rather, the Court emphasized that "A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence." (*Ibid.*, para. 117.) The Court had already found in a contentious case that its determination of an illegal act "entails a legal consequence, namely that of putting an end to an illegal situation" (*Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82). Although in the present case it is the Court, rather than a United Nations organ acting under Articles 24 and 25, that has found the illegality; and although it is found in the context of an advisory opinion rather than in a contentious case, the Court's position as the principal

judicial organ of the United Nations suggests that the legal consequence for a finding that an act or situation is illegal is the same. The obligation upon United Nations Members of non-recognition and non-assistance does not rest on the notion of *erga omnes*.

39. Finally, the invocation (para. 157) of "the *erga omnes*" nature of violations of humanitarian law seems equally irrelevant. These intransgressible principles are generally binding because they are customary international law, no more and no less. And the first Article to the Fourth Geneva Convention, under which "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances" while apparently viewed by the Court as something to do with "the *erga omnes* principle", is simply a provision in an almost universally ratified multilateral Convention. The Final Record of the diplomatic conference of Geneva of 1949 offers no useful explanation of that provision; the commentary thereto interprets the phrase "ensure respect" as going beyond legislative and other action within a State's own territory. It observes that

> "in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally." (*The Geneva Conventions of 12 August 1949: Commentary, IV Geneva Convention relative to the protection of civilian persons in time of war*, Pictet, ed., p. 16.)

It will be noted that the Court has, in subparagraph (3) (D) of the *dispositif*, carefully indicated that any such action should be in conformity with the Charter and international law.

40. In conclusion, I would add that, although there has indeed been much information provided to the Court in this case, that provided directly by Israel has only been very partial. The Court has based itself largely on the Secretary-General's report from 14 April 2002 to 20 November 2003 and on the later Written Statement of the United Nations (see para. 79). It is not clear whether it has availed itself of other data in the public domain. Useful information is in fact contained in such documents as the Third Report of the current Special Rapporteur and Israel's Reply thereto (E/CN.4/2004/6/Add.1), as well as in "The Impact of Israel's Separation Barrier on Affected West Bank Communities: An Update to the Humanitarian and Emergency Policy Group (HEPG), Construction

of the Barrier, Access, and Its Humanitarian Impact, March 2004". In any event, the Court's findings of law are notably general in character, saying remarkably little as concerns the application of specific provisions of the Hague Rules or the Fourth Geneva Convention along particular sections of the route of the wall. I have nonetheless voted in favour of subparagraph (3) (A) of the *dispositif* because there is undoubtedly a significant negative impact upon portions of the population of the West Bank that cannot be excused on the grounds of military necessity allowed by those Conventions; and nor has Israel explained to the United Nations or to this Court why its legitimate security needs can be met only by the route selected.

(*Signed*) Rosalyn HIGGINS.

# SEPARATE OPINION OF JUDGE KOOIJMANS

*Reasons for negative vote on operative subparagraph (3) (D) — Background and context of request for advisory opinion — Need for balanced treatment — Jurisdictional issues — Article 12, paragraph 2, of the Charter and General Assembly resolution 377 A (V) — Question of judicial propriety — Purpose of request — Merits — Self-determination — Proportionality — Self-defence — Legal consequences — Obligations for other States — Article 41 of the International Law Commission Articles on State Responsibility — Duty of non-recognition — Duty of abstention — Duty to ensure respect for humanitarian law — Common Article 1 of the Geneva Conventions.*

## I. Introductory Remarks

1. I have voted in favour of all paragraphs of the operative part of the Advisory Opinion with one exception, viz. subparagraph (3) (D) dealing with the legal consequences for States.

I had a number of reasons for casting that negative vote which I will only briefly indicate at this stage, since I will come back to them when commenting on the various parts of the Opinion.

My motives can be summarized as follows.

First, the request as formulated by the General Assembly did not make it necessary for the Court to determine the obligations for States which ensue from the Court's findings. In this respect an analogy with the structure of the Opinion in the *Namibia* case is not appropriate. In that case the question about the legal consequences for States was at the heart of the request and logically so since it was premised on a decision of the Security Council. That resolution, and in particular its operative paragraph 5 which was addressed to "all States", was considered by the Court to be "essential for the purposes of the present advisory opinion" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 51, para. 108).

A similar situation does not exist in the present case, where the Court's view is not asked on the legal consequences of a decision taken by a political organ of the United Nations but of an act committed by a Member State. That does not prevent the Court from considering the issue of consequences for third States once that act has been found to be illegal but then the Court's conclusion is wholly dependent upon its reasoning and not upon the necessary logic of the request.

It is, however, this reasoning that in my view is not persuasive (see paras. 39-49, below) and this was my second motive for casting a negative vote.

And, third, I find the Court's conclusions as laid down in subparagraph (3) (D) of the *dispositif* rather weak; apart from the Court's finding that States are under an obligation "not to render aid or assistance in maintaining the situation created by [the] construction [of the wall]" (a finding I subscribe to) I find it difficult to envisage what States are expected to do or not to do in actual practice. In my opinion a judicial body's findings should have a direct bearing on the addressee's behaviour; neither the first nor the last part of operative subparagraph (3) (D) meets this requirement.

2. Although I am in general agreement with the Court's Opinion, on some issues I have reservations with regard to its reasoning. I will, in giving my comments, follow the logical order of the Opinion:

*(a)* jurisdictional issues;
*(b)* the question of judicial propriety;
*(c)* the merits;
*(d)* the legal consequences.

Before doing so I wish, however, to make some remarks about the background and context of the request.

## II. Background and Context of the Request for the Advisory Opinion

3. In paragraph 54 of the Opinion the Court observes (in the context of judicial propriety) that it is aware that the question of the wall is part of a greater whole but that that cannot be a reason for it to decline to reply to the question asked. It adds that this wider context will be carefully taken into account. I fully share the Court's view as laid down in that paragraph including the Court's observation that it can nevertheless only examine other issues to the extent that is necessary for the consideration of the question put to it.

4. In my opinion the Court could and should have given more explicit attention to the general context of the request in its Opinion. The situation in and around Palestine has been for a number of decades not only a virtually continuous threat to international peace and security but also a human tragedy which in many respects is mind-boggling. How can a society like the Palestinian one get used to and live with a situation where the victims of violence are often innocent men, women and children? How can a society like the Israeli society get used to and live with a situation where attacks against a political opponent are targeted at innocent civilians, men, women and children, in an indiscriminate way?

5. The construction of the wall is explained by Israel as a necessary protection against the latter category of acts which are generally considered to be international crimes. Deliberate and indiscriminate attacks against civilians with the intention to kill are the core element of terrorism which has been unconditionally condemned by the international community regardless of the motives which have inspired them.

Every State, including Israel, has the right and even the duty (as the Court says in paragraph 141) to respond to such acts in order to protect the life of its citizens, albeit the choice of means in doing so is limited by the norms and rules of international law. In the present case, Israel has not respected those limits, and the Court convincingly demonstrates that these norms and rules of international law have not been respected by it. I find no fault with this conclusion nor with the finding that the construction of the wall along the chosen route has greatly added to the suffering of the Palestinians living in the Occupied Territory.

6. In paragraph 122 the Court finds that the construction of the wall, along with measures taken earlier, severely impedes the exercise by the Palestinian people of its right to self-determination, and therefore constitutes a breach of Israel's obligation to respect that right. I have doubts whether the last part of that finding is correct (see paragraph 32, below), but it is beyond doubt that the mere existence of a structure that separates the Palestinians from each other makes the realization of their right to self-determination far more difficult, even if it has to be admitted that the realization of this right is more dependent upon political agreement than on the situation *in loco*.

But it is also true that the terrorist acts themselves have caused "great harm to the legitimate aspirations of the Palestinian people for a better future", as was stated in the Middle East Quartet Statement of 16 July 2002. And the Statement continues: "Terrorists must not be allowed to kill the hope of an entire region, and a united international community, for genuine peace and security for both Palestinians and Israelis." (Written Statement of Israel, Annex 10.)

7. The fact that the Court has limited itself to report merely on a number of the historical facts which have led to the present human tragedy may be correct from the viewpoint of what is really needed to answer the request of the General Assembly: the result, however, is that the historical résumé, as presented in paragraphs 70 to 78, is rather two-dimensional. I will illustrate this by giving one example which is hardly relevant for the case itself.

8. Before giving its historical résumé, the Court says that it will first make a brief analysis of the status of the territory and it starts by mentioning the establishment of the Mandate after the First World War. Nothing is said, however, about the status of the West Bank between the conclusion of the General Armistice Agreement in 1949 and the occupation by Israel in 1967, in spite of the fact that it is a generally known fact

that it was placed by Jordan under its sovereignty but that this claim to sovereignty, which was relinquished only in 1988, was recognized by three States only.

9. I fail to understand the reason for this omission of an objective historical fact since in my view the fact that Jordan claimed sovereignty over the West Bank only strengthens the argument in favour of the applicability of the Fourth Geneva Convention right from the moment of its occupation by Israel in June 1967.

If it is correct that the Government of Israel claims that the Fourth Geneva Convention is not applicable *de jure* in the West Bank since that territory had not previously to the 1967 war been under Jordanian sovereignty, that argument already fails since a territory, which by one of the parties to an armed conflict is claimed as its own and is under its control, is — once occupied by the other party — by definition occupied territory of a *High Contracting Party* in the sense of the Fourth Geneva Convention (emphasis added). And both Israel and Jordan were parties to the Convention.

That this at the time also was recognized by the Israeli authorities is borne out by the Order issued after the occupation and referred to in paragraph 93 of the Opinion.

10. The strange result of the Court's reticence about the status of the West Bank between 1949 and 1967 is that it is only by implication that the reader is able to understand that it was under Jordanian control (paragraphs 73 and 129 refer to the demarcation line between Israel and Jordan (the Green Line)) without ever being explicitly informed that the West Bank had been placed under Jordanian authority. This is all the more puzzling as the Court would in no way have been compelled to comment on the legality or legitimacy of that authority if it had made mention of it.

11. In a letter of 29 January from the Deputy Director General and Legal Adviser of the Israeli Ministry of Foreign Affairs to the Registrar of the Court it is stated that "Israel trusts and expects that the Court will look beyond the request to the wider issues relevant to this matter" (Written Statement of Israel, covering letter). In this respect it was said that resolution ES-10/14 is "absolutely silent" on the terrorist attacks against Israeli citizens and thus "reflects the gravest prejudice and imbalance with the requesting organ". Israel, therefore, requested the Court not to render the opinion.

12. I am of the view that the Court, in deciding whether it is appropriate to respond to a request for an advisory opinion, can involve itself with the political debate which has preceded the request only to the extent necessary to understand the question put. It is no exception that such debate is heated but, as the Court said in the case of the *Legality of the Threat or Use of Nuclear Weapons*

> "once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution" (*I.C.J. Reports 1996 (I)*, p. 237, para. 16).

The Court, however, does not function in a void. It is the principal judicial organ of the United Nations and has to carry out its function and responsibility within the wider political context. It cannot be expected to present a legal opinion on the request of a political organ without taking full account of the context in which the request was made.

13. Although the Court certainly has taken into account the arguments put forward by Israel and has dealt with them in a considerate manner, I am of the view that the present Opinion could have reflected in a more satisfactory way the interests at stake for all those living in the region. The rather oblique references to terrorist acts which can be found at several places in the Opinion are in my view not sufficient for this purpose. An advisory opinion is brought to the attention of a political organ of the United Nations and is destined to have an effect on a political process. It should therefore throughout its reasoning and up till the operative part reflect the legitimate interests and responsibilities of *all* those involved and not merely refer to them in a concluding paragraph (para. 162).

## III. Jurisdictional Issues

14. I fully share the view of the Court that the adoption of resolution ES-10/14 was not *ultra vires* since it did not contravene the provision of Article 12, paragraph 1, of the Charter; nor did it fail to fulfil the essential conditions set by the Uniting for Peace resolution (resolution 377 A (V)) for the convening of an Emergency Special Session.

15. I doubt, however, whether it is possible to describe the practice of the political organs of the United Nations with respect to the interpretation of Article 12, paragraph 1, of the Charter without taking into account the effect of the Uniting for Peace resolution on this interpretation. In the Opinion, the Court deals with resolution 377 A (V) as a separate item and merely in relation to its procedural requirements. In my opinion this resolution also had a more substantive effect, namely with regard to the interpretation of the relationship between the competences of the Security Council and the General Assembly respectively, in the field of international peace and security and has certainly expedited

the development of the interpretation of the condition, contained in Article 12, paragraph 1, namely that the Assembly shall not make a recommendation with regard to a dispute or situation *while* the Security Council is exercising its functions in respect of such dispute or situation (emphasis added).

16. This effect is also recognized in doctrine. "The adoption of the 'Uniting for Peace' resolution . . . could not fail to have an effect on the weight to be given to the restriction in Article 12, paragraph 1." (Philippe Manin, in J.-P. Cot, *La Charte des Nations Unies*, 2nd ed., 1981, p. 298 *[translation by the Registry]*; see also E. de Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004, p. 46.) In actual practice the adoption of the Uniting for Peace resolution has contributed to the interpretation that, if a veto cast by a permanent member prevents the Security Council from taking a decision, the latter is no longer considered to be exercising its functions within the meaning of Article 12, paragraph 1. And the fact that a veto had been cast when the Security Council voted on a resolution dealing with the construction of the wall is determinative for the conclusion that the Security Council was no longer exercising its functions under the Charter with respect to the construction of the wall. In the present case, therefore, the conclusion that resolution ES-10/14 did not contravene Article 12, paragraph 1, of the Charter cannot be dissociated from the effect resolution 377 A (V) has had on the interpretation of that provision.

17. That such practice is accepted by both Assembly and Security Council also with regard to the procedural requirements of resolution 377 A (V) is borne out by the fact that none of the Council's members considered that the reconvening of the Assembly in Emergency Special Session on 20 October 2003 was unconstitutional and that the adoption of the resolution demanding that Israel stop and reverse the construction of the wall was therefore *ultra vires*. In this respect it is telling that this resolution (resolution ES-10/13) was tabled as a compromise by the Presidency of the European Union, among whose members were two permanent and two non-permanent members of the Security Council, less than a week after a draft resolution on the same subject had been vetoed in the Council.

18. Let me add that I agree with the Court that there has developed a practice enabling the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security. I doubt, however, whether a resolution of the character of resolution ES-10/13 (which beyond any doubt is a recommendation in the sense of Article 12, paragraph 1) could have been lawfully adopted by the Assembly, whether in a regular session or in an Emergency Special Session, if the Security Council had been considering the specific issue of the construction of the wall without yet having taken a decision.

## IV. The Question of Judicial Propriety

19. I must confess that I have felt considerable hesitation as to whether it would be judicially proper to comply with the request of the Assembly.

20. This hesitation had first of all to do with the question whether the Court would not be unduly politicized by giving the requested advisory opinion, thereby undermining its ability to contribute to global security and to respect for the rule of law. It must be admitted that such an opinion, whatever its content, will inevitably become part of an already heated political debate. The question is in particular pertinent as three members of the Quartet (the United States, the Russian Federation and the European Union) abstained on resolution ES-10/14 and do not seem too eager to see the Court complying with the request out of fear that the opinion may interfere with the political peace process. Such fears cannot be taken lightly since the situation concerned is a continuous danger for international peace and security and a source of immense human suffering.

21. While recognizing that the risk of a possible politicization is real, I nevertheless concluded that this risk would not be neutralized by a refusal to give an opinion. The risk should have been a consideration for the General Assembly when it envisaged making the request. Once the decision to do so had been taken, the Court was made an actor on the political stage regardless of whether it would or would not give an opinion. A refusal would just as much have politicized the Court as the rendering of an opinion. Only by limiting itself strictly to its judicial function is the Court able to minimize the risk that its credibility in upholding the respect for the rule of law is affected.

22. My hesitation was also related to the question of the object of the Assembly's request. What was the Assembly's purpose in making the request? Resolution ES-10/14 seems to give some further information in this respect in its last preambular paragraph which reads as follows:

> "*Bearing in mind* that the passage of time further compounds the difficulties on the ground, as Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences . . ."

Evidently the Assembly finds it necessary to take speedy action to bring to an end these detrimental implications and consequences and for this purpose it needs the views of the Court.

But the question remains: Views on what? And why the views of a judicial body on an act which has already been determined not to be in conformity with international law and the perpetrator of which has already been called upon to terminate and reverse its wrongful conduct (resolution ES-10/13)?

23. The present request recalls the dilemma as seen by Judge Petrén in the *Namibia* case. He felt that the purpose of the request for an advisory opinion was in that case "above all to obtain from the Court a reply such that States would find themselves under obligation to bring to bear on South Africa pressure . . .". He called this a reversal of the natural distribution of roles as between the principal judicial organ and the political organ of the United Nations since, instead of asking the Court its opinion on a legal question in order to deduce the political consequences following from it, the opposite was done (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 128).

24. In the present Opinion the Court responds to the argument that the Assembly has not made clear what use it would make of an advisory opinion on the wall, with a reference to the *Nuclear Weapons* case where it said that

> "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (Para. 61.)

And the Court continues that it "cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely the General Assembly" (para. 62).

25. I do not consider this answer fully satisfactory. There is quite a difference between substituting the Court's assessment of the usefulness of the opinion for that of the organ requesting it and analysing from a judicial viewpoint what the purpose of the request is. The latter is a simple necessity in order to find out what the Court as a judicial body is in a position to say. And from that point of view the request is phrased in a way which can be called odd, to put it mildly. And in actual fact the Court makes this analysis when in paragraph 39 of the Opinion it says that the use of the terms "legal consequences" arising from the construction of the wall "necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law". I agree with that statement but not because the word "necessarily" is related to the terms of the request but because it is related to the judicial responsibility of the Court. To quote the words of Judge Dillard in the *Namibia* case:

> "when these [political] organs do see fit to ask for an advisory opinion, they must expect the Court to act in strict accordance with its judicial function. This function *precludes* it from accepting, without any enquiry whatever, a legal conclusion which itself conditions the nature and scope of the legal consequences flowing from it. It would be otherwise if the resolutions requesting an opinion were legally neutral . . ." (*I.C.J. Reports 1971*, p. 151; emphasis added.)

26. In the present case the request is far from being "legally neutral". In order not to be precluded, from the viewpoint of judicial propriety, from rendering the opinion, the Court therefore is duty bound to reconsider the content of the request in order to uphold its judicial dignity. The Court has done so but in my view it should have done so *proprio motu* and not by assuming what the Assembly "necessarily" must have assumed, something it evidently did not.

27. Let me add that in other respects I share the views the Court has expressed with regard to the issue of judicial propriety. In particular the Court's finding that the subject-matter of the General Assembly cannot be regarded as being "only a bilateral matter between Israel and Palestine" (para. 49) is in my view worded in a felicitous way since, in regard to the issue of the existence of a bilateral dispute, it avoids the dilemma of "either/or". A situation which is of legitimate concern to the organized international community and a bilateral dispute with regard to that same situation may exist simultaneously. The existence of the latter cannot deprive the organs of the organized community of the competence which has been assigned to them by the constitutive instruments. In the present case the involvement of the United Nations in the question of Palestine is a long-standing one and, as the Court says, the subject-matter of the request is of acute concern to the United Nations (para. 50). By giving an opinion the Court therefore in no way circumvents the principle of consent to the judicial settlement of a bilateral dispute which exists simultaneously. The bilateral dispute cannot be dissociated from the subject-matter of the request, but only in very particular circumstances which cannot be spelled out in general can its existence be seen as an argument for the Court to decline to reply to the request. In this respect, I find the quotation from the *Western Sahara* Opinion in paragraph 47 of the Opinion, which contains pure circular reasoning, less than helpful.

28. If the request has been legitimately made in view of the United Nations long-standing involvement with the question of Palestine, Israel's argument that the Court does not have at its disposal the necessary evidentiary material, as this is to an important degree in the hands of Israel as a party to the dispute, does not hold water. The Court has to respect Israel's choice not to address the merits, but it is the Court's own responsibility to assess whether the available information is sufficient to enable it to give the requested opinion. And, although it is a matter for sincere regret that Israel has decided not to address the merits, the Court is right when it concludes that the available material allows it to give the opinion.

## V. Merits

29. I share the Court's view that the 1907 Hague Regulations, the Fourth Geneva Convention of 1949, the 1966 Covenants on Civil and

Political Rights and on Economic, Social and Cultural Rights and the 1989 Convention on the Rights of the Child are applicable to the Occupied Palestinian Territory and that Israel by constructing the wall and establishing the associated régime has breached its obligation under certain provisions of each of these conventions.

I find no fault with the Court's reasoning in this respect although I regret that the summary of the Court's findings in paragraph 137 does not contain a list of treaty provisions which have been breached.

30. The Court has refrained from taking a position with regard to territorial rights and the question of permanent status. It has taken note of statements, made by Israeli authorities on various occasions, that the "fence" is a temporary measure, that it is not a border and that it does not change the legal status of the territory. I welcome these assurances which may be seen as the recognition of legal commitments on the side of Israel but share the Court's concern that the construction of the wall creates a fait accompli. It is therefore all the more important to expedite the political process which has to settle all territorial and permanent status issues.

31. *Self-determination* — In my view, it would have been better if the Court had also left issues of self-determination to this political process. I fully recognize that the right of self-determination is one of the basic principles of modern international law and that the realization of this right for the people of Palestine is one of the most burning issues for the solution of the Israeli-Palestinian conflict. The overriding aim of the political process, as it is embodied *inter alia* in the Roadmap, is "the emergence of an independent, democratic and viable Palestinian State living side by side in peace and security with Israel and its other neighbours" (dossier of the Secretary-General, No. 70). This goal is subscribed to by both Israel and Palestine; both are, therefore, in good faith bound to desist from acts which may jeopardize this common interest.

32. The right of self-determination of the Palestinian people is therefore imbedded in a much wider context than the construction of the wall and has to find its realization in this wider context. I readily agree with the Court that the wall and its associated régime impede the exercise by the Palestinian people of its right to self-determination be it only for the reason that the wall establishes a physical separation of the people entitled to enjoy this right. But not every impediment to the exercise of a right is by definition a breach of that right or of the obligation to respect it, as the Court seems to conclude in paragraph 122. As was said by the Quartet in its statement of 16 July 2002, the terrorist attacks (and the failure of the Palestinian Authority to prevent them) cause also great harm to the legitimate aspirations of the Palestinian people and thus

seriously impede the realization of the right of self-determination. Is that also a breach of that right? And if so, by whom? In my view the Court could not have concluded that Israel had committed a breach of its obligation to respect the Palestinians' right to self-determination without further legal analysis.

33. In this respect I do not find the references to earlier statements of the Court in paragraph 88 of the Opinion very enlightening. In the *Namibia* case the Court referred in specific terms to the relations between the inhabitants of a mandate and the mandatory as reflected in the constitutive instruments of the mandate system. In the *East Timor* case the Court called the rights of peoples to self-determination in a colonial situation a right *erga omnes*, therefore a right opposable to all. But it said nothing about the way in which this "right" must be translated into obligations for States which are not the colonial Power. And I repeat the question: Is every impediment to the exercise of the right to self-determination a breach of an obligation to respect it? Is it so only when it is serious? Would the discontinuance of the impeding act restore the right or merely bring the breach to an end?

34. *Proportionality* — The Court finds that the conditions set out in the qualifying clauses in the applicable humanitarian law and human rights conventions have not been met and that the measures taken by Israel cannot be justified by military exigencies or by requirements of national security or public order (paras. 135-137). I agree with that finding but in my opinion the construction of the wall should also have been put to the proportionality test, in particular since the concepts of military necessity and proportionality have always been intimately linked in international humanitarian law. And in my view it is of decisive importance that, even if the construction of the wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test. The route chosen for the construction of the wall and the ensuing disturbing consequences for the inhabitants of the Occupied Palestinian Territory are manifestly disproportionate to interests which Israel seeks to protect, as seems to be recognized also in recent decisions of the Israeli Supreme Court.

35. *Self-defence* — Israel based the construction of the wall on its inherent right of self-defence as contained in Article 51 of the Charter. In this respect it relied on Security Council resolutions 1368 (2001) and 1373 (2001), adopted after the terrorist attacks of 11 September 2001 against targets located in the United States.

The Court starts its response to this argument by stating that

Article 51 recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State (para. 139). Although this statement is undoubtedly correct, as a reply to Israel's argument it is, with all due respect, beside the point. Resolutions 1368 (2001) and 1373 (2001) recognize the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 (2001) without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence.

36. The argument which in my view is decisive for the dismissal of Israel's claim that it is merely exercising its right of self-defence can be found in the second part of paragraph 139. The right of self-defence as contained in the Charter is a rule of international law and thus relates to international phenomena. Resolutions 1368 (2001) and 1373 (2001) refer to acts of *international* terrorism as constituting a threat to *international* peace and security; they therefore have no immediate bearing on terrorist acts originating within a territory which is under control of the State which is also the victim of these acts. And Israel does not claim that these acts have their origin elsewhere. The Court therefore rightly concludes that the situation is different from that contemplated by resolutions 1368 (2001) and 1373 (2001) and that consequently Article 51 of the Charter cannot be invoked by Israel.

## VI. Legal Consequences

37. I have voted in favour of subparagraph (3) (B), (C) and (E) of the operative part. I agree with the Court's finding with regard to the consequences of the breaches by Israel of its obligations under international law for Israel itself and for the United Nations (paras. 149-153 and 160). Since I have voted, however, against operative subparagraph (3) (D), the remainder of my opinion will explain the reasons for my dissent in a more detailed way than I did in my introductory remarks.

38. The General Assembly requests the Court to specify what are the

legal consequences arising from the construction of the wall. If the object of the request is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions (para. 50) it is only logical that a specific paragraph of the *dispositif* is addressed to the General Assembly. That the paragraph is also addressed to the Security Council is logical as well in view of the shared or parallel responsibilities of the two organs.

Since the Court has found that the construction of the wall and the associated régime constitute breaches of Israel's obligations under international law, it is also logical that the Court spells out what are the legal consequences for Israel.

39. Although the Court beyond any doubt is entitled to do so, the request itself does not necessitate (not even by implication) the determination of the legal consequences for other States, even if a great number of participants urged the Court to do so (para. 146). In this respect the situation is completely different from that in the *Namibia* case where the question was exclusively focused on the legal consequences for States, and logically so since the subject-matter of the request was a decision by the Security Council.

In the present case there must therefore be a special reason for determining the legal consequences for other States since the clear analogy in wording with the request in the *Namibia* case is insufficient.

40. That reason as indicated in paragraphs 155 to 158 of the Opinion is that the obligations violated by Israel include certain obligations *erga omnes*. I must admit that I have considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States. The nearest I can come to such an explanation is the text of Article 41 of the International Law Commission's Articles on State Responsibility. That Article reads:

> "1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. [Article 40 deals with serious breaches of obligations arising under a peremptory norm of general international law.]
>
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."

Paragraph 3 of Article 41 is a saving clause and of no relevance for the present case.

41. I will not deal with the tricky question whether obligations *erga omnes* can be equated with obligations arising under a peremptory norm of general international law. In this respect I refer to the useful commentary of the ILC under the heading of Chapter III of its Articles. For argument's sake I start from the assumption that the consequences of the violation of such obligations are identical.

42. Paragraph 1 of Article 41 explicitly refers to a duty to co-operate. As paragraph 3 of the commentary states, "What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches." And paragraph 2 refers to "[c]ooperation . . . in the framework of a competent international organization, in particular the United Nations". Article 41, paragraph 1, therefore does not refer to individual obligations of third States as a result of a serious breach. What is said there is encompassed in the Court's finding in operative subparagraph (3) (E) and not in subparagraph (3) (D).

43. Article 41, paragraph 2, however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach just as operative subparagraph (3) (D) does. In its commentary the ILC refers to unlawful situations which — virtually without exception — take the form of a legal claim, usually to territory. It gives as examples "an attempted acquisition of sovereignty over territory through denial of the right of self-determination", the annexation of Manchuria by Japan and of Kuwait by Iraq, South Africa's claim to Namibia, the Unilateral Declaration of Independence in Rhodesia and the creation of Bantustans in South Africa. In other words, all examples mentioned refer to situations arising from formal or quasi-formal promulgations intended to have an *erga omnes* effect. I have no problem with accepting a duty of non-recognition in such cases.

44. I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part of operative subparagraph (3) (D) supposed to do in order to comply with this obligation? That question is even more cogent considering that 144 States unequivocally have condemned the construction of the wall as unlawful (resolution ES-10/13), whereas those States which abstained or voted against (with the exception of Israel) did not do so because they considered the construction of the wall as legal. The duty not to recognize amounts, therefore, in my view to an obligation without real substance.

45. That argument does not apply to the second obligation mentioned in Article 41, paragraph 2, namely the obligation not to render aid or assistance in maintaining the situation created by the serious breach. I therefore fully support that part of operative subparagraph (3) (D). Moreover, I would have been in favour of adding in the reasoning or even in the operative part a sentence reminding States of the importance of rendering humanitarian assistance to the victims of the construction of the wall. (The Court included a similar sentence, be it with a different scope, in its Opinion in the *Namibia* case, *I.C.J. Reports 1971*, p. 56, para. 125.)

46. Finally, I have difficulty in accepting the Court's finding that the States parties to the Fourth Geneva Convention are under an obligation

to ensure compliance by Israel with humanitarian law as embodied in that Convention (paragraph 159, operative subparagraph (3) (D), last part).

In this respect the Court bases itself on common Article 1 of the Geneva Convention which reads: "The High Contracting Parties undertake to respect and *to ensure respect* for the present Convention in all circumstances." (Emphasis added.)

47. The Court does not say on what ground it concludes that this Article imposes obligations on third States not party to a conflict. The *travaux préparatoires* do not support that conclusion. According to Professor Kalshoven, who investigated thoroughly the genesis and further development of common Article 1, it was mainly intended to ensure respect of the conventions by the population as a whole and as such was closely linked to common Article 3 dealing with internal conflicts (F. Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", in *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 3-61). His conclusion from the *travaux préparatoires* is:

> "I have not found in the records of the Diplomatic Conference even the slightest awareness on the part of government delegates that one might ever wish to read into the phrase 'to ensure respect' any undertaking by a contracting State other than an obligation to ensure respect for the Conventions by its people 'in all circumstances'." (*Ibid.*, p. 28.)

48. Now it is true that already from an early moment the International Committee of the Red Cross in its (non-authoritative) commentaries on the 1949 Convention has taken the position that common Article 1 contains an obligation for all States parties to ensure respect by other States parties. It is equally true that the Diplomatic Conference which adopted the 1977 Additional Protocols incorporated common Article 1 in the First Protocol. But at no moment did the Conference deal with its presumed implications for third States.

49. Hardly less helpful is the Court's reference to common Article 1 in the *Nicaragua* case. The Court, without interpreting its terms, observed that "such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression". The Court continued that "The United States [was] thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua" to act in violation of common Article 3 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 114, para. 220).

But this duty of abstention is completely different from a positive duty to ensure compliance with the law.

50. Although I certainly am not in favour of a restricted interpretation

of common Article 1, such as may have been envisaged in 1949, I simply do not know whether the scope given by the Court to this Article in the present Opinion is correct as a statement of positive law. Since the Court does not give any argument in its reasoning, I do not feel able to support its finding. Moreover, I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic démarches.

51. For all these reasons I felt compelled to vote against operative sub-paragraph (3) (D).

*(Signed)* Pieter H. KOOIJMANS.

# SEPARATE OPINION OF JUDGE AL-KHASAWNEH

*Concurs with Advisory Opinion — Agrees in general with reasoning — Separate opinion only aim is to elucidate some salient points — Status of territories as occupied rests on consistent* opinio juris *— Security Council and General Assembly resolutions — Opinion of High Contracting Parties to Fourth Geneva Convention — Position of ICRC — Position of States — Israeli recognition of applicability of Fourth Geneva Convention — Recent Israeli court decisions — Court however not content to merely reiterate such conclusion — Court independently reached similar conclusions on basis of interpretation of Fourth Geneva Convention — Court saw no reason to embark on ascertainment of prior legal status of occupied territories — Wise decision both as unnecessary and as having no impact on present status — Except in case those territories were* terra nullius *— Cannot be the case — Concept discredited and inapplicable to today's world — Incompatible with territory as mandatory territory — Principles of non-annexation and welfare of inhabitants continue even after termination of mandate — Until right of self-determination is achieved — Obstacle to that right now is prolonged Israeli occupation — Green Line originally an armistice line — Israeli jurists sought to give it more importance before 1967 war — Regardless of its present situation it represents the point from which Israeli occupation can be measured — Doubts about its status work both ways — Court right to refer to negotiation — Negotiations are means and not end — They should be grounded in law — Requirement of good faith should be reflected in abstaining from faits accomplis that prejudice outcome of negotiations.*

1. I concur with the Court's findings and agree in general with its reasoning. Certain salient points in the Advisory Opinion merit some elucidation and it is specifically with regard to those points that I append this opinion.

## THE INTERNATIONAL LEGAL STATUS OF THE TERRITORIES PRESENTLY UNDER ISRAELI OCCUPATION

2. Few propositions in international law can be said to command an almost universal acceptance and to rest on a long, constant and solid *opinio juris* as the proposition that Israel's presence in the Palestinian territory of the West Bank including East Jerusalem and Gaza is one of

military occupation governed by the applicable international legal régime of military occupation.

3. In support of this, one may cite the very large number of resolutions adopted by the Security Council and the General Assembly often unanimously or by overwhelming majorities, including binding decisions of the Council and other resolutions which, while not binding, nevertheless produce legal effects and indicate a constant record of the international community's *opinio juris*. In all of these resolutions the territory in question was unfalteringly characterized as occupied territory; Israel's presence in it as that of a military occupant and Israel's compliance or non-compliance with its obligations towards the territory and its inhabitants measured against the objective yardstick of the protective norms of humanitarian law.

4. Similarly the High Contracting Parties to the Fourth Geneva Convention and the International Committee of the Red Cross "have retained their consensus that the convention", i.e. the Fourth Geneva Convention of 12 August 1949, "does apply *de jure* to the occupied territories"[1].

5. This has also been the position of States individually or in groups including States friendly to Israel. Indeed a review of the record would reveal that, as noted by France in its Written Statement:

> "Israel initially recognized the applicability of the Fourth Convention: according to Article 35 of Order No. 1, issued by the occupying authorities on 7 June 1967 *[translation by the Registry]*, '[t]he Military Court . . . must apply the provisions of the Geneva Convention dated 12 August 1949, Relative to the Protection of Civilians in Time of War, with respect to judicial procedures. In case of conflict between this Order and said Convention, the Convention shall prevail . . .'" (P. 7.)

6. More recently Israel's Supreme Court has confirmed the applicability of the Fourth Geneva Convention to those territories.

7. Whilst "that consistent record of the international community's *opinio juris* cannot just be swept aside and ignored"[2], the Court did not

[1] Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/2 of 25 April 1997, para. 21, A/165-10/6-S/1997/494.

[2] Sir Arthur Watts, CR 2004/3, p. 64, para. 34.

simply reiterate that *opinio juris*, instead, while taking cognizance of it, the Court arrived at similar conclusions regarding the *de jure* applicability of the Fourth Geneva Convention mainly on the basis of a textual interpretation of the Convention itself (paras. 86-101). Paragraph 101 reads:

> "In view of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories. "

8. The Court followed a wise course in steering away from embarking on an enquiry into the precise prior status of those territories not only because such an enquiry is unnecessary for the purpose of establishing their present status as occupied territories and affirming the *de jure* applicability of the Fourth Geneva Convention to them, but also because the prior status of the territories would make no difference whatsoever to their present status as occupied territories except in the event that they were *terra nullius* when they were occupied by Israel, which no one would seriously argue given that that discredited concept is of no contemporary application, besides being incompatible with the territories' status as a former mandatory territory regarding which, as the Court had occasion to pronounce

> "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] 'a sacred trust of civilization'" *(International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950,* p. 131).

9. Whatever the merits and demerits of the Jordanian title in the West Bank might have been, and Jordan would in all probability argue that its title there was perfectly valid and internationally recognized and point out that it had severed its legal ties to those territories in favour of Palestinian self-determination, the fact remains that what prevents this right of self-determination from being fulfilled is Israel's prolonged military occupation with its policy of creating faits accomplis on the ground. In this regard it should be recalled that the principle of non-annexation is not extinguished with the end of the mandate but subsists until it is realized.

### The Significance of the Green Line

10. There is no doubt that the Green Line was initially no more than an armistice line in an agreement that expressly stipulated that its provisions would not be "interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties" and that "the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto" (Advisory Opinion, para. 72).

11. It is not without irony that prominent Israeli jurists were arguing before the 1967 war that the General Armistice agreements were *sui generis*, were in fact more than mere armistice agreements, could not be changed except with the acceptance of the Security Council. Whatever the true significance of that line today, two facts are indisputable:

(1) The Green line, to quote Sir Arthur Watts, "is the starting line from which is measured the extent of Israel's occupation of non-Israeli territory" (CR 2004/3, p. 64, para. 35). There is no implication that the Green Line is to be a permanent frontier.
(2) Attempts at denigrating the significance of the Green Line would in the nature of things work both ways. Israel cannot shed doubts upon the title of others without expecting its own title and the territorial expanse of that title beyond the partition resolution not to be called into question. Ultimately it is through stabilizing its legal relationship with the Palestinians and not through constructing walls that its security would be assured.

### The Role of Negotiations

12. The Court has included a reference to the tragic situation in the Holy Land. A situation that can be brought to an end

> "only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973). The 'Roadmap' approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end." (Advisory Opinion, para. 162.)

13. Whilst there is nothing wrong in calling on protagonists to negotiate in good faith with the aim of implementing Security Council resolutions and while recalling that negotiations have produced peace agreements that represent defensible schemes and have withstood the test of time, no one should be oblivious that negotiations are a means to an end and cannot in themselves replace that end. The discharge of international

obligations including *erga omnes* obligations cannot be made conditional upon negotiations. Additionally, it is doubtful, with regard to the Road-map, when consideration is had to the conditions of acceptance of that effort, whether the meeting of minds necessary to produce mutual and reciprocal obligations exists. Be that as it may, it is of the utmost importance if these negotiations are not to produce non-principled solutions, that they be grounded in law and that the requirement of good faith be translated into concrete steps by abstaining from creating faits accomplis on the ground such as the building of the wall which cannot but prejudice the outcome of those negotiations.

*(Signed)* Awn AL-KHASAWNEH.

DECLARATION OF JUDGE BUERGENTHAL

1. Since I believe that the Court should have exercised its discretion and declined to render the requested advisory opinion, I dissent from its decision to hear the case. My negative votes with regard to the remaining items of the *dispositif* should not be seen as reflecting my view that the construction of the wall by Israel on the Occupied Palestinian Territory does not raise serious questions as a matter of international law. I believe it does, and there is much in the Opinion with which I agree. However, I am compelled to vote against the Court's findings on the merits because the Court did not have before it the requisite factual bases for its sweeping findings; it should therefore have declined to hear the case. In reaching this conclusion, I am guided by what the Court said in *Western Sahara*, where it emphasized that the critical question in determining whether or not to exercise its discretion in acting on an advisory opinion request is

> "whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 28-29, para. 46).

In my view, the absence in this case of the requisite information and evidence vitiates the Court's findings on the merits.

2. I share the Court's conclusion that international humanitarian law, including the Fourth Geneva Convention, and international human rights law are applicable to the Occupied Palestinian Territory and must there be faithfully complied with by Israel. I accept that the wall is causing deplorable suffering to many Palestinians living in that territory. In this connection, I agree that the means used to defend against terrorism must conform to all applicable rules of international law and that a State which is the victim of terrorism may not defend itself against this scourge by resorting to measures international law prohibits.

3. It may well be, and I am prepared to assume it, that on a thorough analysis of all relevant facts, a finding could well be made that some or even all segments of the wall being constructed by Israel on the Occupied Palestinian Territory violate international law (see para. 10 below). But to reach that conclusion with regard to the wall as a whole without

having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel's legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject. I am not suggesting that such an examination would relieve Israel of the charge that the wall it is building violates international law, either in whole or in part, only that without this examination the findings made are not legally well founded. In my view, the humanitarian needs of the Palestinian people would have been better served had the Court taken these considerations into account, for that would have given the Opinion the credibility I believe it lacks.

4. This is true with regard to the Court's sweeping conclusion that the wall as a whole, to the extent that it is constructed on the Occupied Palestinian Territory, violates international humanitarian law and international human rights law. It is equally true with regard to the finding that the construction of the wall "severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right" (para. 122). I accept that the Palestinian people have the right to self-determination and that it is entitled to be fully protected. But assuming without necessarily agreeing that this right is relevant to the case before us and that it is being violated, Israel's right to self-defence, if applicable and legitimately invoked, would nevertheless have to preclude any wrongfulness in this regard. See Article 21 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which declares: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."

5. Whether Israel's right of self-defence is in play in the instant case depends, in my opinion, on an examination of the nature and scope of the deadly terrorist attacks to which Israel proper is being subjected from across the Green Line and the extent to which the construction of the wall, in whole or in part, is a necessary and proportionate response to these attacks. As a matter of law, it is not inconceivable to me that some segments of the wall being constructed on Palestinian territory meet that test and that others do not. But to reach a conclusion either way, one has to examine the facts bearing on that issue with regard to the specific

segments of the wall, their defensive needs and related topographical considerations.

Since these facts are not before the Court, it is compelled to adopt the to me legally dubious conclusion that the right of legitimate or inherent self-defence is not applicable in the present case. The Court puts the matter as follows:

> "Article 51 of the Charter . . . recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.
>
> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.
>
> Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case." (Para. 139.)

6. There are two principal problems with this conclusion. The first is that the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State, leaving aside for the moment the question whether Palestine, for purposes of this case, should not be and is not in fact being assimilated by the Court to a State. Article 51 of the Charter provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .". Moreover, in the resolutions cited by the Court, the Security Council has made clear that "international terrorism constitutes a threat to international peace and security" while "*reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)" (Security Council resolution 1373 (2001)). In its resolution 1368 (2001), adopted only one day after the 11 September 2001 attacks on the United States, the Security Council invokes the right of self-defence in calling on the international community to combat terrorism. In neither of these resolutions did the Security Council limit their application to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case. (See Thomas Franck, "Terrorism and the Right of Self-Defense", *American Journal of International Law*, Vol. 95, 2001, pp. 839-840.)

Second, Israel claims that it has a right to defend itself against terrorist attacks to which it is subjected on its territory from across the Green Line and that in doing so it is exercising its inherent right of self-defence. In assessing the legitimacy of this claim, it is irrelevant that Israel is alleged to exercise control in the Occupied Palestinian Territory — whatever the concept of "control" means given the attacks Israel is subjected from that territory — or that the attacks do not originate from outside the territory. For to the extent that the Green Line is accepted by the Court as delimiting the dividing line between Israel and the Occupied Palestinian Territory, to that extent the territory from which the attacks originate is not part of Israel proper. Attacks on Israel coming from across that line must therefore permit Israel to exercise its right of self-defence against such attacks, provided the measures it takes are otherwise consistent with the legitimate exercise of that right. To make that judgment, that is, to determine whether or not the construction of the wall, in whole or in part, by Israel meets that test, all relevant facts bearing on issues of necessity and proportionality must be analysed. The Court's formalistic approach to the right of self-defence enables it to avoid addressing the very issues that are at the heart of this case.

7. In summarizing its finding that the wall violates international humanitarian law and international human rights law, the Court has the following to say:

> "To sum up, the Court, from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments." (Para. 137.)

The Court supports this conclusion with extensive quotations of the relevant legal provisions and with evidence that relates to the suffering the wall has caused along some parts of its route. But in reaching this conclusion, the Court fails to address any facts or evidence specifically rebutting Israel's claim of military exigencies or requirements of national security. It is true that in dealing with this subject the Court asserts that it draws on the factual summaries provided by the United Nations Secretary-General as well as some other United Nations reports. It is equally true, however, that the Court barely addresses the summaries of Israel's position on this subject that are attached to the Secretary-General's report and which contradict or cast doubt on the material the Court

claims to rely on. Instead, all we have from the Court is a description of the harm the wall is causing and a discussion of various provisions of international humanitarian law and human rights instruments followed by the conclusion that this law has been violated. Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it "is not convinced" but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.

8. It is true that some international humanitarian law provisions the Court cites admit of no exceptions based on military exigencies. Thus, Article 46 of the Hague Rules provides that private property must be respected and may not be confiscated. In the Summary of the legal position of the Government of Israel, Annex I to the report of the United Nations Secretary-General (A/ES-10/248, p. 8), the Secretary-General reports Israel's position on this subject in part as follows:

> "The Government of Israel argues: there is no change in ownership of the land; compensation is available for use of land, crop yield or damage to the land; residents can petition the Supreme Court to halt or alter construction and there is no change in resident status."

The Court fails to address these arguments. While these Israeli submissions are not necessarily determinative of the matter, they should have been dealt with by the Court and related to Israel's further claim that the wall is a temporary structure, which the Court takes note of as an "assurance given by Israel" (para. 121).

9. Paragraph 6 of Article 49 of the Fourth Geneva Convention also does not admit for exceptions on grounds of military or security exigencies. It provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies". I agree that this provision applies to the Israeli settlements in the West Bank and that their existence violates Article 49, paragraph 6. It follows that the segments of the wall being built by Israel to protect the settlements are *ipso facto* in violation of international humanitarian law. Moreover, given the demonstrable great hardship to which the affected Palestinian population is being subjected in and around the enclaves created by those segments of the wall, I seriously doubt that the wall would here satisfy the proportionality requirement to qualify as a legitimate measure of self-defence.

10. A final word is in order regarding my position that the Court should have declined, in the exercise of its discretion, to hear this case. In this connection, it could be argued that the Court lacked many relevant facts bearing on Israel's construction of the wall because Israel failed to present them, and that the Court was therefore justified in relying almost exclusively on the United Nations reports submitted to it. This proposition would be valid if, instead of dealing with an advisory opinion request, the Court had before it a contentious case where each party has the burden of proving its claims. But that is not the rule applicable to advisory opinion proceedings which have no parties. Once the Court recognized that Israel's consent to these proceedings was not necessary since the case was not brought against it and Israel was not a party to it, Israel had no legal obligation to participate in these proceedings or to adduce evidence supporting its claim regarding the legality of the wall. While I have my own views on whether it was wise for Israel not to produce the requisite information, this is not an issue for me to decide. The fact remains that it did not have that obligation. The Court may therefore not draw any adverse evidentiary conclusions from Israel's failure to supply it or assume, without itself fully enquiring into the matter, that the information and evidence before it is sufficient to support each and every one of its sweeping legal conclusions.

*(Signed)* Thomas BUERGENTHAL.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* UGANDA)

**JUDGMENT OF 19 DECEMBER 2005**

# 2005

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
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# AFFAIRE DES ACTIVITÉS ARMÉES SUR LE TERRITOIRE DU CONGO

(RÉPUBLIQUE DÉMOCRATIQUE DU CONGO c. OUGANDA)

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JUDGMENT

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# CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO

(DEMOCRATIC REPUBLIC OF THE CONGO *v.* UGANDA)

*Situation in the Great Lakes region — Task of the Court.*

* * *

*Issue of consent.*

*The DRC consented to presence of Ugandan troops in eastern border area in period preceding August 1998 — Protocol on Security along the Common Border of 27 April 1998 between the DRC and Uganda — No particular formalities required for withdrawal of consent by the DRC to presence of Ugandan troops — Ambiguity of statement by President Kabila published on 28 July 1998 — Any prior consent withdrawn at latest by close of Victoria Falls Summit on 8 August 1998.*

*

*Findings of fact concerning Uganda's use of force in respect of Kitona.*

*Denial by Uganda that it was involved in military action at Kitona on 4 August 1998 Assessment of evidentiary materials in relation to events at Kitona — Deficiencies in evidence adduced by the DRC — Not established to the Court's satisfaction that Uganda participated in attack on Kitona.*

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*Findings of fact concerning military action in the east of the DRC and in other areas of that country.*

*Determination by the Court of facts as to Ugandan presence at, and taking*

*of, certain locations in the DRC — Assessment of evidentiary materials — Sketch-map evidence — Testimony before Porter Commission — Statements against interest — Establishment of locations taken by Uganda and corresponding "dates of capture".*

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*Did the Lusaka, Kampala and Harare Agreements constitute any consent of the DRC to the presence of Ugandan troops?*

*Contention of Uganda that the Lusaka, Kampala and Harare Agreements constituted consent to presence of Ugandan forces on Congolese territory — Nothing in provisions of Lusaka Agreement can be interpreted as affirmation that security interests of Uganda had already required the presence of Ugandan forces on territory of the DRC as from September 1998 — Lusaka Agreement represented an agreed* modus operandi *for the parties, providing framework for orderly withdrawal of all foreign forces from the DRC — The DRC did not thereby recognize situation on ground as legal — Kampala and Harare Disengagement Plans did not change legal status of presence of Ugandan troops — Luanda Agreement authorized limited presence of Ugandan troops in border area — None of the aforementioned Agreements (save for limited exception in the Luanda Agreement) constituted consent by the DRC to presence of Ugandan troops on Congolese territory for period after July 1999.*

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*Self-defence in light of proven facts.*

*Question of whether Ugandan military action in the DRC from early August 1998 to July 1999 could be justified as action in self-defence — Ugandan High Command document of 11 September 1998 — Testimony before Porter Commission of Ugandan Minister of Defence and of commander of Ugandan forces in the DRC — Uganda regarded military events of August 1998 as part of operation "Safe Haven" — Objectives of operation "Safe Haven", as stated in Ugandan High Command document, not consonant with concept of self-defence — Examination of claim by Uganda of existence of tripartite anti-Ugandan conspiracy between the DRC, the ADF and the Sudan — Evidence adduced by Uganda lacking in relevance and probative value Article 51 of the United Nations Charter — No report made by Uganda to Security Council of events requiring it to act in self-defence — No claim by Uganda that it had been subjected to armed attack by armed forces of the DRC — No satisfactory proof of involvement of Government of the DRC in alleged ADF attacks on Uganda — Legal and factual circumstances for exercise of right of self-defence by Uganda not present.*

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*Findings of law on the prohibition against the use of force.*

*Article 2, paragraph 4, of United Nations Charter — Security Council resolutions 1234 (1999) and 1304 (2000) — No credible evidence to support allegation by DRC that MLC was created and controlled by Uganda — Obligations arising under principles of non-use of force and non-intervention violated by Uganda — Unlawful military intervention by Uganda in the DRC constitutes grave violation of prohibition on use of force expressed in Article 2, paragraph 4, of Charter.*

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*The issue of belligerent occupation.*

*Definition of occupation — Examination of evidence relating to the status of Uganda as occupying Power — Creation of new province of "Kibali-Ituri" by commander of Ugandan forces in the DRC — No specific evidence provided by the DRC to show that authority exercised by Ugandan armed forces in any areas other than in Ituri — Contention of the DRC that Uganda indirectly controlled areas outside Ituri administered by Congolese rebel groups not upheld by the Court — Uganda was the occupying Power in Ituri — Obligations of Uganda.*

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*Violations of international human rights law and international humanitarian law: contentions of the Parties.*

*Contention of the DRC that Ugandan armed forces committed wide-scale human rights violations on Congolese territory, particularly in Ituri — Contention of Uganda that the DRC has failed to provide any credible evidentiary basis to support its allegations.*

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*Admissibility of claims in relation to events in Kisangani.*

*Contention of Uganda that the Court lacks competence to deal with events in Kisangani in June 2000 in the absence of Rwanda — Jurisprudence contained in* Certain Phosphate Lands in Nauru *case applicable in current proceedings — Interests of Rwanda do not constitute "the very subject-matter" of decision to be rendered by the Court — The Court is not precluded from adjudicating on whether Uganda's conduct in Kisangani is a violation of international law.*

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*Violations of international human rights law and international humanitarian law: findings of the Court.*

*Examination of evidence relating to violations of international human rights law and international humanitarian law — Findings of fact — Conduct of UPDF and of officers and soldiers of UPDF attributable to Uganda — Irrelevant whether UPDF personnel acted contrary to instructions given or*

*exceeded their authority — Applicable law — Violations of specific obligations under Hague Regulations of 1907 binding as customary international law — Violations of specific provisions of international humanitarian law and international human rights law instruments — Uganda is internationally responsible for violations of international human rights law and international humanitarian law.*

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*Illegal exploitation of natural resources.*

*Contention of the DRC that Ugandan troops systematically looted and exploited the assets and natural resources of the DRC — Contention of Uganda that the DRC has failed to provide reliable evidence to corroborate its allegations.*

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*Findings of the Court concerning acts of illegal exploitation of natural resources.*

*Examination of evidence relating to illegal exploitation of Congolese natural resources by Uganda — Findings of fact — Conduct of UPDF and of officers and soldiers of UPDF attributable to Uganda — Irrelevant whether UPDF personnel acted contrary to instructions given or exceeded their authority — Applicable law — Principle of permanent sovereignty over natural resources not applicable to this situation — Illegal acts by UPDF in violation of the* jus in bello *— Violation of duty of vigilance by Uganda with regard to illegal acts of UPDF — No violation of duty of vigilance by Uganda with regard to illegal acts of rebel groups outside Ituri — International responsibility of Uganda for acts of its armed forces — International responsibility of Uganda as an occupying Power.*

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*Legal consequences of violations of international obligations by Uganda.*

*The DRC's request that Uganda cease continuing internationally wrongful acts — No evidence to support allegations with regard to period after 2 June 2003 — Not established that Uganda continues to commit internationally wrongful acts specified by the DRC — The DRC's request cannot be upheld.*

*The DRC's request for specific guarantees and assurances of non-repetition of the wrongful acts — Tripartite Agreement on Regional Security in the Great Lakes of 26 October 2004 — Commitments assumed by Uganda under the Tripartite Agreement meet the DRC's request for specific guarantees and assurances of non-repetition — Demand by the Court that the Parties respect their obligations under that Agreement and under general international law.*

*The DRC's request for reparation — Obligation to make full reparation for the injury caused by an international wrongful act — Internationally wrongful acts committed by Uganda resulted in injury to the DRC and persons on its territory — Uganda's obligation to make reparation accordingly — Question of reparation to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings.*

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*Compliance with the Court's Order on provisional measures.*

*Binding effect of the Court's orders on provisional measures — No specific evidence demonstrating violations of the Order of 1 July 2000 — The Court's previous findings of violations by Uganda of its obligations under international human rights law and international humanitarian law until final withdrawal of Ugandan troops on 2 June 2003 — Uganda did not comply with the Court's Order on provisional measures of 1 July 2000 — This finding is without prejudice to the question as to whether the DRC complied with the Order.*

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*Counter-claims: admissibility of objections.*

*Question of whether the DRC is entitled to raise objections to admissibility of counter-claims at current stage of proceedings — The Court's Order of 29 November 2001 only settled question of a "direct connection" within the meaning of Article 80 — Question of whether objections raised by the DRC are inadmissible because they fail to conform to Article 79 of the Rules of Court — Article 79 inapplicable to the case of an objection to counter-claims joined to the original proceedings — The DRC is entitled to challenge admissibility of Uganda's counter-claims.*

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*First counter-claim.*

*Contention of Uganda that the DRC supported anti-Ugandan irregular forces — Division of Uganda's first counter-claim into three periods by the DRC: prior to May 1997, from May 1997 to 2 August 1998 and subsequent to 2 August 1998 — No obstacle to examining the first counter-claim following the three periods of time and for practical purposes useful to do so — Admissibility of part of first counter-claim relating to period prior to May 1997 — Waiver of right must be express or unequivocal — Nothing in conduct of Uganda can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu régime — The long period of time between events during the Mobutu régime and filing of Uganda's counter-claim has not rendered inadmissible Uganda's first counter-claim for the period prior to May 1997 — No proof that Zaire provided political and military support to anti-Ugandan rebel groups — No breach of duty of vigilance by Zaire — No evidence of support for anti-Ugandan rebel groups by the DRC in the second period — Any military action taken by the DRC against Uganda in the third period could not be deemed wrongful since it would be justified as*

*action in self-defence — No evidence of support for anti-Ugandan rebel groups by the DRC in the third period.*

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*Second counter-claim.*

*Contention of Uganda that Congolese armed forces attacked the premises of the Ugandan Embassy, maltreated diplomats and other Ugandan nationals present on the premises and at Ndjili International Airport — Objections by the DRC to the admissibility of the second counter-claim — Contention of the DRC that the second counter-claim is not founded — Admissibility of the second counter-claim — Uganda is not precluded from invoking the Vienna Convention on Diplomatic Relations — With regard to diplomats Uganda claims its own rights under the Vienna Convention on Diplomatic Relations — Substance of the part of the counter-claim relating to acts of maltreatment against other persons on the premises of the Embassy falls within the ambit of Article 22 of the Vienna Convention on Diplomatic Relations — The part of the counter-claim relating to maltreatment of persons not enjoying diplomatic status at Ndjili International Airport is based on diplomatic protection — No evidence of Ugandan nationality of persons in question — Sufficient evidence to prove attacks against the Embassy and maltreatment of Ugandan diplomats — Property and archives removed from Ugandan Embassy — Breaches of the Vienna Convention on Diplomatic Relations.*

*The DRC bears responsibility for violation of international law on diplomatic relations — Question of reparation to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings.*

## JUDGMENT

*Present:* *President* SHI; *Vice-President* RANJEVA; *Judges* KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL, ELARABY, OWADA, SIMMA, TOMKA, ABRAHAM; *Judges* ad hoc VERHOEVEN, KATEKA; *Registrar* COUVREUR.

In the case concerning armed activities on the territory of the Congo,

*between*

the Democratic Republic of the Congo,

represented by

H.E. Mr. Honorius Kisimba Ngoy Ndalewe, Minister of Justice, Keeper of the Seals of the Democratic Republic of the Congo,

as Head of Delegation;

H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands,

as Agent;

Maître Tshibangu Kalala, member of the Kinshasa and Brussels Bars,

as Co-Agent and Advocate;

Mr. Olivier Corten, Professor of International Law, Université libre de Bruxelles,
Mr. Pierre Klein, Professor of International Law, Director of the Centre for International Law, Université libre de Bruxelles,
Mr. Jean Salmon, Professor Emeritus, Université libre de Bruxelles, Member of the Institute of International Law and of the Permanent Court of Arbitration,
Mr. Philippe Sands, Q.C., Professor of Law, Director of the Centre for International Courts and Tribunals, University College London,

as Counsel and Advocates;

Maître Ilunga Lwanza, Deputy *Directeur de cabinet* and Legal Adviser, *cabinet* of the Minister of Justice, Keeper of the Seals,
Mr. Yambu A. Ngoyi, Chief Adviser to the Vice-Presidency of the Republic,

Mr. Mutumbe Mbuya, Legal Adviser, *cabinet* of the Minister of Justice, Keeper of the Seals,
Mr. Victor Musompo Kasongo, Private Secretary to the Minister of Justice, Keeper of the Seals,
Mr. Nsingi-zi-Mayemba, First Counsellor, Embassy of the Democratic Republic of the Congo in the Kingdom of the Netherlands,
Ms Marceline Masele, Second Counsellor, Embassy of the Democratic Republic of the Congo in the Kingdom of the Netherlands,

as Advisers;

Maître Mbambu wa Cizubu, member of the Kinshasa Bar, Tshibangu and Partners,
Mr. François Dubuisson, Lecturer, Université libre de Bruxelles,

Maître Kikangala Ngole, member of the Brussels Bar,
Ms Anne Lagerwal, Assistant, Université libre de Bruxelles,
Ms Anjolie Singh, Assistant, University College London, member of the Indian Bar,

as Assistants,

*and*

the Republic of Uganda,

represented by

The Honourable E. Khiddu Makubuya S.C., M.P., Attorney General of the Republic of Uganda,

as Agent, Counsel and Advocate;

Mr. Lucian Tibaruha, Solicitor General of the Republic of Uganda,

as Co-Agent, Counsel and Advocate;

Mr. Ian Brownlie, C.B.E, Q.C., F.B.A., member of the English Bar, member of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, Member of the Institute of International Law,

Mr. Paul S. Reichler, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Bar of the District of Columbia,

Mr. Eric Suy, Emeritus Professor, Catholic University of Leuven, former Under-Secretary-General and Legal Counsel of the United Nations, Member of the Institute of International Law,

The Honourable Amama Mbabazi, Minister of Defence of the Republic of Uganda,

Major General Katumba Wamala, Inspector General of Police of the Republic of Uganda,

as Counsel and Advocates;

Mr. Theodore Christakis, Professor of International Law, University of Grenoble II (Pierre Mendès France),

Mr. Lawrence H. Martin, Foley Hoag LLP, Washington D.C., member of the Bar of the District of Columbia,

as Counsel;

Captain Timothy Kanyogonya, Uganda People's Defence Forces,

as Adviser,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment*:

1. On 23 June 1999, the Democratic Republic of the Congo (hereinafter "the DRC") filed in the Registry of the Court an Application instituting proceedings against the Republic of Uganda (hereinafter "Uganda") in respect of a dispute concerning "acts of *armed aggression* perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity" (emphasis in the original).

In order to found the jurisdiction of the Court, the Application relied on the declarations made by the two Parties accepting the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of Uganda by the Registrar; and, pursuant to paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. By an Order of 21 October 1999, the Court fixed 21 July 2000 as the time-limit for the filing of the Memorial of the DRC and 21 April 2001 as the time-

limit for the filing of the Counter-Memorial of Uganda. The DRC filed its Memorial within the time-limit thus prescribed.

4. On 19 June 2000, the DRC submitted to the Court a request for the indication of provisional measures pursuant to Article 41 of the Statute of the Court. By an Order dated 1 July 2000, the Court, after hearing the Parties, indicated certain provisional measures.

5. Uganda filed its Counter-Memorial within the time-limit fixed for that purpose by the Court's Order of 21 October 1999. That pleading included counter-claims.

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each Party availed itself of its right under Article 31 of the Statute of the Court to choose a judge *ad hoc* to sit in the case. By a letter of 16 August 2000 the DRC notified the Court of its intention to choose Mr. Joe Verhoeven and by a letter of 4 October 2000 Uganda notified the Court of its intention to choose Mr. James L. Kateka. No objections having been raised, the Parties were informed by letters dated 26 September 2000 and 7 November 2000, respectively, that the case file would be transmitted to the judges *ad hoc* accordingly.

7. At a meeting held by the President of the Court with the Agents of the Parties on 11 June 2001, the DRC, invoking Article 80 of the Rules of Court, raised certain objections to the admissibility of the counter-claims set out in the Counter-Memorial of Uganda. During that meeting the two Agents agreed that their respective Governments would file written observations on the question of the admissibility of the counter-claims; they also agreed on the time-limits for that purpose.

On 28 June 2001, the Agent of the DRC filed his Government's written observations on the question of the admissibility of Uganda's counter-claims, and a copy of those observations was communicated to the Ugandan Government by the Registrar. On 15 August 2001, the Agent of Uganda filed his Government's written observations on the question of the admissibility of the counter-claims set out in Uganda's Counter-Memorial, and a copy of those observations was communicated to the Congolese Government by the First Secretary of the Court, Acting Registrar. On 5 September 2001, the Agent of the DRC submitted his Government's comments on Uganda's written observations, a copy of which was transmitted to the Ugandan Government by the Registrar.

Having received detailed written observations from each of the Parties, the Court considered that it was sufficiently well informed of their respective positions with regard to the admissibility of the counter-claims.

8. By an Order of 29 November 2001, the Court held that two of the three counter-claims submitted by Uganda in its Counter-Memorial were admissible as such and formed part of the current proceedings, but that the third was not. It also directed the DRC to file a Reply and Uganda to file a Rejoinder, addressing the claims of both Parties, and fixed 29 May 2002 and 29 November 2002 as the time-limits for the filing of the Reply and the Rejoinder respectively. Lastly, the Court held that it was necessary, "in order to ensure strict equality between the Parties, to reserve the right of the Congo to present its views in writing a second time on the Ugandan counter-claims, in an additional pleading which [might] be the subject of a subsequent Order". The DRC duly filed its Reply within the time-limit prescribed for that purpose.

9. By an Order of 7 November 2002, at the request of Uganda, the Court

extended the time-limit for the filing of the Rejoinder of Uganda to 6 December 2002. Uganda duly filed its Rejoinder within the time-limit as thus extended.

10. By a letter dated 6 January 2003, the Co-Agent of the DRC, referring to the above-mentioned Order of 29 November 2001, informed the Court that his Government wished to present its views in writing a second time on the counter-claims of Uganda, in an additional pleading. By an Order of 29 January 2003 the Court, taking account of the agreement of the Parties, authorized the submission by the DRC of an additional pleading relating solely to the counter-claims submitted by Uganda and fixed 28 February 2003 as the time-limit for the filing of that pleading. The DRC duly filed the additional pleading within the time-limit as thus fixed and the case became ready for hearing.

11. At a meeting held by the President of the Court with the Agents of the Parties on 24 April 2003, the Agents presented their views on the organization of the oral proceedings on the merits. Pursuant to Article 54, paragraph 1, of the Rules, the Court fixed 10 November 2003 as the date for the opening of the oral proceedings. The Registrar informed the Parties accordingly by letters of 9 May 2003.

12. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registry sent the notification referred to in Article 63, paragraph 1, of the Statute to all States parties to the Chicago Convention on International Civil Aviation of 7 December 1944, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, the Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949, the Vienna Convention on Diplomatic Relations of 18 April 1961, the International Covenant on Civil and Political Rights of 19 December 1966, the African Charter on Human and Peoples' Rights of 27 June 1981 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

Pursuant to the instructions of the Court under Article 69, paragraph 3, of the Rules of Court, the Registry addressed the notifications provided for in Article 34, paragraph 3, of the Statute and communicated copies of the written proceedings to the Secretary-General of the United Nations in respect of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Secretary-General of the International Civil Aviation Organization in respect of the Chicago Convention on International Civil Aviation; and the President of the African Union's Commission in respect of the African Charter on Human and Peoples' Rights. The respective organizations were also asked whether they intended to present written observations within the meaning of Article 69, paragraph 3, of the Rules of Court. None of those organizations expressed a wish to submit any such observations.

13. By a letter dated 2 October 2003 addressed to the Registry, the Agent of the DRC requested that Uganda provide the DRC with a number of case-related documents which were not in the public domain. Copies of the requested documents were received in the Registry on 17 October 2003 and transmitted to the Agent of the DRC. By a letter dated 13 October 2003 addressed to the Registry, the Agent of Uganda asked the DRC to furnish certain documents relevant to the issues in the case that were not in the public domain. Copies of

the requested documents were received in the Registry on 31 October 2003 and transmitted to the Agent of Uganda. On 5 November 2003, the Registrar informed the Parties by letter that the Court had decided that those documents did not form part of the case file and that accordingly, pursuant to paragraph 4 of Article 56, they should not be referred to in oral argument, except to the extent that they "form[ed] part of a publication readily available".

14. On 17 October 2003, the Agent of Uganda informed the Court that his Government wished to submit 24 new documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to the DRC. On 29 October 2003, the Agent of the DRC informed the Court that his Government did not intend to raise any objection to the production of those new documents by Uganda. By letters of 5 November 2003, the Registrar informed the Parties that the Court had taken note that the DRC had no objection to the production of the 24 new documents and that counsel would be free to make reference to them in the course of oral argument.

15. On 17 October 2003, the Agent of Uganda further informed the Court that his Government wished to call two witnesses in accordance with Article 57 of the Rules of Court. A copy of the Agent's letter and the attached list of witnesses was transmitted to the Agent of the DRC, who conveyed to the Court his Government's opposition to the calling of those witnesses. On 5 November 2003, the Registrar informed the Parties by letter that the Court had decided that it would not be appropriate, in the circumstances, to authorize the calling of those two witnesses by Uganda.

16. On 20 October 2003, the Agent of Uganda informed the Court that his Government wished, in accordance with Article 56 of the Rules of Court, to add two further documents to its request to produce 24 new documents in the case. As provided for in paragraph 1 of that Article, those documents were communicated to the DRC. On 6 November 2003, the Agent of the DRC informed the Court that his Government had no specific comments to make with regard to the additional two documents.

On 5 November 2003, the Agent of the DRC made a formal application to submit a "small number" of new documents in accordance with Article 56 of the Rules of Court, and referred to the Court's Practice Direction IX. As provided for in paragraph 1 of Article 56, those documents were communicated to Uganda. On 5 November 2003, the Agent of Uganda indicated that his Government did not object to the submission of the new documents by the DRC.

By letters dated 12 November 2003, the Registrar informed the Parties that the Court had taken note, firstly, that the DRC did not object to the production of the two further new documents which Uganda sought to produce in accordance with Article 56 of the Rules of Court, and secondly, that Uganda had no objection to the production of the documents submitted by the DRC on 5 November 2003, and that counsel would be free to quote from both sets of documents during the oral proceedings.

17. On 5 November 2003, the Agent of the DRC enquired whether it might be possible to postpone to a later date, in April 2004, the opening of the hearings in the case originally scheduled for 10 November 2003, "so as to permit the diplomatic negotiations engaged by the Parties to be conducted in an atmosphere of calm". By a letter of 6 November 2003, the Agent of Uganda informed the Court that his Government "supporte[d ]the proposal and adopt[ed] the request".

On 6 November 2003, the Registrar informed both Parties by letter that the Court, "taking account of the representations made to it by the Parties, [had] decided to postpone the opening of the oral proceedings in the case" and that the new date for the opening of the oral proceedings would be fixed in due course. By a letter of 9 September 2004, the Agent of the DRC formally requested that the Court fix a new date for the opening of the oral proceedings. By letters of 20 October 2004, the Registrar informed the Parties that the Court had decided, in accordance with Article 54 of the Rules of Court, to fix Monday 11 April 2005 for the opening of the oral proceedings in the case.

18. On 1 February 2005, the Agent of the DRC informed the Court that his Government wished to produce certain new documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to Uganda. On 16 February 2005, the Co-Agent of Uganda informed the Court that his Government did not intend to raise any objection to the production of one of the new documents by the DRC, and presented certain observations on the remaining documents. On 21 February 2005, the Registrar informed the Parties by letter that the Court had decided to authorize the production of the document to which the Ugandan Government had raised no objection, as well as the production of the other documents. With regard to those other documents, which came from the Judicial Commission of Inquiry into Allegations of Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo set up by the Ugandan Government in May 2001 and headed by Justice David Porter (hereinafter "the Porter Commission"), the Parties were further informed that the Court had noted, *inter alia*, that only certain of them were new, whilst the remainder simply reproduced documents already submitted on 5 November 2003 and included in the case file.

19. On 15 March 2005, the Co-Agent of Uganda provided the Registry with a new document which his Government wished to produce under Article 56 of the Rules of Court. No objection having been made by the Congolese Government to the Ugandan request, the Registrar, on 8 April 2005, informed the Parties that the Court had decided to authorize the production of the said document.

20. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

21. Public sittings were held from 11 April to 29 April 2005, at which the Court heard the oral arguments and replies of:

*For the DRC:* H.E. Mr. Jacques Masangu-a-Mwanza,
H.E. Mr. Honorius Kisimba Ngoy Ndalewe,
Maître Tshibangu Kalala,
Mr. Jean Salmon,
Mr. Philippe Sands,
Mr. Olivier Corten,
Mr. Pierre Klein.

*For Uganda:* The Honourable E. Khiddu Makubuya,
Mr. Paul S. Reichler,
Mr. Ian Brownlie,
The Honourable Amama Mbabazi,
Mr. Eric Suy.

22. In the course of the hearings, questions were put to the Parties by Judges Vereshchetin, Kooijmans and Elaraby.

Judge Vereshchetin addressed a separate question to each Party. The DRC was asked: "What are the respective periods of time to which the concrete submissions, found in the written pleadings of the Democratic Republic of the Congo, refer?"; and Uganda was asked: "What are the respective periods of time to which the concrete submissions relating to the first counter-claim, found in the written pleadings of Uganda, refer?"

Judge Kooijmans addressed the following question to both Parties:

> "Can the Parties indicate which areas of the provinces of Equateur, Orientale, North Kivu and South Kivu were in the relevant periods in time under the control of the UPDF and which under the control of the various rebellious militias? It would be appreciated if sketch-maps would be added."

Judge Elaraby addressed the following question to both Parties:

> "The Lusaka Agreement signed on 10 July 1999 which takes effect 24 hours after the signature, provides that:
>
> > 'The final orderly withdrawal of all foreign forces from the national territory of the Democratic Republic of Congo shall be in accordance with Annex "B" of this Agreement.' (Annex A, Chapter 4, para. 4.1.)
>
> Subparagraph 17 of Annex B provides that the 'Orderly Withdrawal of all Foreign Forces' shall take place on 'D-Day + 180 days'.
>
> Uganda asserts that the final withdrawal of its forces occurred on 2 June 2003.
>
> What are the views of the two Parties regarding the legal basis for the presence of Ugandan forces in the Democratic Republic of the Congo in the period between the date of the 'final orderly withdrawal', agreed to in the Lusaka Agreement, and 2 June 2003?"

The Parties provided replies to these questions orally and in writing, pursuant to Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each Party presented written observations on the written replies received from the other.

*

23. In its Application, the DRC made the following requests:

> "Consequently, and whilst reserving the right to supplement and amplify the present request in the course of the proceedings, the Democratic Republic of the Congo requests the Court to:
>
> *Adjudge and declare that*:
>
> *(a)* Uganda is guilty of an act of aggression within the meaning of Article 1 of resolution 3314 of the General Assembly of the United Nations of 14 December 1974 and of the jurisprudence of the International Court of Justice, contrary to Article 2, paragraph 4, of the United Nations Charter;
>
> *(b)* further, Uganda is committing repeated violations of the Geneva Conventions of 1949 and their Additional Protocols of 1977, in

flagrant disregard of the elementary rules of international humanitarian law in conflict zones, and is also guilty of massive human rights violations in defiance of the most basic customary law;

*(c)* more specifically, by taking forcible possession of the Inga hydroelectric dam, and deliberately and regularly causing massive electrical power cuts, in violation of the provisions of Article 56 of the Additional Protocol of 1977, Uganda has rendered itself responsible for very heavy losses of life among the 5 million inhabitants of the city of Kinshasa and the surrounding area;

*(d)* by shooting down, on 9 October 1998 at Kindu, a Boeing 727 the property of Congo Airlines, thereby causing the death of 40 civilians, Uganda has also violated the Convention on International Civil Aviation signed at Chicago on 7 December 1944, the Hague Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft and the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

*Consequently, and pursuant to the aforementioned international legal obligations, to adjudge and declare that*:

(1) all Ugandan armed forces participating in acts of aggression shall forthwith vacate the territory of the Democratic Republic of the Congo;

(2) Uganda shall secure the immediate and unconditional withdrawal from Congolese territory of its nationals, both natural and legal persons;

(3) the Democratic Republic of the Congo is entitled to compensation from Uganda in respect of all acts of looting, destruction, removal of property and persons and other unlawful acts attributable to Uganda, in respect of which the Democratic Republic of the Congo reserves the right to determine at a later date the precise amount of the damage suffered, in addition to its claim for the restitution of all property removed."

24. In the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of the DRC*,

in the Memorial:

"The Democratic Republic of the Congo, while reserving the right to supplement or modify the present submissions and to provide the Court with fresh evidence and pertinent new legal arguments in the context of the present dispute, requests the Court to adjudge and declare:

(1) that the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces operating there, has violated the following principles of conventional and customary law:

— the principle of non-use of force in international relations, including the prohibition of aggression;

— the obligation to settle international disputes exclusively by peace-

ful means so as to ensure that international peace and security, as well as justice, are not placed in jeopardy;
— respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;
— the principle of non-interference in matters within the domestic jurisdiction of States, which includes refraining from extending any assistance to the parties to a civil war operating on the territory of another State;

(2) that the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources and by pillaging its assets and wealth, has violated the following principles of conventional and customary law:

— respect for the sovereignty of States, including over their natural resources;
— the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;
— the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters;

(3) that the Republic of Uganda, by committing acts of oppression against the nationals of the Democratic Republic of the Congo, by killing, injuring, abducting or despoiling those nationals, has violated the following principles of conventional and customary law:

— the principle of conventional and customary law involving the obligation to respect and ensure respect for fundamental human rights, including in times of armed conflict;
— the entitlement of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural;

(4) that, in light of all the violations set out above, the Republic of Uganda shall, to the extent of and in accordance with, the particulars set out in Chapter VI of this Memorial, and in conformity with customary international law:

— cease forthwith any continuing internationally wrongful act, in particular its occupation of Congolese territory, its support for irregular forces operating in the Democratic Republic of the Congo, its unlawful detention of Congolese nationals and its exploitation of Congolese wealth and natural resources;

— make reparation for all types of damage caused by all types of wrongful act attributable to it, no matter how remote the causal link between the acts and the damage concerned;
— accordingly make reparation in kind where this is still physically possible, in particular restitution of any Congolese resources, assets or wealth still in its possession;

— failing this, furnish a sum covering the whole of the damage

suffered, including, in particular, the examples mentioned in paragraph 6.65 of this Memorial;
— further, in any event, render satisfaction for the insults inflicted by it upon the Democratic Republic of the Congo, in the form of official apologies, the payment of damages reflecting the gravity of the infringements and the prosecution of all those responsible;

— provide specific guarantees and assurances that it will never again in the future commit any of the above-mentioned violations against the Democratic Republic of the Congo";

in the Reply:

"The Democratic Republic of the Congo, while reserving the right to supplement or modify the present submissions and to provide the Court with fresh evidence and pertinent new legal arguments in the context of the present dispute, requests the Court to adjudge and declare:

(1) that the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces operating there, has violated the following principles of conventional and customary law:
— the principle of non-use of force in international relations, including the prohibition of aggression;
— the obligation to settle international disputes exclusively by peaceful means so as to ensure that peace, international security and justice are not placed in jeopardy;
— respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;
— the principle of non-interference in matters within the domestic jurisdiction of States, which includes refraining from extending any assistance to the parties to a civil war operating on the territory of another State;

(2) that the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources and by pillaging its assets and wealth, has violated the following principles of conventional and customary law:
— respect for the sovereignty of States, including over their natural resources;
— the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;
— the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters;

(3) that the Republic of Uganda, by committing abuses against nationals of the Democratic Republic of the Congo, by killing, injuring, and abducting those nationals or robbing them of their property, has violated the following principles of conventional and customary law:

— the principle of conventional and customary law involving the obligation to respect and ensure respect for fundamental human rights, including in times of armed conflict;
— the principle of conventional and customary law whereby it is necessary, at all times, to make a distinction in an armed conflict between civilian and military objectives;
— the entitlement of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural;

(4) that, in light of all the violations set out above, the Republic of Uganda shall, in accordance with customary international law:

— cease forthwith all continuing internationally wrongful acts, and in particular its occupation of Congolese territory, its support for irregular forces operating in the Democratic Republic of the Congo and its exploitation of Congolese wealth and natural resources;

— make reparation for all types of damage caused by all types of wrongful act attributable to it, no matter how remote the causal link between the acts and the damage concerned;
— accordingly, make reparation in kind where this is still physically possible, in particular in regard to any Congolese resources, assets or wealth still in its possession;

— failing this, furnish a sum covering the whole of the damage suffered, including, in particular, the examples set out in paragraph 6.65 of the Memorial of the Democratic Republic of the Congo and restated in paragraph 1.58 of the present Reply;
— further, in any event, render satisfaction for the injuries inflicted upon the Democratic Republic of the Congo, in the form of official apologies, the payment of damages reflecting the gravity of the violations and the prosecution of all those responsible;

— provide specific guarantees and assurances that it will never again in the future perpetrate any of the above-mentioned violations against the Democratic Republic of the Congo;

(5) that the Ugandan counter-claim alleging involvement by the DRC in armed attacks against Uganda be dismissed, on the following grounds:

— to the extent that it relates to the period before Laurent-Désiré Kabila came to power, the claim is inadmissible because Uganda had previously waived its right to lodge such a claim and, in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;
— to the extent that it relates to the period after Laurent-Désiré Kabila came to power, the claim is unfounded because Uganda has failed to establish the facts on which it is based.

(6) that the Ugandan counter-claim alleging involvement by the DRC in

an attack on the Ugandan Embassy and on Ugandan nationals in Kinshasa be dismissed, on the following grounds:

— to the extent that Uganda is seeking to engage the responsibility of the DRC for acts contrary to international law allegedly committed to the detriment of Ugandan nationals, the claim is inadmissible because Uganda has failed to show that the persons for whose protection it claims to provide are its nationals or that such persons have exhausted the local remedies available in the DRC; in the alternative, this claim is unfounded because Uganda has failed to establish the facts on which it is based;
— that part of the Ugandan claims concerning the treatment allegedly inflicted on its diplomatic premises and personnel in Kinshasa is unfounded because Uganda has failed to establish the facts on which it is based";

in the additional pleading entitled "Additional Written Observations on the Counter-Claims presented by Uganda":

"The Democratic Republic of the Congo, while reserving the right to supplement or modify the present submissions and to provide the Court with fresh evidence and pertinent new legal arguments in the context of the present dispute, requests the Court, pursuant to the Rules of Court, to adjudge and declare:

As regards the *first counter-claim presented by Uganda:*

(1) to the extent that it relates to the period before Laurent-Désiré Kabila came to power, the claim is inadmissible because Uganda had previously waived its right to lodge such a claim and, in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;
(2) to the extent that it relates to the period from when Laurent-Désiré Kabila came to power until the onset of Ugandan aggression, the claim is unfounded in fact because Uganda has failed to establish the facts on which it is based;
(3) to the extent that it relates to the period after the onset of Ugandan aggression, the claim is founded neither in fact nor in law because Uganda has failed to establish the facts on which it is based, and because, from 2 August 1998, the DRC was in any event in a situation of self-defence.

As regards the *second counter-claim presented by Uganda:*

(1) to the extent that it is now centred on the interpretation and application of the Vienna Convention of 1961 on Diplomatic Relations, the claim presented by Uganda radically modifies the subject-matter of the dispute, contrary to the Statute and Rules of Court; this aspect of the claim must therefore be dismissed from the present proceedings;
(2) the aspect of the claim relating to the inhumane treatment allegedly suffered by certain Ugandan nationals remains inadmissible, as Uganda has still not shown that the conditions laid down by international law for the exercise of its diplomatic protection have been met;

in the alternative, this aspect of the claim is unfounded, as Uganda is still unable to establish the factual and legal bases for its claims;

(3) the aspect of the claim relating to the alleged expropriation of Ugandan public property is unfounded, as Uganda is still unable to establish the factual and legal bases for its claims."

*On behalf of the Government of Uganda,*

in the Counter-Memorial:

"Reserving its right to supplement or amend its requests, the Republic of Uganda requests the Court:

(1) To adjudge and declare in accordance with international law:

(A) that the requests of the Democratic Republic of the Congo relating to activities or situations involving the Republic of Rwanda or its agents are inadmissible for the reasons set forth in Chapter XV of the present Counter-Memorial;

(B) that the requests of the Democratic Republic of the Congo that the Court adjudge that the Republic of Uganda is responsible for various breaches of international law, as alleged in the Application and/or the Memorial of the Democratic Republic of Congo, are rejected; and

(C) that the Counter-claims presented in Chapter XVIII of the present Counter-Memorial be upheld.

(2) To reserve the issue of reparation in relation to the Counter-claims for a subsequent stage of the proceedings";

in the Rejoinder:

"Reserving her right to supplement or amend her requests, the Republic of Uganda requests the Court:

1. To adjudge and declare in accordance with international law:

(A) that the requests of the Democratic Republic of the Congo relating to activities or situations involving the Republic of Rwanda or her agents are inadmissible for the reasons set forth in Chapter XV of the present Counter-Memorial;

(B) that the requests of the Democratic Republic of the Congo that the Court adjudge that the Republic of Uganda is responsible for various breaches of international law, as alleged in the Memorial and/or the Reply of the Democratic Republic of Congo, are rejected; and

(C) that the Counter-claims presented in Chapter XVIII of the Counter-Memorial and reaffirmed in Chapter VI of the present Rejoinder be upheld.

2. To reserve the issue of reparation in relation to the Counter-claims for a subsequent stage of the proceedings."

25. At the oral proceedings, the following final submissions were presented by the Parties:

*On behalf of the Government of the DRC,*

at the hearing of 25 April 2005, on the claims of the DRC:

"The Congo requests the Court to adjudge and declare:

1. That the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces having operated there, has violated the following principles of conventional and customary law:
   - the principle of non-use of force in international relations, including the prohibition of aggression;
   - the obligation to settle international disputes exclusively by peaceful means so as to ensure that international peace and security, as well as justice, are not placed in jeopardy;
   - respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;
   - the principle of non-intervention in matters within the domestic jurisdiction of States, including refraining from extending any assistance to the parties to a civil war operating on the territory of another State.
2. That the Republic of Uganda, by committing acts of violence against nationals of the Democratic Republic of the Congo, by killing and injuring them or despoiling them of their property, by failing to take adequate measures to prevent violations of human rights in the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:
   - the principle of conventional and customary law imposing an obligation to respect, and ensure respect for, fundamental human rights, including in times of armed conflict, in accordance with international humanitarian law;
   - the principle of conventional and customary law imposing an obligation, at all times, to make a distinction in an armed conflict between civilian and military objectives;
   - the right of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural.
3. That the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources, by pillaging its assets and wealth, by failing to take adequate measures to prevent the illegal exploitation of the resources of the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:
   - the applicable rules of international humanitarian law;
   - respect for the sovereignty of States, including over their natural resources;
   - the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently

to refrain from exposing peoples to foreign subjugation, domination or exploitation;
— the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters.

4. *(a)* That the violations of international law set out in submissions 1, 2 and 3 constitute wrongful acts attributable to Uganda which engage its international responsibility;
*(b)* that the Republic of Uganda shall cease forthwith all continuing internationally wrongful acts, and in particular its support for irregular forces operating in the DRC and its exploitation of Congolese wealth and natural resources;

*(c)* that the Republic of Uganda shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of;
*(d)* that the Republic of Uganda is under an obligation to the Democratic Republic of the Congo to make reparation for all injury caused to the latter by the violation of the obligations imposed by international law and set out in submissions 1, 2 and 3 above;

*(e)* that the nature, form and amount of the reparation shall be determined by the Court, failing agreement thereon between the Parties, and that the Court shall reserve the subsequent procedure for that purpose.

5. That the Republic of Uganda has violated the Order of the Court on provisional measures of 1 July 2000, in that it has failed to comply with the following provisional measures:

'(1) both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

(2) both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000;

(3) both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law'";

at the hearing of 29 April 2005, on the counter-claims of Uganda:

"The Congo requests the International Court of Justice to adjudge and declare:

As regards the *first counter-claim submitted by Uganda:*

(1) to the extent that it relates to the period before Laurent-Désiré Kabila came to power, Uganda's claim is inadmissible because Uganda had previously renounced its right to lodge such a claim: in the alternative, the claim is unfounded because Uganda has failed to establish the facts on which it is based;
(2) to the extent that it relates to the period from the time when Laurent-Désiré Kabila came to power to the time when Uganda launched its armed attack, Uganda's claim is unfounded in fact because Uganda has failed to establish the facts on which it is based;
(3) to the extent that it relates to the period subsequent to the launching of Uganda's armed attack, Uganda's claim is unfounded both in fact and in law because Uganda has failed to establish the facts on which it is based and, in any event, from 2 August 1998 the DRC was in a situation of self-defence.

As regards the *second counter-claim submitted by Uganda:*

(1) to the extent that it now relates to the interpretation and application of the Vienna Convention of 1961 on Diplomatic Relations, the claim submitted by Uganda radically changes the subject-matter of the dispute, contrary to the Statute and to the Rules of Court; that part of the claim must therefore be dismissed from the present proceedings;
(2) that part of the claim relating to the alleged mistreatment of certain Ugandan nationals remains inadmissible because Uganda has still failed to show that the requirements laid down by international law for the exercise of its diplomatic protection were satisfied; in the alternative, that part of the claim is unfounded because Uganda is still unable to establish the factual and legal bases of its claims.

(3) that part of the claim relating to the alleged expropriation of Uganda's public property is unfounded because Uganda is still unable to establish the factual and legal bases of its claims."

*On behalf of the Government of Uganda*,

at the hearing of 27 April 2005, on the claims of the DRC and the counter-claims of Uganda:

"The Republic of Uganda requests the Court:

(1) To adjudge and declare in accordance with international law:
  (A) that the requests of the Democratic Republic of the Congo relating to the activities or situations involving the Republic of Rwanda or her agents are inadmissible for the reasons set forth in Chapter XV of the Counter-Memorial and reaffirmed in the oral pleadings;
  (B) that the requests of the Democratic Republic of the Congo that the Court adjudge and declare that the Republic of Uganda is responsible for various breaches of international law, as alleged in the Memorial, the Reply and/or the oral pleadings are rejected; and
  (C) that Uganda's counter-claims presented in Chapter XVIII of the

Counter-Memorial, and reaffirmed in Chapter VI of the Rejoinder as well as the oral pleadings be upheld.

(2) To reserve the issue of reparation in relation to Uganda's counter-claims for a subsequent stage of the proceedings."

* * *

26. The Court is aware of the complex and tragic situation which has long prevailed in the Great Lakes region. There has been much suffering by the local population and destabilization of much of the region. In particular, the instability in the DRC has had negative security implications for Uganda and some other neighbouring States. Indeed, the Summit meeting of the Heads of State in Victoria Falls (held on 7 and 8 August 1998) and the Agreement for a Ceasefire in the Democratic Republic of the Congo signed in Lusaka on 10 July 1999 (hereinafter "the Lusaka Agreement") acknowledged as legitimate the security needs of the DRC's neighbours. The Court is aware, too, that the factional conflicts within the DRC require a comprehensive settlement to the problems of the region.

However, the task of the Court must be to respond, on the basis of international law, to the particular legal dispute brought before it. As it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that.

* * *

27. The Court finds it convenient, in view of the many actors referred to by the Parties in their written pleadings and at the hearing, to indicate the abbreviations which it will use for those actors in its judgment. Thus the Allied Democratic Forces will hereinafter be referred to as the ADF, the Alliance of Democratic Forces for the Liberation of the Congo (Alliance des forces démocratiques pour la libération du Congo) as the AFDL, the Congo Liberation Army (Armée de libération du Congo) as the ALC, the Congolese Armed Forces (Forces armées congolaises) as the FAC, the Rwandan Armed Forces (Forces armées rwandaises) as the FAR, the Former Uganda National Army as the FUNA, the Lord's Resistance Army as the LRA, the Congo Liberation Movement (Mouvement de libération du Congo) as the MLC, the National Army for the Liberation of Uganda as the NALU, the Congolese Rally for Democracy (Rassemblement congolais pour la démocratie) as the RCD, the Congolese Rally for Democracy-Kisangani (Rassemblement congolais pour la démocratie-Kisangani) as the RCD-Kisangani (also known as RCD-Wamba), the Congolese Rally for Democracy-Liberation Movement (Rassemblement congolais pour la démocratie-Mouvement de libération) as the RCD-ML, the Rwandan Patriotic Army as the RPA, the Sudan People's Liberation Movement/Army as the SPLM/A, the Uganda

National Rescue Front II as the UNRF II, the Uganda Peoples' Defence Forces as the UPDF, and the West Nile Bank Front as the WNBF.

* * *

28. In its first submission the DRC requests the Court to adjudge and declare:

> "1. That the Republic of Uganda, by engaging in military and paramilitary activities against the Democratic Republic of the Congo, by occupying its territory and by actively extending military, logistic, economic and financial support to irregular forces having operated there, has violated the following principles of conventional and customary law:
>
> — the principle of non-use of force in international relations, including the prohibition of aggression;
> — the obligation to settle international disputes exclusively by peaceful means so as to ensure that international peace and security, as well as justice, are not placed in jeopardy;
>
> — respect for the sovereignty of States and the rights of peoples to self-determination, and hence to choose their own political and economic system freely and without outside interference;
> — the principle of non-intervention in matters within the domestic jurisdiction of States, including refraining from extending any assistance to the parties to a civil war operating on the territory of another State."

29. The DRC explains that in 1997 Laurent-Désiré Kabila, who was at the time a Congolese rebel leader at the head of the AFDL (which was supported by Uganda and Rwanda), succeeded in overthrowing the then President of Zaire, Marshal Mobutu Ssese Seko, and on 29 May 1997 was formally sworn in as President of the renamed Democratic Republic of the Congo. The DRC asserts that, following President Kabila's accession to power, Uganda and Rwanda were granted substantial benefits in the DRC in the military and economic fields. The DRC claims, however, that President Kabila subsequently sought a gradual reduction in the influence of these two States over the DRC's political, military and economic spheres. It was, according to the DRC, this "new policy of independence and emancipation" from the two States that constituted the real reason for the invasion of Congolese territory by Ugandan armed forces in August 1998.

30. The DRC maintains that at the end of July 1998 President Kabila learned of a planned coup d'état organized by the Chief of Staff of the FAC, Colonel Kabarebe (a Rwandan national), and that, in an official statement published on 28 July 1998 (see paragraph 49 below), President

Kabila called for the withdrawal of foreign troops from Congolese territory. Although his address referred mainly to Rwandan troops, the DRC argues that there can be no doubt that President Kabila intended to address his message to "all foreign forces". The DRC states that on 2 August 1998 the 10th Brigade assigned to the province of North Kivu rebelled against the central Government of the DRC, and that during the night of 2 to 3 August 1998 Congolese Tutsi soldiers and a few Rwandan soldiers not yet repatriated attempted to overthrow President Kabila. According to the DRC, Uganda began its military intervention in the DRC immediately after the failure of the coup attempt.

31. The DRC argues that on 4 August 1998 Uganda and Rwanda organized an airborne operation, flying their troops from Goma on the eastern frontier of the DRC to Kitona, some 1,800 km away on the other side of the DRC, on the Atlantic coast. The DRC alleges that the aim was to overthrow President Kabila within ten days. According to the DRC, in the advance towards Kinshasa, Ugandan and Rwandan troops captured certain towns and occupied the Inga Dam, which supplies electricity to Kinshasa. The DRC explains that Angola and Zimbabwe came to the assistance of the Congolese Government to help prevent the capture of Kinshasa. The DRC also states that in the north-eastern part of the country, within a matter of months, UPDF troops had advanced and had progressively occupied a substantial part of Congolese territory in several provinces.

32. The DRC submits that Uganda's military operation against the DRC also consisted in the provision of support to Congolese armed groups opposed to President Kabila's Government. The DRC thus maintains that the RCD was created by Uganda and Rwanda on 12 August 1998, and that at the end of September 1998 Uganda supported the creation of the new MLC rebel group, which was not linked to the Rwandan military. According to the DRC, Uganda was closely involved in the recruitment, education, training, equipment and supplying of the MLC and its military wing, the ALC. The DRC alleges that the close links between Uganda and the MLC were reflected in the formation of a united military front in combat operations against the FAC. The DRC maintains that in a number of cases the UPDF provided tactical support, including artillery cover, for ALC troops. Thus, the DRC contends that the UPDF and the ALC constantly acted in close co-operation during many battles against the Congolese regular army. The DRC concludes that Uganda, "in addition to providing decisive military support for several Congolese rebel movements, has been extremely active in supplying these movements with a political and diplomatic framework".

33. The DRC notes that the events in its territory were viewed with grave concern by the international community. The DRC claims that at the Victoria Falls Summit, which took place on 7 and 8 August 1998, and

was attended by representatives of the DRC, Uganda, Namibia, Rwanda, Tanzania, Zambia and Zimbabwe,

> "member countries of the SADC [Southern African Development Community], following the submission of an application by the Democratic Republic of the Congo, unequivocally condemned the aggression suffered by the Congo and the occupation of certain parts of its national territory".

The DRC further points out that, in an attempt to help resolve the conflict, the SADC, the States of East Africa and the Organization of African Unity (OAU) initiated various diplomatic efforts, which included a series of meetings between the belligerents and the representatives of various African States, also known as the "Lusaka Process". On 18 April 1999 the Sirte Peace Agreement was concluded, in the framework of the Lusaka peace process, between President Kabila of the DRC and President Museveni of Uganda. The DRC explains that, under this Agreement, Uganda undertook to "cease hostilities immediately" and to withdraw its troops from the territory of the DRC. The Lusaka Agreement was signed by the Heads of State of the DRC, Uganda and other African States (namely, Angola, Namibia, Rwanda and Zimbabwe) on 10 July 1999 and by the MLC and RCD (rebel groups) on 1 August 1999 and 31 August 1999, respectively. The DRC explains that this Agreement provided for the cessation of hostilities between the parties' forces, the disengagement of these forces, the deployment of OAU verifiers and of the United Nations Mission in the Democratic Republic of the Congo (hereinafter "MONUC"), to be followed by the withdrawal of foreign forces. On 8 April 2000 and 6 December 2000 Uganda signed troop disengagement agreements known as the Kampala plan and the Harare plan.

34. According to the DRC, following the withdrawal of Ugandan troops from its territory in June 2003, Uganda has continued to provide arms to ethnic groups confronting one another in the Ituri region, on the boundary with Uganda. The DRC further argues that Uganda "has left behind it a fine network of warlords, whom it is still supplying with arms and who themselves continue to plunder the wealth of the DRC on behalf of Ugandan and foreign businessmen".

*

35. Uganda, for its part, claims that from early 1994 through to approximately May 1997 the Congolese authorities provided military and logistical support to anti-Ugandan insurgents. Uganda asserts that from the beginning of this period it was the victim of cross-border attacks from these armed rebels in eastern Congo. It claims that, in response to these attacks, until late 1997 it confined its actions to its own side of the

Congo-Uganda border, by reinforcing its military positions along the frontier.

36. According to Uganda, in 1997 the AFDL, made up of a loose alliance of the combined forces of the various Congolese rebel groups, together with the Rwandan army, overthrew President Mobutu's régime in Zaire. Uganda asserts that upon assuming power on 29 May 1997, President Kabila invited Uganda to deploy its own troops in eastern Congo in view of the fact that the Congolese army did not have the resources to control the remote eastern provinces, and in order to "eliminate" the anti-Ugandan insurgents operating in that zone and to secure the border region. According to Uganda, it was on this understanding that Ugandan troops crossed into eastern Congo and established bases on Congolese territory. Uganda further alleges that in December 1997, at President Kabila's further invitation, Uganda sent two UPDF battalions into eastern Congo, followed by a third one in April 1998, also at the invitation of the Congolese President. Uganda states that on 27 April 1998 the Protocol on Security along the Common Border was signed by the two Governments in order to reaffirm the invitation of the DRC to Uganda to deploy its troops in eastern Congo as well as to commit the armed forces of both countries to jointly combat the anti-Ugandan insurgents in Congolese territory and secure the border region. Uganda maintains that three Ugandan battalions were accordingly stationed in the border region of the Ruwenzori Mountains within the DRC.

37. However, Uganda claims that between May and July 1998 President Kabila broke off his alliances with Rwanda and Uganda and established new alliances with Chad, the Sudan and various anti-Ugandan insurgent groups.

With regard to the official statement by President Kabila published on 28 July 1998 calling for the withdrawal of Rwandan troops from Congolese territory, Uganda interprets this statement as not affecting Uganda, arguing that it made no mention of the Ugandan armed forces that were then in the DRC pursuant to President Kabila's earlier invitation and to the Protocol of 27 April 1998.

38. Uganda affirms that it had no involvement in or foreknowledge of the FAC rebellion that occurred in eastern Congo on 2 August 1998 nor of the attempted coup d'état against President Kabila on the night of 2-3 August 1998. Uganda likewise denies that it participated in the attack on the Kitona military base. According to Uganda, on 4 August 1998 there were no Ugandan troops present in either Goma or Kitona, or on board the planes referred to by the DRC.

39. Uganda further claims that it did not send additional troops into the DRC during August 1998. Uganda states, however, that by August-September 1998, as the DRC and the Sudan prepared to attack Ugandan forces in eastern Congo, its security situation had become untenable. Uganda submits that "[i]n response to this grave threat, and in the lawful exercise of its sovereign right of self-defence", it made a decision on

11 September 1998 to augment its forces in eastern Congo and to gain control of the strategic airfields and river ports in northern and eastern Congo in order to stop the combined forces of the Congolese and Sudanese armies as well as the anti-Ugandan insurgent groups from reaching Uganda's borders. According to Uganda, the military operations to take control of these key positions began on 20 September 1998. Uganda states that by February 1999 Ugandan forces succeeded in occupying all the key airfields and river ports that served as gateways to eastern Congo and the Ugandan border. Uganda maintains that on 3 July 1999 its forces gained control of the airport at Gbadolite and drove all Sudanese forces out of the DRC.

40. Uganda notes that on 10 July 1999 the on-going regional peace process led to the signing of a peace agreement in Lusaka by the Heads of State of Uganda, the DRC, Rwanda, Zimbabwe, Angola and Namibia, followed by the Kampala (8 April 2000) and Harare (6 December 2000) Disengagement Plans. Uganda points out that, although no immediate or unilateral withdrawal was called for, it began withdrawing five battalions from the DRC on 22 June 2000. On 20 February 2001 Uganda announced that it would withdraw two more battalions from the DRC. On 6 September 2002 Uganda and the DRC concluded a peace agreement in Luanda (Agreement between the Governments of the Democratic Republic of the Congo and the Republic of Uganda on Withdrawal of Ugandan Troops from the Democratic Republic of the Congo, Co-operation and Normalisation of Relations between the two Countries, hereinafter "the Luanda Agreement"). Under its terms Uganda agreed to withdraw from the DRC all Ugandan troops, except for those expressly authorized by the DRC to remain on the slopes of Mt. Ruwenzori. Uganda claims that, in fulfilment of its obligations under the Luanda Agreement, it completed the withdrawal of all of its troops from the DRC in June 2003. Uganda asserts that "[s]ince that time, not a single Ugandan soldier has been deployed inside the Congo".

41. As for the support for irregular forces operating in the DRC, Uganda states that it has never denied providing political and military assistance to the MLC and the RCD. However, Uganda asserts that it did not participate in the formation of the MLC and the RCD.

> "[I]t was only *after* the rebellion had broken out and *after* the RCD had been created that Uganda began to interact with the RCD, and, even then, Uganda's relationship with the RCD was strictly political until after the middle of September 1998." (Emphasis in the original.)

According to Uganda, its military support for the MLC and for the RCD began in January 1999 and March 1999 respectively. Moreover, Uganda argues that the nature and extent of its military support for the Congolese rebels was consistent with and limited to the requirements of self-defence. Uganda further states that it refrained from providing the rebels

with the kind or amount of support they would have required to achieve such far-reaching purposes as the conquest of territory or the overthrow of the Congolese Government.

* *

ISSUE OF CONSENT

42. The Court now turns to the various issues connected with the first submission of the DRC.

43. In response to the DRC's allegations of military and paramilitary activities amounting to aggression, Uganda states that from May 1997 (when President Laurent-Désiré Kabila assumed power in Kinshasa) until 11 September 1998 (the date on which Uganda states that it decided to respond on the basis of self-defence) it was present in the DRC with the latter's consent. It asserts that the DRC's consent to the presence of Ugandan forces was renewed in July 1999 by virtue of the terms of the Lusaka Agreement and extended thereafter. Uganda defends its military actions in the intervening period of 11 September 1998 to 10 July 1999 as lawful self-defence. The Court will examine each of Uganda's arguments in turn.

44. In a written answer to the question put to it by Judge Vereshchetin (see paragraph 22 above), the DRC clarified that its claims relate to actions by Uganda beginning in August 1998. However, as the Parties do not agree on the characterization of events in that month, the Court deems it appropriate first to analyse events which occurred a few months earlier, and the rules of international law applicable to them.

45. Relations between Laurent-Désiré Kabila and the Ugandan Government had been close, and with the coming to power of the former there was a common interest in controlling anti-government rebels who were active along the Congo-Uganda border, carrying out in particular cross-border attacks against Uganda. It seems certain that from mid-1997 and during the first part of 1998 Uganda was being allowed to engage in military action against anti-Ugandan rebels in the eastern part of Congolese territory. Uganda claims that its troops had been invited into eastern Congo by President Kabila when he came to power in May 1997. The DRC has acknowledged that "Ugandan troops were present on the territory of the Democratic Republic of the Congo with the consent of the country's lawful government". It is clear from the materials put before the Court that in the period preceding August 1998 the DRC did not object to Uganda's military presence and activities in its eastern border area. The written pleadings of the DRC make reference to authorized Ugandan operations from September 1997 onwards. There is reference to such authorized action by Uganda on 19 December 1997, in early February 1998 and again in early July 1998, when the DRC author-

ized the transfer of Ugandan units to Ntabi, in Congolese territory, in order to fight more effectively against the ADF.

46. A series of bilateral meetings between the two Governments took place in Kinshasa from 11 to 13 August 1997, in Kampala from 6 to 7 April 1998 and again in Kinshasa from 24 to 27 April 1998. This last meeting culminated in a Protocol on Security along the Common Border being signed on 27 April 1998 between the two countries, making reference, *inter alia*, to the desire "to put an end to the existence of the rebel groups operating on either side of the common border, namely in the Ruwenzori". The two parties agreed that their respective armies would "co-operate in order to insure security and peace along the common border". The DRC contends that these words do not constitute an "invitation or acceptance by either of the contracting parties to send its army into the other's territory". The Court believes that both the absence of any objection to the presence of Ugandan troops in the DRC in the preceding months, and the practice subsequent to the signing of the Protocol, support the view that the continued presence as before of Ugandan troops would be permitted by the DRC by virtue of the Protocol. Uganda told the Court that

> "[p]ursuant to the Protocol, Uganda sent a third battalion into eastern Congo, which brought her troop level up to approximately 2,000, and she continued military operations against the armed groups in the region both unilaterally and jointly with Congolese Government forces".

The DRC has not denied this fact nor that its authorities accepted this situation.

47. While the co-operation envisaged in the Protocol may be reasonably understood as having its effect in a continued authorization of Ugandan troops in the border area, it was not the legal basis for such authorization or consent. The source of an authorization or consent to the crossing of the border by these troops antedated the Protocol and this prior authorization or consent could thus be withdrawn at any time by the Government of the DRC, without further formalities being necessary.

48. The Court observes that when President Kabila came to power, the influence of Uganda and in particular Rwanda in the DRC became substantial. In this context it is worthy of note that many Rwandan officers held positions of high rank in the Congolese army and that Colonel James Kabarebe, of Rwandan nationality, was the Chief of Staff of the FAC (the armed forces of the DRC). From late spring 1998, President Kabila sought, for various reasons, to reduce this foreign influence; by mid-1998, relations between President Kabila and his former allies had

deteriorated. In light of these circumstances the presence of Rwandan troops on Congolese territory had in particular become a major concern for the Government of the DRC.

49. On 28 July 1998, an official statement by President Kabila was published, which read as follows:

> "The Supreme Commander of the Congolese National Armed Forces, the Head of State of the Republic of the Congo and the Minister of National Defence, advises the Congolese people that he has just terminated, with effect from this Monday 27 July 1998, the Rwandan military presence which has assisted us during the period of the country's liberation. Through these military forces, he would like to thank all of the Rwandan people for the solidarity they have demonstrated to date. He would also like to congratulate the democratic Congolese people on their generosity of spirit for having tolerated, provided shelter for and trained these friendly forces during their stay in our country. This marks the end of the presence of all foreign military forces in the Congo." *[Translation by the Registry.]*

50. The DRC has contended that, although there was no specific reference to Ugandan troops in the statement, the final phrase indicated that consent was withdrawn for Ugandan as well as Rwandan troops. It states that, having learned of a plotted coup, President Kabila "officially announced . . . the end of military co-operation with Rwanda and asked the Rwandan military to return to their own country, adding that this marked the end of the presence of foreign troops in the Congo". The DRC further explains that Ugandan forces were not mentioned because they were "very few in number in the Congo" and were not to be treated in the same way as the Rwandan forces, "who in the prevailing circumstances, were perceived as enemies suspected of seeking to overthrow the régime". Uganda, for its part, maintains that the President's statement was directed at Rwandan forces alone; that the final phrase of the statement was not tantamount to the inclusion of a reference to Ugandan troops; and that any withdrawal of consent for the presence of Ugandan troops would have required a formal denunciation, by the DRC, of the April 1998 Protocol.

51. The Court notes, first, that for reasons given above, no particular formalities would have been required for the DRC to withdraw its consent to the presence of Ugandan troops on its soil. As to the content of President Kabila's statement, the Court observes that, as a purely textual matter, the statement was ambiguous.

52. More pertinently, the Court draws attention to the fact that the consent that had been given to Uganda to place its forces in the DRC, and to engage in military operations, was not an open-ended consent. The DRC accepted that Uganda could act, or assist in acting, against rebels on the eastern border and in particular to stop them operating across the common border. Even had consent to the Ugandan military

presence extended much beyond the end of July 1998, the parameters of that consent, in terms of geographic location and objectives, would have remained thus restricted.

53. In the event, the issue of withdrawal of consent by the DRC, and that of expansion by Uganda of the scope and nature of its activities, went hand in hand. The Court observes that at the Victoria Falls Summit (see paragraph 33 above) the DRC accused Rwanda and Uganda of invading its territory. Thus, it appears evident to the Court that, whatever interpretation may be given to President Kabila's statement of 28 July 1998, any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998, i.e. the closing date of the Victoria Falls Summit.

54. The Court recalls that, independent of the conflicting views as to when Congolese consent to the presence of Ugandan troops might have been withdrawn, the DRC has informed the Court that its claims against Uganda begin with what it terms an aggression commencing on 2 August 1998.

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## FINDINGS OF FACT CONCERNING UGANDA'S USE OF FORCE IN RESPECT OF KITONA

55. The Court observes that the dispute about the commencement date of the military action by Uganda that was not covered by consent is, in the most part, directed at the legal characterization of events rather than at whether these events occurred. In some instances, however, Uganda denies that its troops were ever present at particular locations, the military action at Kitona being an important example. The DRC has informed the Court that from 2 August 1998 Uganda was involved in military activities in the DRC that violated international law, and that these were directed at the overthrow of President Kabila. According to the DRC, Ugandan forces (together with those of Rwanda) were involved on 4 August in heavy military action at Kitona, which lies in the west of the DRC some 1,800 km from the Ugandan frontier. Virtually simultaneously Uganda engaged in military action in the east, first in Kivu and then in Orientale province. The DRC contends that this was followed by an invasion of Equateur province in north-west Congo. The DRC maintains that "[a]fter a few months of advances, the Ugandan army had thus conquered several hundred thousand square kilometres of territory". The DRC provided a sketch-map to illustrate the alleged scope and reach of Ugandan military activity.

56. Uganda characterizes the situation at the beginning of August

1998 as that of a state of civil war in the DRC — a situation in which President Kabila had turned to neighbouring Powers for assistance, including, notably, the Sudan (see paragraphs 120-129 below). These events caused great security concerns to Uganda. Uganda regarded the Sudan as a long-time enemy, which now, as a result of the invitation from President Kabila, had a free rein to act against Uganda and was better placed strategically to do so. Uganda strongly denies that it engaged in military activity beyond the eastern border area until 11 September. That military activity by its troops occurred in the east during August is not denied by Uganda. But it insists that it was not part of a plan agreed with Rwanda to overthrow President Kabila: it was rather actions taken by virtue of the consent given by the DRC to the operations by Uganda in the east, along their common border.

57. In accordance with its practice, the Court will first make its own determination of the facts and then apply the relevant rules of international law to the facts which it has found to have existed. The Court will not attempt a determination of the overall factual situation as it applied to the vast territory of the DRC from August 1998 till July 2003. It will make such findings of fact as are necessary for it to be able to respond to the first submission of the DRC, the defences offered by Uganda, and the first submissions of Uganda as regards its counter-claims. It is not the task of the Court to make findings of fact (even if it were in a position to do so) beyond these parameters.

58. These findings of fact necessarily entail an assessment of the evidence. The Court has in this case been presented with a vast amount of materials proffered by the Parties in support of their versions of the facts. The Court has not only the task of deciding which of those materials must be considered relevant, but also the duty to determine which of them have probative value with regard to the alleged facts. The greater part of these evidentiary materials appear in the annexes of the Parties to their written pleadings. The Parties were also authorized by the Court to produce new documents at a later stage. In the event, these contained important items. There has also been reference, in both the written and the oral pleadings, to material not annexed to the written pleadings but which the Court has treated as "part of a publication readily available" under Article 56, paragraph 4, of its Rules of Court. Those, too, have been examined by the Court for purposes of its determination of the relevant facts.

59. As it has done in the past, the Court will examine the facts relevant to each of the component elements of the claims advanced by the Parties. In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value. In accordance with

its prior practice, the Court will explain what items it should eliminate from further consideration (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 50, para. 85; see equally the practice followed in the case concerning *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3).

60. Both Parties have presented the Court with a vast amount of documentation. The documents advanced in supporting findings of fact in the present case include, *inter alia*, resolutions of the United Nations Security Council, reports of the Special Rapporteur of the Commission on Human Rights, reports and briefings of the OAU, communiqués by Heads of State, letters of the Parties to the Security Council, reports of the Secretary-General on MONUC, reports of the United Nations Panels of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (hereinafter "United Nations Panel reports"), the White Paper prepared by the Congolese Ministry of Human Rights, the Porter Commission Report, the Ugandan White Paper on the Porter Commission Report, books, reports by non-governmental organizations and press reports.

61. The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41. para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties.

62. The Court will embark upon its task by determining whether it has indeed been proved to its satisfaction that Uganda invaded the DRC in early August 1998 and took part in the Kitona airborne operation on 4 August 1998. In the Memorial the DRC claimed that on 4 August 1998 three Boeing aircraft from Congo Airlines and Blue Airlines, and a Con-

golese plane from Lignes Aériennes Congolaises (LAC), were boarded by armed forces from "aggressor countries", including Uganda, as they were about to leave Goma Airport. It was claimed that, after refuelling and taking on board ammunition in Kigali, they flew to the airbase in Kitona, some 1,800 km from Uganda's border, where several contingents of foreign soldiers, including Ugandans, landed. It was claimed by the DRC that these forces, among which were Ugandan troops, took Kitona, Boma, Matadi and Inga, which they looted, as well as the Inga Dam. The DRC claimed that the aim of Uganda and Rwanda was to march to Kinshasa and rapidly overthrow President Kabila.

63. Uganda for its part has denied that its forces participated in the airborne assault launched at Kitona, insisting that at the beginning of August the only UPDF troops in the DRC were the three battalions in Beni and Butembo, present with the consent of the Congolese authorities. In the oral pleadings Uganda stated that it had been invited by Rwanda to join forces with it in displacing President Kabila, but had declined to do so. No evidence was advanced by either Party in relation to this contention. The Court accordingly does not need to address the question of "intention" and will concentrate on the factual evidence, as such.

64. In its Memorial the DRC relied on "testimonies of Ugandan and other soldiers, who were captured and taken prisoners in their abortive attempt to seize Kinshasa". No further details were provided, however. No such testimonies were ever produced to the Court, either in the later written pleadings or in the oral pleadings. Certain testimonies by persons of Congolese nationality were produced, however. These include an interview with the Congo airline pilot, in which he refers — in connection with the Kitona airborne operation — to the presence of both Rwandans and Ugandans at Hotel Nyira. The Court notes that this statement was prepared more than three years after the alleged events and some 20 months after the DRC lodged with the Court its Application commencing proceedings. It contains no signature as such, though the pilot says he "signed on the manuscript". The interview was conducted by the Assistant Legal Adviser at the Service for the Military Detection of Unpatriotic Activities in the DRC. Notwithstanding the DRC's position that there is nothing in this or other such witness statements to suggest that they were obtained under duress, the setting and context cannot therefore be regarded as conducive to impartiality. The same conclusion has to be reached as regards the interview with Issa Kisaka Kakule, a former rebel. Even in the absence of these deficiencies, the statement of the airline pilot cannot prove the arrival of Ugandan forces and their participation in the military operation in Kitona. The statement of Lieutenant Colonel Viala Mbeang Ilwa was more contemporaneous (15 October 1998) and is of some particular interest, as he was the pilot of the plane said to have been hijacked. In it he asserts that Ugandan officers at the hotel informed him

of their plan to topple President Kabila within ten days. There is, however, no indication of how this statement was provided, or in what circumstances. The same is true of the statement of Commander Mpele-Mpele regarding air traffic allegedly indicating Ugandan participation in the Kitona operation.

65. The Court has been presented with some evidence concerning a Ugandan national, referred to by the DRC as Salim Byaruhanga, said to be a prisoner of war. The record of an interview following the visit of Ugandan Senator Aggrey Awori consists of a translation, unsigned by the translator. Later, the DRC produced for the Court a video, said to verify the meeting between Mr. Awori and Ugandan prisoners. The video shows four men being asked questions by another addressing them in a language of the region. One of these says his name is "Salim Byaruhanga". There is, however, no translation provided, nor any information as to the source of this tape. There do exist letters of August 2001 passing between the International Committee of the Red Cross (ICRC) and the Congolese Government on the exchange of Ugandan prisoners, one of whom is named as Salim Byaruhanga. However, the ICRC never refers to this person as a member of the UPDF. Uganda has also furnished the Court with a notarized affidavit of the Chief of Staff of the UPDF saying that there were no Ugandan prisoners of war in the DRC, nor any officer by the name of Salim Byaruhanga. This affidavit is stated to have been prepared in November 2002, in view of the forthcoming case before the International Court of Justice. The Court recalls that it has elsewhere observed that a member of the government of a State engaged in litigation before this Court — and especially litigation relating to armed conflict — "will probably tend to identify himself with the interests of his country" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 43, para. 70). The same may be said of a senior military officer of such a State, and "while in no way impugning the honour or veracity" of such a person, the Court should "treat such evidence with great reserve" *(ibid.)*.

66. The Court observes that, even if such a person existed and even if he was a prisoner of war, there is nothing in the ICRC letters that refers to his participation (or to the participation of other Ugandan nationals) at Kitona. Equally, the PANA Agency press communiqué of 17 September 2001 mentions Salim Byaruhanga when referring to the release of four Ugandan soldiers taken prisoner in 1998 and 1999 — but there is no reference to participation in action in Kitona.

67. The press statements issued by the Democratic Party of Uganda on 14 and 18 September 1998, which refer to Ugandan troops being

flown to western Congo from Gala Airport, make no reference to the location of Kitona or to events there on 4 August.

68. Nor can the truth about the Kitona airborne operation be established by extracts from a few newspapers, or magazine articles, which rely on a single source (Agence France Presse, 2 September 1998); on an interested source (Integrated Regional Information Networks (hereinafter IRIN)), or give no sources at all (Pierre Barbancey, *Regards 41*). The Court has explained in an earlier case that press information may be useful as evidence when it is "wholly consistent and concordant as to the main facts and circumstances of the case" (*United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 10, para. 13), but that particular caution should be shown in this area. The Court observes that this requirement of consistency and concordance is not present in the journalistic accounts. For example, while Professor Weiss referred to 150 Ugandan troops under the command of the Rwandan Colonel Kaberebe at Kitona in an article relating to the events in the DRC, the Belgian journalist Mrs. Braekman wrote about rebels fleeing a Ugandan battalion of several hundred men.

69. The Court cannot give weight to claims made by the DRC that a Ugandan tank was used in the Kitona operation. It would seem that a tank of the type claimed to be "Ugandan" was captured at Kasangulu. This type of tank a — T-55 — was in fact one used also by the DRC itself and by Rwanda. The DRC does not clarify in its argument whether a single tank was transported from Uganda, nor does it specify, with supporting evidence, on which of the planes mentioned (a Boeing 727, Ilyushin 76, Boeing 707 or Antonov 32) it was transported from Uganda. The reference by the DRC to the picture of Mr. Bemba, the leader of the MLC, on a tank of this type in his book *Le choix de la liberté*, published in 2001, cannot prove its use by Ugandan forces in Kitona. Indeed, the Court finds it more pertinent that in his book Mr. Bemba makes no mention of the involvement of Ugandan troops at Kitona, but rather confirms that Rwanda took control of the military base in Kitona.

70. The Court has also noted that contemporaneous documentation clearly indicated that at the time the DRC regarded the Kitona operation as having been carried out by Rwanda. Thus the White Paper annexed to the Application of the DRC states that between 600 and 800 Rwandan soldiers were involved in the Kitona operation on 4 August. The letter sent by the Permanent Representative of the DRC on 2 September 1998 to the President of the Security Council referred to 800 soldiers from Rwanda being involved in the Kitona operation on 4 August 1998. This perception seems to be confirmed by the report of the Special Rapporteur

of the Commission on Human Rights in February 1999, where reference is made to Rwandan troops arriving in Kitona on 4 August in order to attack Kinshasa. The press conference given at United Nations Headquarters in New York by the Permanent Representative of the DRC to the United Nations on 13 August 1998 only referred to Rwandan soldiers conducting the Kitona airborne operation on 4 August, and to Ugandan troops advancing upon Bunia on 9 August.

71. The Court thus concludes that, on the basis of the evidence before it, it has not been established to its satisfaction that Uganda participated in the attack on Kitona on 4 August 1998.

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### Findings of Fact: Military Action in the East of the DRC and in Other Areas of That Country

72. The Court will next analyse the claim made by the DRC of military action by Uganda in the east of the DRC during August 1998. The facts regarding this action are relatively little contested between the Parties. Their dispute is as to how these facts should be characterized. The Court must first establish which relevant facts it regards as having been convincingly established by the evidence, and which thus fall for scrutiny by reference to the applicable rules of international law.

73. The Court finds it convenient at this juncture to explain that its determination of the facts as to the Ugandan presence at, and taking of, certain locations is independent of the sketch-map evidence offered by the Parties in support of their claims in this regard. In the response given by the DRC to the question of Judge Kooijmans, reference was made to the sketch-map provided by the DRC (see paragraph 55 above) to confirm the scope of the Ugandan "invasion and occupation". This sketch-map is based on a map of approximate deployment of forces in the DRC contained in a Report (Africa Report No. 26) prepared by International Crisis Group (hereinafter ICG), an independent, non-governmental body, whose reports are based on information and assessment from the field. On the ICG map, forces of the MLC and Uganda are shown to be "deployed" in certain positions to the north-west (Gbadolite, Zongo, Gemena, Bondo, Buta, Bumba, Lisala, Bomongo, Basankusu, and Mbandaka); and Ugandan and "RCD-Wamba" (officially known as RCD-Kisangani) forces are shown as "deployed" on the eastern frontier at Bunia, Beni and Isiro. The presence of Uganda and RCD-Wamba forces is shown at two further unspecified locations.

74. As to the sketch-maps which Uganda provided at the request of Judge Kooijmans, the DRC argues that they are too late to be relied on and were unilaterally prepared without any reference to independent source materials.

75. In the view of the Court, these maps lack the authority and credibility, tested against other evidence, that is required for the Court to place reliance on them. They are at best an aid to the understanding of what is contended by the Parties. These sketch-maps necessarily lack precision. With reference to the ICG map (see paragraph 73 above), there is also the issue of whether MLC forces deployed in the north-west may, without yet further findings of fact and law, be treated as "Ugandan" forces for purposes of the DRC's claim of invasion and occupation. The same is true for the RCD-Wamba forces deployed in the north-east.

76. Uganda has stated, in its response to the question put to it during the oral proceedings by Judge Kooijmans (see paragraph 22 above), that as of 1 August 1998

> "there were three battalions of UPDF troops — not exceeding 2,000 soldiers — in the eastern border areas of the DRC, particularly in the northern part of North Kivu Province (around Beni and Butembo) and the southern part of Orientale Province (around Bunia)".

Uganda states that it "modestly augmented the UPDF presence in the Eastern border" in response to various events. It has informed the Court that a UPDF battalion went into Bunia on 13 August, and that a single battalion had been sent to Watsa "to maintain the situation between Bunia and the DRC's border with Sudan". Uganda further states in its response to Judge Kooijmans' question that by the end of August 1998 there were no Ugandan forces present in South Kivu, Maniema or Kasai Oriental province; "nor were Ugandan forces present in North Kivu Province south of the vicinity of Butembo".

77. The DRC has indicated that Beni and Butembo were taken by Ugandan troops on 6 August 1998, Bunia on 13 August and Watsa on 25 August.

78. The Court finds that most evidence of events in this period is indirect and less reliable than that which emerges from statements made under oath before the Porter Commission. The Court has already noted that statements "emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court believes the same to be the case when such statements against interest are made by senior military officers given the objective circumstances in which those statements were taken. Accordingly, the Court finds it relevant that before the Porter Commission, Brigadier General Kazini, who was commander of the Ugandan forces in the DRC, referred

to "the capture of Beni, that was on 7 August 1998".

79. He also referred to 8 August 1998 as the date of capture of Beni, 7 August being the date "that was the fighting (when it took place) and our troops occupied Beni". The Court is satisfied that Beni was taken on 7 August, and Bunia on 13 August. There is some small uncertainty about the precise date of the taking of Watsa, though none as to the fact of its being taken in this period. A report by Lieutenant Colonel Waswa (Annexure G, Porter Commission Report) asserts that the "7[th] infantry B[attalio]n operational force" entered the DRC at Aru on 10 August, leaving there on 14 August, and "went to Watsa via Duruba 250 km away from the Uganda-Congo border. The force spent one day at Duruba, i.e., 23 August 1998 and proceeded to Watsa which is 40 km where we arrived on 24 August 1998." Twenty days were said by him to have been spent at Watsa, where the airport was secured. Notwithstanding that this report was dated 18 May 2001, the Court notes that it is detailed, specific and falls within the rubric of admission against interest to which the Court will give weight. However, Justice Porter refers to 29 August as the relevant date for Watsa; whereas, in its response to the question of Judge Kooijmans, the DRC gives the date of 25 August for the "prise de Watsa" (taking of Watsa).

80. The Court will now consider the events of September 1998 on the basis of the evidence before it. Uganda acknowledges that it sent part of a battalion to Kisangani Airport, to guard that facility, on 1 September 1998. It has been amply demonstrated that on several later occasions, notably in August 1999 and in May and June 2000, Uganda engaged in large-scale fighting in Kisangani against Rwandan forces, which were also present there.

81. The Court notes that a schedule was given by the Ugandan military to the Porter Commission containing a composite listing of locations and corresponding "dates of capture". The Court observes that the period it covers stops short of the period covered by the DRC's claims. This evidence was put before the Court by Uganda. It includes references to locations not mentioned by the DRC, whose list, contained in the response to Judge Kooijmans's question, is limited to places said to have been "taken". The Court simply observes that Ugandan evidence before the Porter Commission in relation to the month of September 1998 refers to Kisangani (1 September); Munubele (17 September); Bengamisa (18 September); Banalia (19 September); Isiro (20 September); Faladje (23 September); and Tele Bridge (29 September). Kisangani (1 September) and Isiro (20 September) are acknowledged by Uganda as having been "taken" by its forces (and not just as locations passed through).

82. As for the events of October 1998, Uganda has confirmed that it was at Buta on 3 October and Aketi on 6 October. The DRC lists the taking of Aketi as 8 November (response to the question put by Judge Kooijmans), but the Court sees no reason for this date to be preferred.

Both Parties agree that Buta was taken on 3 October and Dulia on 27 October. The Porter Commission was informed that Ugandan troops were present at Bafwasende on 12 October.

83. The DRC has alleged that Kindu was taken by Ugandan troops on 20 October 1998; this was denied in some detail by Uganda in its Rejoinder. No response was made in the oral pleadings by the DRC to the reasons given by Uganda for denying it had taken Kindu. Nor is Kindu in the listing given by the Ugandan military authorities to the Porter Commission. The Court does not feel it has convincing evidence as to Kindu having been taken by Ugandan forces in October 1998.

84. There is agreement between the Parties that Bumba was taken on 17 November 1998.

85. Uganda claims that Lisala was taken on 12 December 1998. The list contained in the Porter Commission exhibits makes reference to the location of Benda, with the date of 13 December. Also listed are Titure (20 December) and Poko (22 December). Uganda insists it "came to" Businga on 28 December 1998 and not in early February 1999 as claimed by the DRC; and to Gemena on 25 December 1998, and not on 10 July 1999 as also claimed by the DRC.

These discrepancies do not favour the case of Uganda and the Court accepts the earlier dates claimed by Uganda.

86. The DRC claims that Ango was taken on 5 January 1999, and this is agreed by Uganda. There also appears in the Ugandan "location/dates of capture" list, Lino-Mbambi (2 January 1999) and Lino (same date), Akula Port (4 February); Kuna (1 March); Ngai (4 March); Bonzanga (19 March); Pumtsi (31 March); Bondo (28 April); Katete (28 April); Baso Adia (17 May); Ndanga (17 May); Bongandanga (22 May); Wapinda (23 May); Kalawa Junchai (28 May); Bosobata (30 May); Bosobolo (9 June); Abuzi (17 June); Nduu (22 June); Pimu Bridge (27 June); Businga loko Bridge (28 June); Yakoma (30 June); and Bogbonga (30 June). All of these appear to be locations which Ugandan forces were rapidly traversing. The sole place claimed by the DRC to have been "taken" in this period was Mobeka — a precise date for which is given by Uganda (30 June 1999).

87. The DRC claims Gbadolite to have been taken on 3 July 1999 and that fact is agreed by Uganda. The Ugandan list refers also to Mowaka (1 July); Ebonga (2 July); Pambwa Junction (2 July); Bosomera (3 July); Djombo (4 July); Bokota (4 July); Bolomudanda Junction (4 July); the crossing of Yakoma Bridge (4 July); Mabaye (4 July); Businga (7 July); Katakoli (8 July); Libenge (29 July); Zongo (30 July); and Makanza (31 July).

88. The DRC also claims Bongandanga and Basankusu (two locations in the extreme south of Equateur province) to have been taken on 30 November 1999; Bomorge, Moboza and Dongo at unspecified dates

in February 2000; Inese and Bururu in April 2000; and Mobenzene in June 2000.

89. There is considerable controversy between the Parties over the DRC's claim regarding towns taken after 10 July 1999. The Court recalls that on this date the Parties had agreed to a ceasefire and to all the further provisions of the Lusaka Agreement. Uganda has insisted that Gemena was taken in December 1998 and the Court finds this date more plausible. Uganda further states in its observations on the DRC's response to the question of Judge Kooijmans that "there is no evidence that Ugandan forces were ever in Mobenzene, Bururu, Bomongo, and Moboza at any time". The Court observes that Uganda's list before the Porter Commission also makes no reference to Dongo at all during this period.

90. Uganda limits itself to stating that equally no military offensives were initiated by Uganda at Zongo, Basankusu and Dongo during the post-Lusaka periods; rather, "the MLC, with some limited Ugandan assistance, repulsed [attacks by the FAC in violation of the Lusaka Agreement]".

91. The Court makes no findings as to the responsibility of each of the Parties for any violations of the Lusaka Agreement. It confines itself to stating that it has not received convincing evidence that Ugandan forces were present at Mobenzene, Bururu, Bomongo and Moboza in the period under consideration by the Court for purposes of responding to the final submissions of the DRC.

* *

### Did the Lusaka, Kampala and Harare Agreements Constitute any Consent of the DRC to the Presence of Ugandan Troops?

92. It is the position of Uganda that its military actions until 11 September 1998 were carried out with the consent of the DRC, that from 11 September 1998 until 10 July 1999 it was acting in self-defence, and that thereafter the presence of its soldiers was again consented to under the Lusaka Agreement.

The Court will first consider whether the Lusaka Agreement, the Kampala and Harare Disengagement Plans and the Luanda Agreement constituted consent to the presence of Ugandan troops on the territory of the DRC.

93. The Court issued on 29 November 2001 an Order regarding counter-claims contained in the Counter-Memorial of Uganda. The Court found certain of Uganda's counter-claims to be admissible as such. However, it found Uganda's third counter-claim, alleging violations by the DRC of the Lusaka Agreement, to be "not directly connected with the subject-matter of the Congo's claims". Accordingly, the Court found this counter-claim not admissible under Article 80, paragraph 1, of the Rules of Court.

94. It does not follow, however, that the Lusaka Agreement is thereby excluded from all consideration by the Court. Its terms may certainly be examined in the context of responding to Uganda's contention that, according to its provisions, consent was given by the DRC to the presence of Ugandan troops from the date of its conclusion (10 July 1999) until all the requirements contained therein should have been fulfilled.

95. The Lusaka Agreement does not refer to "consent". It confines itself to providing that "[t]he final withdrawal of all foreign forces from the national territory of the DRC shall be carried out in accordance with the Calendar in Annex 'B' of this Agreement and a withdrawal schedule to be prepared by the UN, the OAU and the JMC [Joint Military Commission]" (Art. III, para. 12). Under the terms of Annex "B", the Calendar for the Implementation of the Ceasefire Agreement was dependent upon a series of designated "Major Events" which were to follow upon the official signature of the Agreement ("D-Day"). This "Orderly Withdrawal of all Foreign Forces" was to occur on "D-Day plus 180 days". It was provided that, pending that withdrawal, "[a]ll forces shall remain in the declared and recorded locations" in which they were present at the date of signature of the Agreement (Ann. A, Art. 11.4).

96. The Court first observes that nothing in the provisions of the Lusaka Agreement can be interpreted as an affirmation that the security interests of Uganda had already required the presence of Ugandan forces on the territory of the DRC as from September 1998, as claimed by Uganda in the oral proceedings.

97. The Lusaka Agreement is, as Uganda argues, more than a mere ceasefire agreement, in that it lays down various "principles" (Art. III) which cover both the internal situation within the DRC and its relations with its neighbours. The three annexes appended to the Agreement deal with these matters in some considerable detail. The Agreement goes beyond the mere ordering of the parties to cease hostilities; it provides a framework to facilitate the orderly withdrawal of all foreign forces to a stable and secure environment. The Court observes that the letter from the Secretary-General of the United Nations to the President of Uganda of 4 May 2001, calling for Uganda to adhere to the agreed timetable for orderly withdrawal, is to be read in that light. It carries no implication as to the Ugandan military presence having been accepted as lawful. The overall provisions of the Lusaka Agreement acknowledge the importance of internal stability in the DRC for all of its neighbours. However, the Court cannot accept the argument made by Uganda in the oral proceedings that the Lusaka Agreement constituted "an acceptance by all parties of Uganda's justification for sending additional troops into the DRC between mid-September 1998 and mid-July 1999".

98. A more complex question, on which the Parties took clearly

opposed positions, was whether the calendar for withdrawal and its relationship to the series of "Major Events", taken together with the reference to the "D-Day plus 180 days", constituted consent by the DRC to the presence of Ugandan forces for at least 180 days from 10 July 1999 — and indeed beyond that time if the envisaged necessary "Major Events" did not occur.

99. The Court is of the view that, notwithstanding the special features of the Lusaka Agreement just described, this conclusion cannot be drawn. The Agreement took as its starting point the realities on the ground. Among those realities were the major Ugandan military deployment across vast areas of the DRC and the massive loss of life over the preceding months. The arrangements made at Lusaka, to progress towards withdrawal of foreign forces and an eventual peace, with security for all concerned, were directed at these factors on the ground and at the realities of the unstable political and security situation. The provisions of the Lusaka Agreement thus represented an agreed *modus operandi* for the parties. They stipulated how the parties should move forward. They did not purport to qualify the Ugandan military presence in legal terms. In accepting this *modus operandi* the DRC did not "consent" to the presence of Ugandan troops. It simply concurred that there should be a process to end that reality in an orderly fashion. The DRC was willing to proceed from the situation on the ground as it existed and in the manner agreed as most likely to secure the result of a withdrawal of foreign troops in a stable environment. But it did not thereby recognize the situation on the ground as legal, either before the Lusaka Agreement or in the period that would pass until the fulfilment of its terms.

100. In resolution 1234 of 9 April 1999 the Security Council had called for the "immediate signing of a ceasefire agreement" allowing for, *inter alia*, "the orderly withdrawal of all foreign forces". The Security Council fully appreciated that this withdrawal would entail political and security elements, as shown in paragraphs 4 and 5 of resolution 1234 (1999). This call was reflected three months later in the Lusaka Agreement. But these arrangements did not preclude the Security Council from continuing to identify Uganda and Rwanda as having violated the sovereignty and territorial integrity of the DRC and as being under an obligation to withdraw their forces "without further delay, in conformity with the timetable of the Ceasefire Agreement" (Security Council resolution 1304, 16 June 2000), i.e., without any delay to the *modus operandi* provisions agreed upon by the parties.

101. This conclusion as to the effect of the Lusaka Agreement upon the legality of the presence of Ugandan troops on Congolese territory did not change with the revisions to the timetable that became necessary. The

Kampala Disengagement Plan of 8 April 2000 and the Harare Disengagement Plan of 6 December 2000 provided for new schedules for withdrawal, it having become apparent that the original schedule in the Annex to the Lusaka Agreement was unrealistic. While the status of Ugandan troops remained unchanged, the delay in relation to the D-Day plus 180 days envisaged in the Lusaka Agreement likewise did not change the legal status of the presence of Uganda, all parties having agreed to these delays to the withdrawal calendar.

102. The Luanda Agreement, a bilateral agreement between the DRC and Uganda on "withdrawal of Ugandan troops from the Democratic Republic of the Congo, co-operation and normalisation of relations between the two countries", alters the terms of the multilateral Lusaka Agreement. The other parties offered no objection.

103. The withdrawal of Ugandan forces was now to be carried out "in accordance with the Implementation Plan marked Annex "A' and attached thereto" (Art. 1, para. 1). This envisaged the completion of withdrawal within 100 days after signature, save for the areas of Gbadolite, Beni and their vicinities, where there was to be an immediate withdrawal of troops (Art. 1, para. 2). The Parties also agreed that

> "the Ugandan troops shall remain on the slopes of Mt. Ruwenzori until the Parties put in place security mechanisms guaranteeing Uganda's security, including training and co-ordinated patrol of the common border".

104. The Court observes that, as with the Lusaka Agreement, none of these elements purport generally to determine that Ugandan forces had been legally present on the territory of the DRC. The Luanda Agreement revised the *modus operandi* for achieving the withdrawal of Ugandan forces in a stable security situation. It was now agreed — without reference to whether or not Ugandan forces had been present in the area when the agreement was signed, and to whether any such presence was lawful — that their presence on Mount Ruwenzori should be authorized, if need be, after the withdrawal elsewhere had been completed until appropriate security mechanisms had been put in place. The Court observes that this reflects the acknowledgment by both Parties of Uganda's security needs in the area, without pronouncing upon the legality of prior Ugandan military actions there or elsewhere.

105. The Court thus concludes that the various treaties directed to achieving and maintaining a ceasefire, the withdrawal of foreign forces and the stabilization of relations between the DRC and Uganda did not (save for the limited exception regarding the border region of the Ruwenzori Mountains contained in the Luanda Agreement) constitute consent by the DRC to the presence of Ugandan troops on its territory for the period after July 1999, in the sense of validating that presence in law.

* *

SELF-DEFENCE IN THE LIGHT OF PROVEN FACTS

106. The Court has already said that, on the basis of the evidence before it, it has not been established to its satisfaction that Uganda participated in the attack on Kitona on 4 August 1998 (see paragraph 71 above). The Court has also indicated that with regard to the presence of Ugandan troops on Congolese territory near to the common border after the end of July 1998, President Kabila's statement on 28 July 1998 was ambiguous (see paragraph 51 above). The Court has further found that any earlier consent by the DRC to the presence of Ugandan troops on its territory had at the latest been withdrawn by 8 August 1998 (see paragraph 53 above). The Court now turns to examine whether Uganda's military activities starting from this date could be justified as actions in self-defence.

107. The DRC has contended that Uganda invaded on 2 August 1998, beginning with a major airborne operation at Kitona in the west of the DRC, then rapidly capturing or taking towns in the east, and then, continuing to the north-west of the country. According to the DRC, some of this military action was taken by the UPDF alone or was taken in conjunction with anti-government rebels and/or with Rwanda. It submits that Uganda was soon in occupation of a third of the DRC and that its forces only left in April 2003.

108. Uganda insists that 2 August 1998 marked the date only of the beginning of civil war in the DRC and that, although Rwanda had invited it to join in an effort to overthrow President Kabila, it had declined. Uganda contends that it did not act jointly with Rwanda in Kitona and that it had the consent of the DRC for its military operations in the east until the date of 11 September 1998. 11 September was the date of issue of the "Position of the High Command on the Presence of the UPDF in the DRC" (hereinafter "the Ugandan High Command document") (see paragraph 109 below). Uganda now greatly increased the number of its troops from that date on. Uganda acknowledges that its military operations thereafter can only be justified by reference to an entitlement to act in self-defence.

109. The Court finds it useful at this point to reproduce in its entirety the Ugandan High Command document. This document has been relied on by both Parties in this case. The High Command document, although mentioning the date of 11 September 1998, in the Court's view, provides the basis for the operation known as operation "Safe Haven". The document reads as follows:

> "WHEREAS for a long time the DRC has been used by the enemies of Uganda as a base and launching pad for attacks against Uganda;

AND

WHEREAS the successive governments of the DRC have not been in effective control of all the territory of the Congo;

AND

WHEREAS in May 1997, on the basis of a mutual understanding the Government of Uganda deployed UPDF to jointly operate with the Congolese Army against Uganda enemy forces in the DRC;

AND

WHEREAS when an anti-Kabila rebellion erupted in the DRC the forces of the UPDF were still operating along side the Congolese Army in the DRC, against Uganda enemy forces who had fled back to the DRC;

NOW THEREFORE the High Command sitting in Kampala this 11th day of September, 1998, resolves to maintain forces of the UPDF in order to secure Uganda's legitimate security interests which are the following:

1. To deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda.
2. To enable UPDF neutralize Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan.
3. To ensure that the political and administrative vacuum, and instability caused by the fighting between the rebels and the Congolese Army and its allies do not adversely affect the security of Uganda.
4. To prevent the genocidal elements, namely, the Interahamwe, and ex-FAR, which have been launching attacks on the people of Uganda from the DRC, from continuing to do so.
5. To be in position to safeguard the territory integrity of Uganda against irresponsible threats of invasion from certain forces."

110. In turning to its assessment of the legal character of Uganda's activities at Aru, Beni, Bunia and Watsa in August 1998, the Court begins by observing that, while it is true that those localities are all in close proximity to the border, "as per the consent that had been given previously by President Kabila", the nature of Ugandan action at these locations was of a different nature from previous operations along the common border. Uganda was not in August 1998 engaging in military operations against rebels who carried out cross-border raids. Rather, it was engaged in military assaults that resulted in the taking of the town of Beni and its airfield between 7 and 8 August, followed by the taking of the town of Bunia and its airport on 13 August, and the town of Watsa and its airport at a date between 24 and 29 August.

111. The Court finds these actions to be quite outside any mutual understanding between the Parties as to Uganda's presence on Congolese territory near to the border. The issue of when any consent may have terminated is irrelevant when the actions concerned are so clearly beyond co-operation "in order to ensure peace and security along the common border", as had been confirmed in the Protocol of 27 April 1998.

112. The Court observes that the Ugandan operations against these eastern border towns could therefore only be justified, if at all, as actions in self-defence. However, at no time has Uganda sought to justify them on this basis before the Court.

113. Operation "Safe Haven", by contrast, was firmly rooted in a claimed entitlement "to secure Uganda's legitimate security interests" rather than in any claim of consent on the part of the DRC. The Court notes, however, that those most intimately involved in its execution regarded the military actions throughout August 1998 as already part and parcel of operation "Safe Haven".

114. Thus Mr. Kavuma, the Minister of State for Defence, informed the Porter Commission that the UPDF troops first crossed the border at the beginning of August 1998, at the time of the rebellion against President Kabila, "when there was confusion inside the DRC" (Porter Commission document CW/01/02 23/07/01, p. 23). He confirmed that this "entry" was "to defend our security interests". The commander of the Ugandan forces in the DRC, General Kazini, who had immediate control in the field, informing Kampala and receiving thereafter any further orders, was asked "[w]hen was 'Operation Safe Haven'? When did it commence?" He replied "[i]t was in the month of August. That very month of August 1998. 'Safe Haven' started after the capture of Beni, that was on 7 August 1998." (CW/01/03 24/07/01, p. 774.) General Kazini emphasized that the Beni operation was the watershed: "So before that . . . 'Operation Safe Haven' had not started. It was the normal UPDF operations — counter-insurgency operations in the Rwenzoris before that date of 7 August, 1998." (CW/01/03 24/07/01, p. 129.) He spoke of "the earlier plan" being that both Governments, in the form of the UPDF and the FAC, would jointly deal with the rebels along the border. "But now this new phenomenon had developed: there was a mutiny, the rebels were taking control of those areas. So we decided to launch an offensive together with the rebels, a special operation we code-named 'Safe Haven'." General Kazini was asked by Justice Porter what was the objective of this joint offensive with the rebels. General Kazini replied "[t]o crush the bandits together with their FAC allies" and confirmed that by "FAC" he meant the "Congolese Government Army" (CW/01/03 24/07/01, p. 129).

115. It is thus clear to the Court that Uganda itself actually regarded the military events of August 1998 as part and parcel of operation "Safe Haven", and not as falling within whatever "mutual understandings" there had previously been.

116. The Court has noted that within a very short space of time Ugandan forces had moved rapidly beyond these border towns. It is agreed by all that by 1 September 1998 the UPDF was at Kisangani, very far from the border. Furthermore, Lieutenant Colonel Magenyi informed the Porter Commission, under examination, that he had entered the DRC on 13 August and stayed there till mid-February 1999. He was based at Isiro, some 580 km from the border. His brigade had fought its way there: "we were fighting the ADFs who were supported by the FAC".

117. Accordingly, the Court will make no distinction between the events of August 1998 and those in the ensuing months.

118. Before this Court Uganda has qualified its action starting from mid-September 1998 as action in self-defence. The Court will thus examine whether, throughout the period when its forces were rapidly advancing across the DRC, Uganda was entitled to engage in military action in self-defence against the DRC. For these purposes, the Court will not examine whether each individual military action by the UPDF could have been characterized as action in self-defence, unless it can be shown, as a general proposition, that Uganda was entitled to act in self-defence in the DRC in the period from August 1998 till June 2003.

119. The Court first observes that the objectives of operation "Safe Haven", as stated in the Ugandan High Command document (see paragraph 109 above), were not consonant with the concept of self-defence as understood in international law.

120. Uganda in its response to the question put to it by Judge Kooijmans (see paragraph 22 above) confirms that the changed policies of President Kabila had meant that co-operation in controlling insurgency in the border areas had been replaced by "stepped-up cross-border attacks against Uganda by the ADF, which was being re-supplied and re-equipped by the Sudan and the DRC Government". The Court considers that, in order to ascertain whether Uganda was entitled to engage in military action on Congolese territory in self-defence, it is first necessary to examine the reliability of these claims. It will thus begin by an examination of the evidence concerning the role that the Sudan was playing in the DRC at the relevant time.

121. Uganda claimed that there was a tripartite conspiracy in 1998 between the DRC, the ADF and the Sudan; that the Sudan provided military assistance to the DRC's army and to anti-Ugandan rebel groups; that the Sudan used Congo airfields to deliver materiel; that the Sudan airlifted rebels and its own army units around the country; that Sudanese aircraft bombed the UPDF positions at Bunia on 26 August 1998; that a

Sudanese brigade of 2,500 troops was in Gbadolite and was preparing to engage the UPDF forces in eastern Congo; and that the DRC encouraged and facilitated stepped-up cross border attacks from May 1998 onwards.

122. The Court observes, more specifically, that in its Counter-Memorial Uganda claimed that from 1994 to 1997 anti-Ugandan insurgents "received direct support from the Government of Sudan" and that the latter trained and armed insurgent groups, in part to destabilize Uganda's status as a "good example" in Africa. For this, Uganda relied on a Human Rights Watch (hereinafter HRW) report. The Court notes that this report is on the subject of slavery in the Sudan and does not assist with the issue before the Court. It also relied on a Ugandan political report which simply claimed, without offering supporting evidence, that the Sudan was backing groups launching attacks from the DRC. It further relies on an HRW report of 2000 stating that the Sudan was providing military and logistical assistance to the LRA, in the north of Uganda, and to the SPLM/A (by which Uganda does not claim to have been attacked). The claims relating to the LRA, which are also contained in the Counter-Memorial of Uganda, have no relevance to the present case. No more relevant is the HRW report of 1998 criticizing the use of child soldiers in northern Uganda.

123. The Court has next examined the evidence advanced to support the assertion that the Sudan was supporting anti-Ugandan groups which were based in the DRC, namely FUNA, UNRF II and NALU. This consists of a Ugandan political report of 1998 which itself offers no evidence, and an address by President Museveni of 2000. These documents do not constitute probative evidence of the points claimed.

124. Uganda states that President Kabila entered into an alliance with the Sudan, "which he invited to occupy and utilise airfields in north-eastern Congo for two purposes: delivering arms and other supplies to the insurgents; and conducting aerial bombardment of Uganda towns and villages". Only President Museveni's address to Parliament is relied on. Certain assertions relating to the son of Idi Amin, and the role he was being given in the Congolese military, even were they true, prove nothing as regards the specific allegations concerning the Sudan.

125. Uganda has informed the Court that a visit was made by President Kabila in May 1998 to the Sudan, in order to put at the Sudan's disposal all the airfields in northern and eastern Congo, and to deliver arms and troops to anti-Ugandan insurgents along Uganda's border. Uganda offered as evidence President Museveni's address to Parliament, together with an undated, unsigned internal Ugandan military intelligence document. Claims as to what was agreed as a result of any such meeting that might have taken place remain unproven.

126. Uganda informed the Court that Uganda military intelligence reported that in August 1998 the Sudan airlifted insurgents from the WNBF and LRA to fight alongside Congolese forces against RPA and RCD rebels. The Court observes that, even were that proven (which in the Court's view is not the case), the DRC was entitled so to have acted. This invitation could not of itself have entitled Uganda to use force in self-defence. The Court has not been able to verify from concordant evidence the claim that the Sudan transported an entire Chadian brigade to Gbadolite (whether to join in attacks on Uganda or otherwise).

127. The Court further observes that claims that the Sudan was training and transporting FAC troops, at the request of the Congolese Government, cannot entitle Uganda to use force in self-defence, even were the alleged facts proven. In the event, such proof is not provided by the unsigned Ugandan military intelligence document, nor by a political report that Uganda relies on.

128. Article 51 of the Charter refers to the right of "individual or collective" self-defence. The Court notes that a State may invite another State to assist it in using force in self-defence. On 2 August 1998 civil war had broken out in the DRC and General Kazini later testified to the Porter Commission that operation "Safe Haven" began on 7-8 August 1998. The Ugandan written pleadings state that on 14 August 1998 Brigadier Khalil of the Sudan delivered three planeloads of weapons to the FAC in Kinshasa, and that the Sudan stepped up its training of FAC troops and airlifted them to different locations in the DRC. Once again, the evidence offered to the Court as to the delivery of the weapons is the undated, unsigned, internal Ugandan military intelligence report. This was accompanied by a mere political assertion of Sudanese backing for troops launching attacks on Uganda from the DRC. The evidentiary situation is exactly the same as regards the alleged agreement by President Kabila with the Sudanese Vice-President for joint military measures against Uganda. The same intelligence report, defective as evidence that the Court can rely on, is the sole source for the claims regarding the Sudanese bombing with an Antonov aircraft of UPDF positions in Bunia on 26 August 1998; the arrival of the Sudanese brigade in Gbadolite shortly thereafter; the deployment of Sudanese troops, along with those of the DRC, on Uganda's border on 14 September; and the pledges made on 18 September for the deployment of more Sudanese troops.

129. It was said by Uganda that the DRC had effectively admitted the threat to Uganda's security posed by the Sudan, following the claimed series of meetings between President Kabila and Sudanese officials

in May, August and September 1998. In support of these claims Uganda referred the Court to a 1999 ICG report, "How Kabila Lost His Way"; although not provided in the annexes, this report was in the public domain and the Court has ascertained its terms. Reliance is also placed on a political statement by the Ugandan High Command. The Court observes that this does not constitute reliable evidence and in any event it speaks only of the reason for the mid-September deployment of troops. The Court has also found that it cannot rely as persuasive evidence on a further series of documents said to support these various claims relating to the Sudan, all being internal political documents. The Court has examined the notarized affidavit of 2002 of the Ugandan Ambassador to the DRC, which refers to documents that allegedly were at the Ugandan Embassy in Kinshasa, showing that "the Sudanese government was supplying ADF rebels". While a notarized affidavit is entitled to a certain respect, the Court must observe that it is provided by a party in the case and provides at best indirect "information" that is unverified.

130. The Court observes that it has not been presented with evidence that can safely be relied on in a court of law to prove that there was an agreement between the DRC and the Sudan to participate in or support military action against Uganda; or that any action by the Sudan (of itself factually uncertain) was of such a character as to justify Uganda's claim that it was acting in self-defence.

131. The Court has also examined, in the context of ascertaining whether Uganda could have been said to have acted in self-defence, the evidence for Uganda's claims that from May 1998 onwards the frequency, intensity and destructiveness of cross-border attacks by the ADF "increased significantly", and that this was due to support from the DRC and from the Sudan.

132. The Court is convinced that the evidence does show a series of attacks occurring within the relevant time-frame, namely: an attack on Kichwamba Technical School of 8 June 1998, in which 33 students were killed and 106 abducted; an attack near Kichwamba, in which five were killed; an attack on Benyangule village on 26 June, in which 11 persons were killed or wounded; the abduction of 19 seminarians at Kiburara on 5 July; an attack on Kasese town on 1 August, in which three persons were killed. A sixth attack was claimed at the oral hearings to have occurred at Kijarumba, with 33 fatalities. The Court has not been able to ascertain the facts as to this latter incident.

133. The DRC does not deny that a number of attacks took place, but its position is that the ADF alone was responsible for them. The documents relied on by Uganda for its entitlement to use force in self-defence against the DRC include a report of the interrogation of a captured ADF rebel, who admits participating in the Kichwamba attack and refers to an "intention" to obtain logistical support and sanctuary from the Congolese Government; this report is not signed by the person making the statement, nor does it implicate the DRC. Uganda also relies on a document entitled "Chronological Illustration of Acts of Destabilisation by Sudan and Congo Based Dissidents", which is a Ugandan military document. Further, some articles in newspapers relied on by Uganda in fact blame only the ADF for the attacks. A very few do mention the Sudan. Only some internal documents, namely unsigned witness statements, make any reference to Congolese involvement in these acts.

134. The Court observes that this is also the case as regards the documents said to show that President Kabila provided covert support to the ADF. These may all be described as internal documents, often with no authenticating features, and containing unsigned, unauthenticated and sometimes illegible witness statements. These do not have the quality or character to satisfy the Court as to the matters claimed.

135. In oral pleadings Uganda again referred to these "stepped up attacks". Reference was made to an ICG report of August 1998, "North Kivu, into the Quagmire". Although not provided in the annexes, this report was in the public domain and the Court has ascertained its terms. It speaks of the ADF as being financed by Iran and the Sudan. It further states that the ADF is "[e]xploiting the incapacity of the Congolese Armed Forces" in controlling areas of North Kivu with neighbour Uganda. This independent report does seem to suggest some Sudanese support for the ADF's activities. It also implies that this was not a matter of Congolese policy, but rather a reflection of its inability to control events along its border.

136. Uganda relies on certain documents annexed by the DRC to its Reply. However, the Court does not find this evidence weighty and convincing. It consists of a bundle of news reports of variable reliability, which go no further than to say that unconfirmed reports had been received that the Sudan was flying military supplies to Juba and Dungu. The Court has therefore not found probative such media reports as the IRIN update for 12 to 14 September 1998, stating that Hutu rebels were being trained in southern Sudan, and the IRIN update for 16 September 1998, stating that "rebels claim Sudan is supporting Kabila at Kindu".

Neither has the Court relied on the (unreferenced and unsourced) claim that President Kabila made a secret visit to Khartoum on 25 August 1998 nor on the extract from Mr. Bemba's book *Le choix de la liberté* stating that 108 Sudanese soldiers were in the DRC, under the command of the Congolese army, to defend the area around Gbadolite.

137. Nor has the Court been able to satisfy itself as to certain internal military intelligence documents, belatedly offered, which lack explanations as to how the information was obtained (e.g. Revelations of Commander Junju Juma (former commanding officer in the ADF) of 17 May 2000, undated Revelations by Issa Twatera (former commanding officer in the ADF)).

138. A further "fact" relied on by Uganda in this case as entitling it to act in self-defence is that the DRC incorporated anti-Ugandan rebel groups and Interahamwe militia into the FAC. The Court will examine the evidence and apply the law to its findings.

139. In its Counter-Memorial, Uganda claimed that President Kabila had incorporated into his army thousands of ex-FAR and Interahamwe *génocidaires* in May 1998. A United States State Department statement in October 1998 condemned the DRC's recruitment and training of former perpetrators of the Rwandan genocide, thus giving some credence to the reports internal to Uganda that were put before the Court, even though these lacked signatures or particulars of sources relied on. But this claim, even if true, seems to have relevance for Rwanda rather than Uganda.

140. Uganda in its oral pleadings repeated the claims of incorporation of former Rwandan soldiers and Interahamwe into special units of the Congolese army. No sources were cited, nor was it explained to the Court how this might give rise to a right of self-defence on the part of Uganda.

141. In the light of this assessment of all the relevant evidence, the Court is now in a position to determine whether the use of force by Uganda within the territory of the DRC could be characterized as self-defence.

142. Article 51 of the United Nations Charter provides:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and

shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

143. The Court recalls that Uganda has insisted in this case that operation "Safe Haven" was not a use of force against an anticipated attack. As was the case also in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case, "reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised" (*I.C.J. Reports 1986*, p. 103, para. 194). The Court there found that "[a]ccordingly [it] expresses no view on that issue". So it is in the present case. The Court feels constrained, however, to observe that the wording of the Ugandan High Command document on the position regarding the presence of the UPDF in the DRC makes no reference whatever to armed attacks that have already occurred against Uganda at the hands of the DRC (or indeed by persons for whose action the DRC is claimed to be responsible). Rather, the position of the High Command is that it is necessary "to secure Uganda's legitimate security interests". The specified security needs are essentially preventative — to ensure that the political vacuum does not adversely affect Uganda, to prevent attacks from "genocidal elements", to be in a position to safeguard Uganda from irresponsible threats of invasion, to "deny the Sudan the opportunity to use the territory of the DRC to destabilize Uganda". Only one of the five listed objectives refers to a response to acts that had already taken place — the neutralization of "Uganda dissident groups which have been receiving assistance from the Government of the DRC and the Sudan".

144. While relying heavily on this document, Uganda nonetheless insisted to the Court that after 11 September 1998 the UPDF was acting in self-defence in response to attacks that had occurred. The Court has already found that the military operations of August in Beni, Bunia and Watsa, and of 1 September at Kisangani, cannot be classified as coming within the consent of the DRC, and their legality, too, must stand or fall by reference to self-defence as stated in Article 51 of the Charter.

145. The Court would first observe that in August and early September 1998 Uganda did not report to the Security Council events that it had regarded as requiring it to act in self-defence.

146. It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to

which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 *(g)* of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.

147. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the preconditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.

* *

## FINDINGS OF LAW ON THE PROHIBITION AGAINST THE USE OF FORCE

148. The prohibition against the use of force is a cornerstone of the United Nations Charter. Article 2, paragraph 4, of the Charter requires that:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these

parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.

149. The Court has found that, from 7 August 1998 onwards, Uganda engaged in the use of force for purposes and in locations for which it had no consent whatever. The Court has also found that the events attested to by Uganda did not justify recourse to the use of force in self-defence.

150. The long series of resolutions passed by the Security Council (1234 (1999), 1258 (1999), 1273 (1999), 1279 (1999), 1291 (2000), 1304 (2000), 1316 (2000), 1323 (2000), 1332 (2000), 1341 (2001), 1355 (2001), 1376 (2001), 1399 (2002), 1417 (2002), 1445 (2002), 1457 (2003), 1468 (2003), 1484 (2003), 1489 (2003), 1493 (2003), 1499 (2003), 1501 (2003), 1522 (2004), 1533 (2004), 1552 (2004), 1555 (2004), 1565 (2004), 1592 (2005), 1596 (2005), 1616 (2005) and 1621 (2005)) and the need for the United Nations to deploy MONUC, as well as the prolonged efforts by the United Nations to restore peace in the region and full sovereignty to the DRC over its territory, testify to the magnitude of the military events and the attendant suffering. The same may be said of the need to appoint a Special Rapporteur on the situation of human rights, a Special Envoy of the Secretary-General for that region, and the establishment of a panel (later reconstituted) to report on certain of the categories of facts relating to natural resources.

151. The Court recalls that on 9 April 1999 the Security Council determined the conflict to constitute a threat to peace, security and stability in the region. In demanding an end to hostilities and a political solution to the conflict (which call was to lead to the Lusaka Agreement of 10 July 1999), the Security Council deplored the continued fighting and presence of foreign forces in the DRC and called for the States concerned "to bring to an end the presence of these uninvited forces" (United Nations doc. S/RES/1234, 9 April 1999).

152. The United Nations has throughout this long series of carefully balanced resolutions and detailed reports recognized that all States in the region must bear their responsibility for finding a solution that would bring peace and stability. The Court notes, however, that this widespread responsibility of the States of the region cannot excuse the unlawful military action of Uganda.

153. The evidence has shown that the UPDF traversed vast areas of the DRC, violating the sovereignty of that country. It engaged in military operations in a multitude of locations, including Bunia, Kisangani, Gbadolite and Ituri, and many others. These were grave violations of Article 2, paragraph 4, of the Charter.

154. The Court notes that the Security Council, on 16 June 2000, expressed "outrage at renewed fighting between Ugandan and Rwandan

forces in Kisangani", and condemned it as a "violation of the sovereignty and territorial integrity of the Democratic Republic of the Congo" (United Nations doc. S/RES/1304 (2000)).

155. The Court further observes that Uganda — as is clear from the evidence given by General Kazini and General Kavuma to the Porter Commission (see above, paragraph 114) — decided in early August 1998 to launch an offensive together with various factions which sought to overthrow the Government of the DRC. The DRC has in particular claimed that, from September 1998 onwards, Uganda both created and controlled the MLC rebel group led by Mr. Bemba.

156. The DRC also points to the book written by Mr. Bemba (see paragraph 69 above) to support this contention, as well as to the fact that in the Harare Disengagement Plan the MLC and UPDF are treated as a single unit.

157. For its part, Uganda acknowledges that it assisted the MLC during fighting between late September 1998 and July 1999, while insisting that its assistance to Mr. Bemba "was always limited and heavily conditioned". Uganda has explained that it gave "just enough" military support to the MLC to help Uganda achieve its objectives of driving out the Sudanese and Chadian troops from the DRC, and of taking over the airfields between Gbadolite and the Ugandan border; Uganda asserts that it did not go beyond this.

158. The Court observes that the pages cited by the DRC in Mr. Bemba's book do not in fact support the claim of "the creation" of the MLC by Uganda, and cover the later period of March-July 1999. The Court has noted the description in Mr. Bemba's book of the training of his men by Ugandan military instructors and finds that this accords with statements he made at that time, as recorded in the ICG report of 20 August 1999. The Court has equally noted Mr. Bemba's insistence, in November 1999, that, while he was receiving support, it was he who was in control of the military venture and not Uganda. The Court is equally of the view that the Harare Disengagement Plan merely sought to identify locations of the various parties, without passing on their relationships to each other.

159. The Court has not relied on various other items offered as evidence on this point by the DRC, finding them, uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say by the DRC, or even in some cases partisan. The Court has for such reasons set aside the ICG report of 17 November, the HRW Report of March 2001, passages from the Secretary-General's report on MONUC of 4 September 2000 (where reliance on second-hand reports is acknowledged); articles in the IRIN bulletin and *Jeune Afrique*; and the statement of a

deserter who was co-operating with the Congolese military commission in preparing a statement for purposes of the present proceedings.

160. The Court concludes that there is no credible evidence to suggest that Uganda created the MLC. Uganda has acknowledged giving training and military support and there is evidence to that effect. The Court has not received probative evidence that Uganda controlled, or could control, the manner in which Mr. Bemba put such assistance to use. In the view of the Court, the conduct of the MLC was not that of "an organ" of Uganda (Article 4, International Law Commission Draft Articles on Responsibility of States for internationally wrongful acts, 2001), nor that of an entity exercising elements of governmental authority on its behalf (Art. 5). The Court has considered whether the MLC's conduct was "on the instructions of, or under the direction or control of" Uganda (Art. 8) and finds that there is no probative evidence by reference to which it has been persuaded that this was the case. Accordingly, no issue arises in the present case as to whether the requisite tests are met for sufficiency of control of paramilitaries (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 62-65, paras. 109-115).

161. The Court would comment, however, that, even if the evidence does not suggest that the MLC's conduct is attributable to Uganda, the training and military support given by Uganda to the ALC, the military wing of the MLC, violates certain obligations of international law.

162. Thus the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter "the Declaration on Friendly Relations") provides that:

> "Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force." (General Assembly resolution 2625 (XXV), 24 October 1970.)

The Declaration further provides that

> "no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State" *(ibid.)*.

These provisions are declaratory of customary international law.

163. The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war.

164. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court made it clear that the principle of non-intervention prohibits a State "to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State" (*I.C.J. Reports 1986*, p. 108, para. 206). The Court notes that in the present case it has been presented with probative evidence as to military intervention. The Court further affirms that acts which breach the principle of non-intervention "will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations" (*ibid.*, pp. 109-110, para. 209).

165. In relation to the first of the DRC's final submissions, the Court accordingly concludes that Uganda has violated the sovereignty and also the territorial integrity of the DRC. Uganda's actions equally constituted an interference in the internal affairs of the DRC and in the civil war there raging. The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.

* * *

166. Before turning to the second and third submissions of the DRC, dealing with alleged violations by Uganda of its obligations under international human rights law and international humanitarian law and the illegal exploitation of the natural resources of the DRC, it is essential for the Court to consider the question as to whether or not Uganda was an occupying Power in the parts of Congolese territory where its troops were present at the relevant time.

* *

THE ISSUE OF BELLIGERENT OCCUPATION

167. The DRC asserts that the border regions of eastern Congo were attacked by Ugandan forces between 7 and 8 August 1998, and that more areas fell under the control of Ugandan troops over the following months with the advance of the UPDF into Congolese territory. It further points

out that "the territories occupied by Uganda have varied in size as the conflict has developed": the area of occupation initially covered Orientale province and part of North Kivu province; in the course of 1999 it increased to cover a major part of Equateur province. The DRC specifies that the territories occupied extended from Bunia and Beni, close to the eastern border, to Bururu and Mobenzene, in the far north-western part of the DRC; and that "the southern boundary of the occupied area [ran] north of the towns of Mbandaka westwards, then [extended] east to Kisangani, rejoining the Ugandan border between Goma and Butembo". According to the DRC, the occupation of its territory ended with the withdrawal of the Ugandan army on 2 June 2003.

168. The DRC contends that "the UPDF set up an occupation zone, which it administered both directly and indirectly", in the latter case by way of the creation of and active support for various Congolese rebel factions. As an example of such administration, the DRC refers to the creation of a new province within its territory. In June 1999, the Ugandan authorities, in addition to the existing ten provinces, created an 11th province in the north-east of the DRC, in the vicinity of the Ugandan frontier. The "Kibali-Ituri" province thus created was the result of merging the districts of Ituri and Haut-Uélé, detached from Orientale province. On 18 June 1999 General Kazini, commander of the Ugandan forces in the DRC, "appointed Ms Adèle Lotsove, previously Deputy Governor of Orientale Province, to govern this new province". The DRC further asserts that acts of administration by Uganda of this province continued until the withdrawal of Ugandan troops. In support of this contention, the DRC states that Colonel Muzoora, of the UPDF, exercised *de facto* the duties of governor of the province between January and May 2001, and that "at least two of the five governors who succeeded Ms Lotsove up until 2003 were relieved of their duties by the Ugandan military authorities, sometimes under threat of force". The DRC claims that the Ugandan authorities were directly involved "in the political life of the occupied regions" and, citing the Ugandan daily newspaper *New Vision*, that "Uganda has even gone so far as to supervise local elections". The DRC also refers to the Sixth report of the Secretary-General on MONUC, which describes the situation in Bunia (capital of Ituri district) in the following terms: "[s]ince 22 January, MONUC military observers in Bunia have reported the situation in the town to be tense but with UPDF in effective control".

169. Finally, according to the DRC, the fact that Ugandan troops were not present in every location in the vast territory of the north and east of the DRC "in no way prevents Uganda from being considered an occupying power in the localities or areas which were controlled by its armed forces". The DRC claims that the notion of occupation in inter-

national law, as reflected in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (hereinafter "the Hague Regulations of 1907"), is closely tied to the control exercised by the troops of the State operating on parts, extensive or not, of the territory of the occupied State. Thus, "rather than the omnipresence of the occupying State's armed forces, it is that State's ability to assert its authority which the Hague Regulations look to as the criterion for defining the notion of occupying State".

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170. For its part, Uganda denies that it was an occupying Power in the areas where UPDF troops were present. It argues that, in view of the small number of its troops in the territory of the DRC, i.e. fewer than 10,000 soldiers "at the height of the deployment", they could not have occupied vast territories as claimed by the DRC. In particular, Uganda maintains that its troops "were confined to the regions of eastern Congo adjacent to the Uganda border and to designated strategic locations, especially airfields, from which Uganda was vulnerable to attack by the DRC and her allies". Thus, there was "no zone of Ugandan military occupation and there [was] no Ugandan military administration in place". Uganda points out, moreover, that it "ensured that its troops refrained from all interferences in the local administration, which was run by the Congolese themselves". Uganda further notes that "it was the rebels of the Congo Liberation Movement (MLC) and of the Congolese Rally for Democracy (RDC) which controlled and administered these territories, exercising *de facto* authority".

171. As for the appointment of a governor of Ituri district, which Uganda characterizes as "the only attempt at interference in this local administration by a Ugandan officer", Uganda states that this action was "motivated by the desire to restore order in the region of Ituri in the interests of the population". Furthermore, Uganda emphasizes that this step was "immediately opposed and disavowed by the Ugandan authorities" and that the officer in question, General Kazini, was firmly reprimanded by his superiors, who instituted disciplinary measures against him.

* *

172. The Court observes that, under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised (see *Legal Con-*

*sequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 167, para. 78, and p. 172, para. 89).

173. In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an "occupying Power" in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied.

174. The Court will now ascertain whether parts of the territory of the DRC were placed under the authority of the Ugandan army in the sense of Article 42 of the Hague Regulations of 1907. In this regard, the Court first observes that the territorial limits of any zone of occupation by Uganda in the DRC cannot be determined by simply drawing a line connecting the geographical locations where Ugandan troops were present, as has been done on the sketch-map presented by the DRC (see paragraphs 55 and 73 above).

175. It is not disputed between the Parties that General Kazini, commander of the Ugandan forces in the DRC, created the new "province of Kibali-Ituri" in June 1999 and appointed Ms Adèle Lotsove as its Governor. Various sources of evidence attest to this fact, in particular a letter from General Kazini dated 18 June 1999, in which he appoints Ms Adèle Lotsove as "provisional Governor" and gives suggestions with regard to questions of administration of the new province. This is also supported by material from the Porter Commission. The Court further notes that the Sixth report of the Secretary-General on MONUC (S/2001/128 of 12 February 2001) states that, according to MONUC military observers, the UPDF was in effective control in Bunia (capital of Ituri district).

176. The Court considers that regardless of whether or not General Kazini, commander of the Ugandan forces in the DRC, acted in violation of orders and was punished as a result, his conduct is clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power.

177. The Court observes that the DRC makes reference to "indirect administration" through various Congolese rebel factions and to the supervision by Ugandan officers over local elections in the territories under UPDF control. However, the DRC does not provide any specific evidence to show that authority was exercised by Ugandan armed forces

in any areas other than in Ituri district. The Court further notes that, although Uganda recognized that as of 1 September 1998 it exercised "administrative control" at Kisangani Airport, there is no evidence in the case file which could allow the Court to characterize the presence of Ugandan troops stationed at Kisangani Airport as occupation in the sense of Article 42 of the Hague Regulations of 1907. Neither can the Court uphold the DRC's contention that Uganda was an occupying Power in areas outside Ituri controlled and administered by Congolese rebel movements. As the Court has already indicated, the evidence does not support the view that these groups were "under the control" of Uganda (see paragraph 160 above).

178. The Court thus concludes that Uganda was the occupying Power in Ituri at the relevant time. As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.

180. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation.

* * *

VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW: CONTENTIONS OF THE PARTIES

181. It is recalled (see paragraph 25 above) that in its second submission the DRC requests the Court to adjudge and declare:

"2. That the Republic of Uganda, by committing acts of violence against nationals of the Democratic Republic of the Congo, by killing and injuring them or despoiling them of their property, by failing to take adequate measures to prevent violations of human rights in the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:

— the principle of conventional and customary law imposing an obligation to respect, and ensure respect for, fundamental human rights, including in times of armed conflict, in accordance with international humanitarian law;
— the principle of conventional and customary law imposing an obligation, at all times, to make a distinction in an armed conflict between civilian and military objectives;
— the right of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural."

182. The DRC cites various sources of evidence in support of its claims, including the 2004 MONUC report on human rights violations in Ituri, reports submitted by the Special Rapporteur of the United Nations Commission on Human Rights, and testimony gathered on the ground by a number of Congolese and international non-governmental organizations. The DRC argues that it has "presented abundant evidence of violations of human rights attributable to Uganda, based on reliable, varied and concordant sources". In particular, it notes that many of the grave accusations are the result of careful fieldwork carried out by MONUC experts, and attested to by other independent sources.

183. The DRC claims that the Ugandan armed forces perpetrated wide-scale massacres of civilians during their operations in the DRC, in particular in the Ituri region, and resorted to acts of torture and other forms of inhumane and degrading treatment. The DRC claims that soldiers of the UPDF carried out acts of reprisal directed against the civilian inhabitants of villages presumed to have harboured anti-Ugandan fighters. In the specific context of the conflict in Ituri, the DRC argues that the findings of the 2004 MONUC report on human rights violations in Ituri clearly establish the fact that the Ugandan armed forces participated in the mass killings of civilians.

184. The DRC maintains that, in the areas occupied by the UPDF, Ugandan soldiers plundered civilian property for their "personal profit" and engaged in the deliberate destruction of villages, civilian dwellings

and private property. With regard to the clashes between Uganda and Rwanda in the city of Kisangani in 1999 and 2000, the DRC refers, in particular, to Security Council resolution 1304 (2000), in which the Council deplored, *inter alia*, "the damage to property inflicted by the forces of Uganda and Rwanda on the Congolese population". The DRC also alleges that the property and resources of the civilian populations in the eastern Congolese regions occupied by the Ugandan army were destroyed on certain occasions by UPDF soldiers as part of a "scorched earth" policy aimed at combating ADF rebels.

185. The DRC claims that several hundred Congolese children were forcibly recruited by the UPDF and taken to Uganda for ideological and military training in the year 2000. In particular, according to the DRC, many children were abducted in August 2000 in the areas of Bunia, Beni and Butembo and given military training at the Kyankwanzi camp in Uganda with a view to incorporating them into the Ugandan armed forces. The DRC maintains that the abducted children were only able to leave the Kyankwanzi training camp for final repatriation to the DRC at the beginning of July 2001 after persistent efforts by UNICEF and the United Nations to ensure their release.

186. The DRC contends that the Ugandan armed forces failed to protect the civilian population in combat operations with other belligerents. Thus it alleges that attacks were carried out by the UPDF without any distinction being made between combatants and non-combatants. In this regard, the DRC makes specific reference to fighting between Ugandan and Rwandan forces in Kisangani in 1999 and 2000, causing widespread loss of life within the civilian population and great damage to the city's infrastructure and housing. In support of its claims, the DRC cites various reports of Congolese and international non-governmental organizations and refers extensively to the June 2000 MONUC Report and to the December 2000 report by the United Nations inter-agency assessment mission, which went to Kisangani pursuant to Security Council resolution 1304 (2000). The DRC notes that the latter report referred to "systematic violations of international humanitarian law and indiscriminate attacks on civilians" committed by Uganda and Rwanda as they fought each other.

187. The DRC claims that Ugandan troops were involved in ethnic conflicts between groups in the Congolese population, particularly between Hema and Lendu in the Ituri region, resulting in thousands of civilian casualties. According to the DRC, UPDF forces openly sided with the Hema ethnic group because of "alleged ethnic links between its members and the Ugandan population". In one series of cases, the DRC alleges that Ugandan armed forces provided direct military support to Congolese factions and joined with them in perpetrating massacres of

civilians. The DRC further claims that Uganda not only supported one of the groups but also provided training and equipment for other groups over time, thereby aggravating the local conflicts.

188. The DRC also asserts that, on several occasions, Ugandan forces passively witnessed atrocities committed by the members of local militias in Ituri. In this connection, the DRC refers to various incidents attested to by reports emanating from the United Nations and MONUC, and from Congolese and international non-governmental organizations. In particular, the DRC refers to a massacre of ethnic Lendu carried out by ethnic Hema militias in Bunia on 19 January 2001. The DRC states that similar events occurred in other localities.

189. The DRC charges that Uganda breached its obligation of vigilance incumbent upon it as an occupying Power by failing to enforce respect for human rights and international humanitarian law in the occupied regions, and particularly in Ituri. The DRC argues that the need to ensure full respect for fundamental rights in the territories occupied by the Ugandan army was similarly emphasized by the United Nations Commission on Human Rights.

190. The DRC argues that, by its actions, Uganda has violated provisions of the Hague Regulations of 1907; the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; the International Covenant on Civil and Political Rights; the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977; the African Charter on Human and Peoples' Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the African Charter on the Rights and Welfare of the Child.

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191. Uganda contends that the DRC has consistently failed to provide any credible evidentiary basis to support its allegations of the involvement of Ugandan troops in massacres, torture and ill-treatment of Congolese civilians, supposed acts of plunder and scorched earth policy, destruction of Congolese villages and civilian dwellings, and looting of private property. In this regard, Uganda refers to each of the incidents alleged by the DRC and argues that the documentation relied upon by the DRC to prove its claims either fails to show that the incident occurred, or fails to show any involvement of Ugandan troops. In more general terms, Uganda points to the unreliability of the evidence adduced by the DRC, claiming that it does not distinguish between the various armies operating in eastern Congo during the relevant period. Uganda also maintains that the DRC relies on partisan sources of information,

such as the *Association africaine des droits de l'homme* (ASADHO), which Uganda describes as a pro-Congolese non-governmental organization. Uganda further asserts that the 2004 MONUC report on human rights violations in Ituri, heavily relied on by the DRC to support its various claims in connection with the conflict in Ituri, "is inappropriate as a form of assistance in any assessment accompanied by judicial rigour". Uganda states, *inter alia*, that in its view, "MONUC did not have a mission appropriate to investigations of a specifically legal character" and that "both before and after deployment of the multinational forces in June 2003, there were substantial problems of access to Ituri".

192. Uganda contends that the DRC's allegations regarding the forced recruitment of child soldiers by Uganda are "framed only in general terms" and lack "evidentiary support". According to Uganda, the children "were rescued" in the context of ethnic fighting in Bunia and a mutiny within the ranks of the RCD-ML rebel group, and taken to the Kyankwanzi Leadership Institute for care and counselling in 2001. Uganda states that the children were subsequently repatriated under the auspices of UNICEF and the Red Cross. In support of its claims, Uganda refers to the Fifth and Sixth reports on MONUC of the Secretary-General of the United Nations. Uganda also maintains that it received expressions of gratitude from UNICEF and from the United Nations for its role in assisting the children in question.

193. Uganda reserves its position on the events in Kisangani in 2000 and, in particular, on the admissibility of issues of responsibility relating to these events (see paragraphs 197-198 below).

194. Uganda claims that the DRC's assertion that Ugandan forces incited ethnic conflicts among groups in the Congolese population is false and furthermore is not supported by credible evidence.

195. Uganda argues that no evidence has been presented to establish that Uganda had any interest in becoming involved in the civil strife in Ituri. Uganda asserts that, from early 2001 until the final departure of its troops in 2003, Uganda did what it could to promote and maintain a peaceful climate in Ituri. Uganda believes that its troops were insufficient to control the ethnic violence in that region, "and that only an international force under United Nations auspices had any chance of doing so".

* *

ADMISSIBILITY OF CLAIMS IN RELATION TO EVENTS IN KISANGANI

196. Before considering the merits of the DRC's allegations of violations by Uganda of international human rights law and international humanitarian law, the Court must first deal with a question raised by Uganda concerning the admissibility of the DRC's claims relating to Uganda's responsibility for the fighting between Ugandan and Rwandan troops in Kisangani in June 2000.

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197. Uganda submits that

> "the Court lacks competence to deal with the events in Kisangani in June 2000 in the absence of consent on the part of Rwanda, and, in the alternative, even if competence exists, in order to safeguard the judicial function the Court should not exercise that competence".

Moreover, according to Uganda, the terms of the Court's Order of 1 July 2000 indicating provisional measures were without prejudice to issues of fact and imputability; neither did the Order prejudge the question of the jurisdiction of the Court to deal with the merits of the case.

198. Concerning the events in Kisangani, Uganda maintains that Rwanda's legal interests form "the very subject-matter" of the decision which the DRC is seeking, and that consequently a decision of the Court covering these events would infringe the "indispensable third party" principle referred to in the cases concerning *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America)* (*Judgment, I.C.J. Reports 1954*, p. 19, and *East Timor (Portugal* v. *Australia)* (*Judgment, I.C.J. Reports 1995*, p. 90). According to Uganda, the circumstances in the present case produce the same type of dilemma faced by the Court in those cases. In particular, Uganda states that "[t]he culpability or otherwise of Uganda, as a consequence of the conduct of its armed forces, can only be assessed on the basis of appropriate legal standards if the conduct of the armed forces of Rwanda is assessed at the same time". Uganda further argues that, "[i]n the absence of evidence as to the role of Rwanda, it is impossible for the Court to know whether the justification of self-defence is available to Uganda or, in respect of the quantum of damages, how the role of Rwanda is to be taken into account". Uganda contends that, "[i]f the conflict was provoked by Rwanda, this would materially and directly affect the responsibility of Uganda vis-à-vis the DRC". Uganda also claims that the necessity to safeguard the judicial function of the Court, as referred to in the case concerning *Northern Cameroons* (*Preliminary Objections, Judgment,*

*I.C.J. Reports 1963*, pp. 33-34, 37, 38), would preclude the Court from exercising any jurisdiction it might have in relation to the events that occurred in Kisangani.

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199. With reference to the objection raised by Uganda regarding the Court's jurisdiction to rule on the events in Kisangani in the absence of Rwanda from the proceedings, the DRC asserts that "Rwanda's absence from these proceedings is totally irrelevant and cannot prevent the Court from ruling on the question of Uganda's responsibility". According to the DRC,

> "[t]he purpose of the DRC's claim is simply to secure recognition of *Uganda's sole* responsibility for the use of force by its own armed forces in Congolese territory . . . in and around Kisangani, as well as for the serious violations of essential rules of international humanitarian law committed on those occasions" (emphasis in original).

200. The DRC argues that the Court is competent to adjudicate on the events in Kisangani "without having to consider the question of whether it should be Rwanda or Uganda that is held responsible for initiating the hostilities that led to the various clashes". The DRC refers to the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)* in support of its contention that there is nothing to prevent the Court from "exercising its jurisdiction with regard to a respondent State, even in the absence of other States implicated in the Application". The DRC argues that the *Monetary Gold* and *East Timor* cases, relied on by Uganda to support its arguments, are fundamentally different from the present case. According to the DRC, the application which it filed against Uganda "is entirely autonomous and independent" and does not bear on any separate proceedings instituted by the DRC against other States. The DRC maintains that "[i]t is Uganda's responsibility which is the subject-matter of the Congolese claim, and there is no other 'indispensable party' whose legal interests would form 'the very subject-matter of the decision', as in the *Monetary Gold* or *East Timor* precedents".

201. The DRC points out that the Court, in its Order of 1 July 2000 indicating provisional measures, "refused to accept Uganda's reasoning and agreed to indicate certain measures specifically relating to the events in Kisangani despite the absence of Rwanda from the proceedings".

202. In light of the above considerations, the DRC argues that Uganda's objection must be rejected.

* *

203. The Court has had to examine questions of this kind on previous

occasions. In the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, the Court observed that it is not precluded from adjudicating upon the claims submitted to it in a case in which a third State "has an interest of a legal nature which may be affected by the decision in the case", provided that "the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for". The Court further noted that:

> "In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the *Monetary Gold* case. In the latter case, the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim . . . In the *Monetary Gold* case the link between, on the one hand, the necessary findings regarding, Albania's alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical . . .
>
> . . . . . .
>
> In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly the Court cannot decline to exercise its jurisdiction." (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 261-262, para. 55.)

204. The Court considers that this jurisprudence is applicable in the current proceedings. In the present case, the interests of Rwanda clearly do not constitute "the very subject-matter" of the decision to be rendered by the Court on the DRC's claims against Uganda, nor is the determination of Rwanda's responsibility a prerequisite for such a decision. The fact that some alleged violations of international human rights law and international humanitarian law by Uganda occurred in the course of hostilities between Uganda and Rwanda does not impinge on this finding. Thus it is not necessary for Rwanda to be a party to this case for the Court to be able to determine whether Uganda's conduct was a violation of these rules of international law.

* *

VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW: FINDINGS OF THE COURT

205. The Court will now examine the allegations by the DRC concerning violations by Uganda of its obligations under international human rights law and international humanitarian law during its military intervention in the DRC. For these purposes, the Court will take into consideration evidence contained in certain United Nations documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources.

In order to rule on the DRC's claim, it is not necessary for the Court to make findings of fact with regard to each individual incident alleged.

206. The Court first turns to the DRC's claims that the Ugandan armed forces caused loss of life to the civilian population, committed acts of torture and other forms of inhumane treatment, and destroyed villages and dwellings of civilians. The Court observes that the report of the Special Rapporteur of the Commission on Human Rights of 18 January 2000 (E/CN/4/2000/42, para. 112) refers to massacres carried out by Ugandan troops in Beni on 14 November 1999. The Secretary-General in his Third Report on MONUC concluded that Rwandan and Ugandan armed forces "should be held accountable for the loss of life and the property damage they inflicted on the civilian population of Kisangani" (doc. S/2000/566 of 12 June 2000, para. 79). Security Council resolution 1304 (2000) of 16 June 2000 deplored "the loss of civilian lives, the threat to the civilian population and the damage to property inflicted by the forces of Uganda and Rwanda on the Congolese population". Several incidents of atrocities committed by Ugandan troops against the civilian population, including torture and killings, are referred to in the report of the Special Rapporteur of the Commission on Human Rights of 1 February 2001 (E/CN/4/2001/40, paras. 112, 148-151). MONUC's special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, paras. 19, 42-43, 62) contains much evidence of direct involvement by UPDF troops, in the context of the Hema-Lendu ethnic conflict in Ituri, in the killings of civilians and the destruction of their houses. In addition to particular incidents, it is stated that "[h]undreds of localities were destroyed by UPDF and the Hema South militias" (para. 21); "UPDF also carried out widespread bombing and destruction of hundreds of villages from 2000 to 2002" (para. 27).

207. The Court therefore finds the coincidence of reports from credible sources sufficient to convince it that massive human rights violations and grave breaches of international humanitarian law were committed by the UPDF on the territory of the DRC.

208. The Court further finds that there is sufficient evidence of a reliable quality to support the DRC's allegation that the UPDF failed to protect the civilian population and to distinguish between combatants and non-combatants in the course of fighting against other troops, especially the FAR. According to the report of the inter-agency assessment mission to Kisangani (established pursuant to paragraph 14 of Security Council resolution 1304 (2000) (doc. S/2000/1153 of 4 December 2000, paras. 15-16)), the armed conflict between Ugandan and Rwandan forces in Kisangani led to

> "fighting spreading into residential areas and indiscriminate shelling occurring for 6 days . . .
>
> Over 760 civilians were killed, and an estimated 1,700 wounded. More than 4,000 houses were partially damaged, destroyed or made uninhabitable. Sixty-nine schools were shelled, and other public buildings were badly damaged. Medical facilities and the cathedral were also damaged during the shelling, and 65,000 residents were forced to flee the fighting and seek refuge in nearby forests."

MONUC's special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, para. 73) states that on 6 and 7 March 2003,

> "during and after fighting between UPC [Union des patriotes congolais] and UPDF in Bunia, several civilians were killed, houses and shops were looted and civilians were wounded by gunshots . . . Stray bullets reportedly killed several civilians; others had their houses shelled." (Para. 73.)

In this context, the Court notes that indiscriminate shelling is in itself a grave violation of humanitarian law.

209. The Court considers that there is also persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district. The reports of the Special Rapporteur of the Commission on Human Rights (doc. A/55/403 of 20 September 2000, para. 26 and E/CN/4/2001/40 of 1 February 2001, para. 31) state that the Ugandan presence in Ituri caused a conflict between the Hema (of Ugandan origin) and the Lendu. According to these reports, land was seized from the Lendu by the Hema with the encouragement and military support of Ugandan soldiers. The reports also state that the confrontations in August 2000 resulted in some 10,000 deaths and the displacement of some 50,000 people, and that since the beginning of the conflict the UPDF had failed to take action to put an end to the violence. The Sixth Report of the Secretary-General on MONUC (doc. S/2001/128 of 12 February 2001, para. 56) stated that "UPDF troops stood by during the killings and failed to protect the civilians". It is also indicated in MONUC's special

report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, para. 6), that

> "Ugandan army commanders already present in Ituri, instead of trying to calm the situation, preferred to benefit from the situation and support alternately one side or the other according to their political and financial interests".

The above reports are consistent in the presentation of facts, support each other and are corroborated by other credible sources, such as the HRW Report "Ituri: Covered in Blood. Ethnically Targeted Violence in Northeastern DR Congo", July 2003 (available at http://hrw.org/reports/2003/ituri0703/).

210. The Court finds that there is convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control. The Fifth Report of the Secretary-General on MONUC (doc. S/2000/1156 of 6 December 2000, para. 75) refers to the confirmed "cross-border deportation of recruited Congolese children from the Bunia, Beni and Butembo region to Uganda". The Eleventh Report of the Secretary-General on MONUC (doc. S/2002/621 of 5 June 2002, para. 47) points out that the local UPDF authorities in and around Bunia in Ituri district "have failed to prevent the fresh recruitment or re-recruitment of children" as child soldiers. MONUC's special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, para. 148) refers to several incidents where Congolese children were transferred to UPDF training camps for military training.

211. Having examined the case file, the Court considers that it has credible evidence sufficient to conclude that the UPDF troops committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.

212. With regard to the claim by the DRC that Uganda carried out a

deliberate policy of terror, confirmed in its view by the almost total impunity of the soldiers and officers responsible for the alleged atrocities committed on the territory of the DRC, the Court, in the absence of specific evidence supporting this claim, does not consider that this allegation has been proven. The Court, however, wishes to stress that the civil war and foreign military intervention in the DRC created a general atmosphere of terror pervading the lives of the Congolese people.

*

213. The Court turns now to the question as to whether acts and omissions of the UPDF and its officers and soldiers are attributable to Uganda. The conduct of the UPDF as a whole is clearly attributable to Uganda, being the conduct of a State organ. According to a well-established rule of international law, which is of customary character, "the conduct of any organ of a State must be regarded as an act of that State" (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 87, para. 62). The conduct of individual soldiers and officers of the UPDF is to be considered as the conduct of a State organ. In the Court's view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit.

214. It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.

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215. The Court, having established that the conduct of the UPDF and of the officers and soldiers of the UPDF is attributable to Uganda, must now examine whether this conduct constitutes a breach of Uganda's international obligations. In this regard, the Court needs to determine the rules and principles of international human rights law and international humanitarian law which are relevant for this purpose.

216. The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and interna-

tional human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In this Advisory Opinion the Court found that

> "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law." (*I.C.J. Reports 2004*, p. 178, para. 106.)

It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories (*ibid.*, pp. 178-181, paras. 107-113).

217. The Court considers that the following instruments in the fields of international humanitarian law and international human rights law are applicable, as relevant, in the present case:

— Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907. Neither the DRC nor Uganda are parties to the Convention. However, the Court reiterates that "the provisions of the Hague Regulations have become part of customary law" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 172, para. 89) and as such are binding on both Parties;
— Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949. The DRC's (at the time Republic of the Congo (Léopoldville)) notification of succession dated 20 February 1961 was deposited on 24 February 1961, with retroactive effect as from 30 June 1960, the date on which the DRC became independent; Uganda acceded on 18 May 1964;
— International Covenant on Civil and Political Rights of 19 December 1966. The DRC (at the time Republic of Zaire) acceded to the Covenant on 1 November 1976; Uganda acceded on 21 June 1995;
— Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The DRC (at the time Republic of

Zaire) acceded to the Protocol on 3 June 1982; Uganda acceded on 13 March 1991;
— African Charter on Human and Peoples' Rights of 27 June 1981. The DRC (at the time Republic of Zaire) acceded to the Charter on 20 July 1987; Uganda acceded on 10 May 1986;
— Convention on the Rights of the Child of 20 November 1989. The DRC (at the time Republic of Zaire) ratified the Convention on 27 September 1990 and Uganda on 17 August 1990;
— Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 25 May 2000. The Protocol entered into force on 12 February 2002. The DRC ratified the Protocol on 11 November 2001; Uganda acceded on 6 May 2002.

218. The Court moreover emphasizes that, under common Article 2 of the four Geneva Conventions of 12 August 1949,

> "[i]n addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."

219. In view of the foregoing, the Court finds that the acts committed by the UPDF and officers and soldiers of the UPDF (see paragraphs 206-211 above) are in clear violation of the obligations under the Hague Regulations of 1907, Articles 25, 27 and 28, as well as Articles 43, 46 and 47 with regard to obligations of an occupying Power. These obligations are binding on the Parties as customary international law. Uganda also violated the following provisions of the international humanitarian law and international human rights law instruments, to which both Uganda and the DRC are parties:

— Fourth Geneva Convention, Articles 27 and 32 as well as Article 53 with regard to obligations of an occupying Power;

— International Covenant on Civil and Political Rights, Articles 6, paragraph 1, and 7;
— First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2;
— African Charter on Human and Peoples' Rights, Articles 4 and 5;

— Convention on the Rights of the Child, Article 38, paragraphs 2 and 3;
— Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, 4, 5 and 6.

220. The Court thus concludes that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.

221. The Court finally would point out that, while it has pronounced on the violations of international human rights law and international humanitarian law committed by Ugandan military forces on the territory of the DRC, it nonetheless observes that the actions of the various parties in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population. The Court is painfully aware that many atrocities have been committed in the course of the conflict. It is incumbent on all those involved in the conflict to support the peace process in the DRC and other peace processes in the Great Lakes area, in order to ensure respect for human rights in the region.

* * *

ILLEGAL EXPLOITATION OF NATURAL RESOURCES

222. In its third submission the DRC requests the Court to adjudge and declare:

> "3. That the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources, by pillaging its assets and wealth, by failing to take adequate measures to prevent the illegal exploitation of the resources of the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:
>
> — the applicable rules of international humanitarian law;
> — respect for the sovereignty of States, including over their natural resources;
> — the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;
> — the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters."

223. The DRC alleges that, following the invasion of the DRC by

Uganda in August 1998, the Ugandan troops "illegally occupying" Congolese territory, acting in collaboration with Congolese rebel groups supported by Uganda, systematically looted and exploited the assets and natural resources of the DRC. According to the DRC, after the systematic looting of natural resources, the Ugandan military and the rebel groups which it supported "moved on to another phase in the expropriation of the wealth of Congo, by direct exploitation of its resources" for their own benefit. The DRC contends that the Ugandan army took outright control of the entire economic and commercial system in the occupied areas, with almost the entire market in consumer goods being controlled by Ugandan companies and businessmen. The DRC further claims that UDPF forces have engaged in hunting and plundering of protected species. The DRC charges that the Ugandan authorities did nothing to put an end to these activities and indeed encouraged the UPDF, Ugandan companies and rebel groups supported by Uganda to exploit natural resources on Congolese territory.

224. The DRC maintains that the highest Ugandan authorities, including President Museveni, were aware of the UPDF forces' involvement in the plundering and illegal exploitation of the natural resources of the DRC. Moreover, the DRC asserts that these activities were tacitly supported or even encouraged by the Ugandan authorities, "who saw in them a way of financing the continuation of the war in the DRC, 'rewarding' the military involved in this operation and opening up new markets to Ugandan companies".

225. The DRC claims that the illegal exploitation, plundering and looting of the DRC's natural resources by Uganda have been confirmed in a consistent manner by a variety of independent sources, among them the Porter Commission Report, the United Nations Panel reports and reports of national organs and non-governmental organizations. According to the DRC, the facts which it alleges are also corroborated by the economic data analysed in various reports by independent experts.

226. The DRC contends that illegal exploitation, plundering and looting of the DRC's natural resources constitute violations by Uganda of "the sovereignty and territorial integrity of the DRC, more specifically of the DRC's sovereignty over its natural resources". In this regard the DRC refers to the right of States to their natural resources and cites General Assembly resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, adopted on 14 December 1962; the Declaration on the Establishment of a New International Economic Order contained in United Nations General Assembly resolution 3201 (S.VI) of 1 May 1974 and the Charter of Economic Rights and Duties of States, adopted by the United Nations General Assembly in its resolution 3281 (XXIX) of 12 December 1974.

227. The DRC claims that Uganda in all circumstances is responsible

for acts of plunder and illegal exploitation of the resources of the DRC committed by officers and soldiers of the UPDF as an organ of the Republic of Uganda. For the DRC it is not relevant whether members of the Ugandan army acted under, or contrary to, official orders from their Government or in an official or private capacity.

228. Turning to the duty of vigilance, the DRC argues that, in relation to the obligation to respect the sovereignty of States over their natural resources, this duty implies that a State should take adequate measures to ensure that its military forces, nationals or groups that it controls do not engage in illegal exploitation of natural resources on the territory of another State. The DRC claims that all activities involving exploitation of natural resources conducted by Ugandan companies and nationals and rebel movements supported by Uganda were acts of illegal exploitation. The DRC further contends that Uganda took no proper steps to bring to an end the illegal exploitation of the natural resources of the DRC by members of Ugandan military, private companies or nationals and by the Congolese rebel movements that it controlled and supported, thus violating its duty of vigilance.

229. The DRC asserts that, by engaging in the illegal exploitation, plundering and looting of the DRC's natural resources, Uganda also violated its obligations as an occupying Power under the *jus in bello*. According to the DRC, "the detailed rules of the law of armed conflict in relation to the exploitation of natural resources have to be considered against the background of this fundamental principle of permanent sovereignty over natural resources". This principle, in the view of the DRC, continues to apply at all times, including during armed conflict and occupation.

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230. For its part, Uganda maintains that the DRC has not provided reliable evidence to corroborate its allegations regarding the looting and illegal exploitation of natural resources of the DRC by Uganda. It claims that neither the United Nations Panel reports nor the Porter Commission Report can be considered as supporting the DRC's allegations. Moreover, according to Uganda, the limited nature of its intervention is inconsistent with the DRC's contention that Uganda occupied the eastern Congo in order to exploit natural resources. Nor, in view of this fact, could Uganda exercise the pervasive economic control required to exploit the areas as alleged by the DRC.

231. Uganda further denies that it has violated the principle of the Congolese people's sovereignty over its natural resources. It maintains that this principle, "which was shaped in a precise historical context (that of decolonization) and has a very precise purpose", cannot be applicable in the context of the present case. Uganda claims that individual acts of

members of the Ugandan military forces committed in their private capacity and in violation of orders and instructions cannot serve as basis for attributing to Uganda a wrongful act violating the principle of the permanent sovereignty of Congolese people over their natural resources.

232. Uganda likewise denies that it violated its duty of vigilance with regard to acts of illegal exploitation in the territories where its troops were present. Uganda does not agree with the contention that it had a duty of vigilance with regard to the Congolese rebel groups, asserting that it did not control those groups and had no power over their administrative acts. Uganda also maintains that, "within the limits of its capabilities, it exercised a high degree of vigilance to ensure that its nationals did not, through their actions, infringe the Congolese people's right to control their natural resources".

233. Uganda also contests the view that the alleged breach of its "duty of vigilance" is founded on Uganda's failure to prohibit trade "between its nationals and the territories controlled by the rebels in eastern Congo". In Uganda's view, the *de facto* authority of Congolese rebel movements established in eastern Congo could not affect the commercial relations between the eastern Congo, Uganda and several other States, which were maintained in the interests of the local populations and essential to the populations' survival, and therefore "did not impose an obligation to apply commercial sanctions".

234. Uganda states that the DRC's contentions that Uganda failed to take action against illegal activity are without merit. In this regard it refers to a radio broadcast by President Museveni in December 1998, which made "it clear that no involvement of the members of the Ugandan armed forces in commercial activities in eastern Congo would be tolerated". Furthermore, Uganda points out that "the Porter Commission found that there was no Ugandan governmental policy to exploit the DRC's natural resources". It maintains that the Porter Commission confirmed that the Ugandan Government's policy was to forbid its officers and soldiers from engaging in any business or commercial activities in the DRC. However, in cases where the Porter Commission found that there was evidence to support allegations that individual soldiers engaged in commercial activities and looting "acting in a purely private capacity for their personal enrichment", the Government of Uganda accepted the Commission's recommendations to initiate criminal investigations against the alleged offenders.

235. Uganda recognizes that, as found by the Porter Commission, there were instances of illegal commercial activities or looting committed by certain members of the Ugandan military forces acting in their private capacity and in violation of orders and instructions given to them "by the highest State authorities". However, Uganda maintains that these individual acts cannot be characterized as "internationally wrongful acts" of

Uganda. For Uganda, violations by Ugandan nationals of the internal law of Uganda or of certain Congolese rules and practices in the territories where rebels exercised *de facto* administrative authority, referred to by the Porter Commission, do not necessarily constitute an internationally wrongful act, "for it is well known that the originating act giving rise to international responsibility is not an act characterized as 'illegal' by the domestic law of the State but an 'internationally wrongful act' imputable to a State".

236. Finally, Uganda asserts that the DRC neither specified precisely the wrongful acts for which it seeks to hold Uganda internationally responsible nor did it demonstrate that "it suffered *direct injury* as a result of acts which it seeks to impute to Uganda". In this regard Uganda refers to the Porter Commission, which, according to Uganda, concluded that "the overwhelming majority, if not all, of the allegations concerning the exploitation of the DRC's forest and agricultural resources by Uganda or by Ugandan soldiers", were not proven; that several allegations of looting were also unfounded; and that Uganda "had at no time intended to exploit the natural resources of the DRC or to use those resources to 'finance the war' and that it did not do so".

* *

## Findings of the Court concerning Acts of Illegal Exploitation of Natural Resources

237. The Court observes that in order to substantiate its allegations the DRC refers to the United Nations Panel reports and to the Porter Commission Report. The Court has already expressed its view with regard to the evidentiary value of the Porter Commission materials in general (see paragraph 61 above) and considers that both the Porter Commission Report, as well as the United Nations Panel reports, to the extent that they have later proved to be probative, furnish sufficient and convincing evidence for it to determine whether or not Uganda engaged in acts of looting, plundering and illegal exploitation of the DRC's natural resources. Taking this into account, in order to rule on the third submission of the DRC, the Court will draw its conclusions on the basis of the evidence it finds reliable.

In reaching its decision on the DRC's claim, it is not necessary for the Court to make findings of fact with regard to each individual incident alleged.

238. According to the Porter Commission Report, the written message sent by General Kazini in response to the radio message broadcast by the Ugandan President in December 1998 demonstrated that the General was aware of problems of conduct of some UPDF officers, that he did not take any "real action until the matter became public" and that he did

not inform the President. The Commission further states that it follows from General Kazini's message that he, in point of fact, admitted that the allegation that "some top officers in the UPDF were planning from the beginning to do business in Congo was generally true"; "that Commanders in business partnership with Ugandans were trading in the DRC, about which General Kazini took no action"; and that Ugandan "military aircraft were carrying Congolese businessmen into Entebbe, and carrying items which they bought in Kampala back to the Congo". The Commission noted that, while certain orders directed against the use of military aircraft by businessmen were made by General Kazini, that practice nonetheless continued. The Commission also referred to a radio message of General Kazini in which he said that "officers in the Colonel Peter Kerim sector, Bunia and based at Kisangani Airport were engaging in business contrary to the presidential radio message". The Commission further stated that General Kazini was aware that officers and men of the UPDF were involved in gold mining and trade, smuggling and looting of civilians.

239. The Commission noted that General Kazini's radio messages in response to the reports about misconduct of the UPDF did not intend, in point of fact, to control this misconduct. It stated as follows:

> "There is no doubt that his purpose in producing these messages was to try to show that he was taking action in respect of these problems . . . There appears to have been little or no action taken as a result of these messages . . . all this correspondence was intended by General Kazini to cover himself, rather than to prompt action. There also appears to be litle or no follow up to the orders given."

240. The Commission found that General Kazini was "an active supporter in the Democratic Republic of the Congo of Victoria, an organization engaged in smuggling diamonds through Uganda: and it is difficult to believe that he was not profiting for himself from the operation". The Commission explained that the company referred to as "Victoria" in its Report dealt "in diamonds, gold and coffee which it purchased from Isiro, Bunia, Bumba, Bondo, Buta and Kisangani" and that it paid taxes to the MLC.

241. The Commission further recognized that there had been exploitation of the natural resources of the DRC since 1998, and indeed from before that. This exploitation had been carried out, *inter alia*, by senior army officers working on their own and through contacts inside the DRC; by individual soldiers taking advantage of their postings; by cross-border trade and by private individuals living within Uganda. There were instances of looting, "about which General Kazini clearly knew as he sent a radio message about it. This Commission is unable to exclude the possibility that individual soldiers of the UPDF were involved, or that they

were supported by senior officers." The Commission's investigations "reveal that there is no doubt that both RCD and UPDF soldiers were imposing a gold tax, and that it is very likely that UPDF soldiers were involved in at least one mining accident".

242. Having examined the case file, the Court finds that it does not have at its disposal credible evidence to prove that there was a governmental policy of Uganda directed at the exploitation of natural resources of the DRC or that Uganda's military intervention was carried out in order to obtain access to Congolese resources. At the same time, the Court considers that it has ample credible and persuasive evidence to conclude that officers and soldiers of the UPDF, including the most high-ranking officers, were involved in the looting, plundering and exploitation of the DRC's natural resources and that the military authorities did not take any measures to put an end to these acts. (Such acts are referred to in a number of paragraphs in the Porter Commission Report, in particular, paragraphs 13.1. "UPDF Officers conducting business", 13.2. "Gold Mining", 13.4. "Looting", 13.5. "Smuggling", 14.4. "Allegations against top UPDF Officers", 14.5. "Allegations against General Kazini", 15.7. "Organised Looting", 20.3. "General James Kazini" and 21.3.4. "The Diamond Link: General Kazini".)

243. As the Court has already noted (see paragraph 213 above), Uganda is responsible both for the conduct of the UPDF as a whole and for the conduct of individual soldiers and officers of the UPDF in the DRC. The Court further recalls (see paragraph 214 above) that it is also irrelevant for the purposes of attributing their conduct to Uganda whether UPDF officers and soldiers acted contrary to instructions given or exceeded their authority. Thus the Court must now examine whether acts of looting, plundering and exploitation of the DRC's natural resources by officers and soldiers of the UPDF and the failure of the Ugandan authorities to take adequate measures to ensure that such acts were not committed constitute a breach of Uganda's international obligations.

244. The Court finds that it cannot uphold the contention of the DRC that Uganda violated the principle of the DRC's sovereignty over its natural resources (see paragraph 226 above). The Court recalls that the principle of permanent sovereignty over natural resources is expressed in General Assembly resolution 1803 (XVII) of 14 December 1962 and further elaborated in the Declaration on the Establishment of a New International Economic Order (General Assembly resolution 3201 (S.VI) of 1 May 1974) and the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974). While recognizing the importance of this principle, which is a principle of customary international law, the Court notes that there is nothing in these General Assembly resolutions which suggests that they are applicable to

the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State, which is the subject-matter of the DRC's third submission. The Court does not believe that this principle is applicable to this type of situation.

245. As the Court has already stated (see paragraph 180 above), the acts and omissions of members of Uganda's military forces in the DRC engage Uganda's international responsibility in all circumstances, whether it was an occupying Power in particular regions or not. Thus, whenever members of the UPDF were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of the *jus in bello*, which prohibits the commission of such acts by a foreign army in the territory where it is present. The Court notes in this regard that both Article 47 of the Hague Regulations of 1907 and Article 33 of the Fourth Geneva Convention of 1949 prohibit pillage.

The Court further observes that both the DRC and Uganda are parties to the African Charter on Human and Peoples' Rights of 27 June 1981, which in paragraph 2 of Article 21, states that "[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation".

246. The Court finds that there is sufficient evidence to support the DRC's claim that Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering and exploitation of the DRC's natural resources. As already noted, it is apparent that, despite instructions from the Ugandan President to ensure that such misconduct by UPDF troops cease, and despite assurances from General Kazini that he would take matters in hand, no action was taken by General Kazini and no verification was made by the Ugandan Government that orders were being followed up (see paragraphs 238-239 above). In particular the Court observes that the Porter Commission stated in its Report that

> "[t]he picture that emerges is that of a deliberate and persistent indiscipline by commanders in the field, tolerated, even encouraged and covered by General Kazini, as shown by the incompetence or total lack of inquiry and failure to deal effectively with breaches of discipline at senior levels".

(Also of relevance in the Porter Commission Report are paragraphs 13.1 "UPDF Officers conducting business", 13.5 "Smuggling" and 14.5 "Allegations against General Kazini"). It follows that by this failure to act Uganda violated its international obligations, thereby incurring its international responsibility. In any event, whatever measures had been taken by its authorities, Uganda's responsibility was nonetheless engaged by the fact that the unlawful acts had been committed by members of its

armed forces (see paragraph 214 above).

247. As for the claim that Uganda also failed to prevent the looting, plundering and illegal exploitation of the DRC's natural resources by rebel groups, the Court has already found that the latter were not under the control of Uganda (see paragraph 160 above). Thus, with regard to the illegal activities of such groups outside of Ituri, it cannot conclude that Uganda was in breach of its duty of vigilance.

248. The Court further observes that the fact that Uganda was the occupying Power in Ituri district (see paragraph 178 above) extends Uganda's obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces. It is apparent from various findings of the Porter Commission that rather than preventing the illegal traffic in natural resources, including diamonds, high-ranking members of the UPDF facilitated such activities by commercial entities. In this regard, the Report of the Commission mentions a company referred to as "Victoria" (see paragraph 240 above), which operated, *inter alia*, in Bunia. In particular the Report indicates that "General Kazini gave specific instructions to UPDF Commanders in Isiro, Bunia, Beni, Bumba, Bondo and Buta to allow the Company to do business uninterrupted in the areas under their command". (Also of relevance in the Report of the Commission are paragraphs 18.5.1 "Victoria Group", 20.3 "General James Kazini" and 21.3 "The Diamond Link".)

249. Thus the Court finds that it has been proven that Uganda has not complied with its obligations as an occupying Power in Ituri district. The Court would add that Uganda's argument that any exploitation of natural resources in the DRC was carried out for the benefit of the local population, as permitted under humanitarian law, is not supported by any reliable evidence.

250. The Court concludes that it is in possession of sufficient credible evidence to find that Uganda is internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources committed by members of the UPDF in the territory of the DRC, for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory.

* * *

LEGAL CONSEQUENCES OF VIOLATIONS OF INTERNATIONAL OBLIGATIONS BY UGANDA

251. The Court, having established that Uganda committed internationally wrongful acts entailing its international responsibility (see paragraphs 165, 220 and 250 above), turns now to the determination of the legal consequences which such responsibility involves.

252. In its fourth submission the DRC requests the Court to adjudge and declare:

"4. *(a)* . . . . . ;

*(b)* that the Republic of Uganda shall cease forthwith all continuing internationally wrongful acts, and in particular its support for irregular forces operating in the DRC and its exploitation of Congolese wealth and natural resources;

*(c)* that the Republic of Uganda shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of;

*(d)* that the Republic of Uganda is under an obligation to the Democratic Republic of the Congo to make reparation for all injury caused to the latter by the violation of the obligations imposed by international law and set out in submissions 1, 2 and 3 above;

*(e)* that the nature, form and amount of the reparation shall be determined by the Court, failing agreement thereon between the Parties, and that the Court shall reserve the subsequent procedure for that purpose."

253. The DRC claims that, as the first legal consequence of the establishment of Uganda's international responsibility, the latter is under an obligation to cease forthwith all continuing internationally wrongful acts. According to the DRC's Memorial, this obligation of cessation covers, in particular, the occupation of Congolese territory, the support for irregular forces operating in the DRC, the unlawful detention of Congolese nationals and the exploitation of Congolese wealth and natural resources. In its Reply the DRC refers to the occupation of Congolese territory, the support for irregular forces operating in the DRC and the exploitation of Congolese wealth and natural resources. In its final submission presented at the end of the oral proceedings, the DRC, in view of the withdrawal of Ugandan troops from the territory of the DRC, asks that Uganda cease from providing support for irregular forces operating in the DRC and cease from exploiting Congolese wealth and natural resources.

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254. In answer to the question by Judge Vereshchetin (see para-

graph 22 above), the DRC explained that, while its claims relating to the occupation of the territory of the DRC covered the period from 6 August 1998 to 2 June 2003, other claims including those of new military actions, new acts of support to irregular forces, as well as continuing illegal exploitation of natural resources, covered the period from 2 August 1998 until the end of the oral proceedings. The Court notes, however, that it has not been presented with evidence to support allegations with regard to the period after 2 June 2003.

In particular, the Court observes that there is no evidence in the case file which can corroborate the DRC's allegation that at present Uganda supports irregular forces operating in the DRC and continues to be involved in the exploitation of Congolese natural resources. Thus, the Court does not find it established that Uganda, following the withdrawal of its troops from the territory of the DRC in June 2003, continues to commit the internationally wrongful acts specified by the DRC. The Court thus concludes that the DRC's request that Uganda be called upon to cease the acts referred to in its submission 4 *(b)* cannot be upheld.

* *

255. The DRC further requests the Court to rule that Uganda provide specific guarantees and assurances of non-repetition of the wrongful acts complained of. The DRC claims that this request is justified by "the threats which accompanied the troop withdrawal in May 2003". In this regard it alleges that in April 2003 Mr. James Wapakhabulo, the then Minister for Foreign Affairs of Uganda, made a statement "according to which 'the withdrawal of our troops from the Democratic Republic of the Congo does not mean that we will not return there to defend our security!'". As to the form of the guarantees and assurances of non-repetition, the DRC, referring to existing international practice, requests from Uganda "a solemn declaration that it will in future refrain from pursuing a policy that violates the sovereignty of the Democratic Republic of the Congo and the rights of its population"; in addition, it "demands that specific instructions to that effect be given by the Ugandan authorities to their agents".

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256. In this respect the Court has taken judicial notice of the Tripartite Agreement on Regional Security in the Great Lakes, signed on 26 October 2004 by the DRC, Rwanda and Uganda. In the Preamble of this Agreement the Parties emphasize "the need to ensure that the principles of good neighbourliness, respect for the sovereignty, territorial integrity, and non-interference in the internal affairs of sovereign states are

respected, particularly in the region". Article I indicates that one of the objectives of the Agreement is to "[e]nsure respect for the sovereignty and territorial integrity of the countries in the region and cessation of any support for armed groups or militias, in accordance with relevant resolutions of the United Nations and other rules of international law". Finally, in paragraph 1 of Article II, "[t]he Parties reiterate their commitment to fulfil their obligations and undertakings under existing agreements and the relevant resolutions of the United Nations Security Council". The Parties further agreed to establish a Tripartite Joint Commission, which, *inter alia*, "shall implement the terms of this Agreement and ensure that the objectives of this Agreement are being met".

257. The Court considers that, if a State assumes an obligation in an international agreement to respect the sovereignty and territorial integrity of the other States parties to that agreement (an obligation which exists also under general international law) and a commitment to cooperate with them in order to fulfil such obligation, this expresses a clear legally binding undertaking that it will not repeat any wrongful acts. In the Court's view, the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law.

* *

258. The DRC also asks the Court to adjudge and declare that Uganda is under an obligation to make reparation to the DRC for all injury caused by the violation by Uganda of its obligations under international law. The DRC contends that the internationally wrongful acts attributable to Uganda which engaged the latter's international responsibility, namely "years of invasion, occupation, fundamental human rights violations and plundering of natural resources", caused "massive war damage" and therefore entail an obligation to make reparation. The DRC acknowledges that "for the purposes of determining the extent of reparation it must specify the nature of the injury and establish the causal link with the initial wrongful act". However, at this stage of the proceedings the DRC requests a general declaration by the Court establishing the principle that reparation is due, with the determination of the exact amount of the damages and the nature, form and amount of the reparation, failing agreement between the Parties, being deferred until a later stage in the proceedings. The DRC points out that such a procedure is "in accordance with existing international jurisprudence" and refers, in particular, to the Court's Judgment on the merits in the case concerning

*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*.

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259. The Court observes that it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act (see *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 81, para. 152; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 59, para. 119). Upon examination of the case file, given the character of the internationally wrongful acts for which Uganda has been found responsible (illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violations of international human rights law and of international humanitarian law, looting, plunder and exploitation of the DRC's natural resources), the Court considers that those acts resulted in injury to the DRC and to persons on its territory. Having satisfied itself that this injury was caused to the DRC by Uganda, the Court finds that Uganda has an obligation to make reparation accordingly.

260. The Court further considers appropriate the request of the DRC for the nature, form and amount of the reparation due to it to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings. The DRC would thus be given the opportunity to demonstrate and prove the exact injury that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts for which it is responsible. It goes without saying, however, as the Court has had the opportunity to state in the past, "that in the phase of the proceedings devoted to reparation, neither Party may call in question such findings in the present Judgment as have become *res judicata*" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 143, para. 284).

261. The Court also notes that the DRC has stated its intention to seek initially to resolve the issue of reparation by way of direct negotiations with Uganda and to submit the question to the Court only "failing agreement thereon between the parties". It is not for the Court to determine the final result of these negotiations to be conducted by the Parties. In such negotiations, the Parties should seek in good faith an agreed solution based on the findings of the present Judgment.

* * *

COMPLIANCE WITH THE COURT'S ORDER ON PROVISIONAL MEASURES

262. In its fifth submission the DRC requests the Court to adjudge and declare

> "5. That the Republic of Uganda has violated the Order of the Court on provisional measures of 1 July 2000, in that it has failed to comply with the following provisional measures:
>
> "(1) both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;
>
> (2) both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000;
>
> (3) both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law'."

263. The Court observes that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109). The Court recalls that the purpose of provisional measures is to protect the rights of either party, pending the determination of the merits of the case. The Court's Order of 1 July 2000 on provisional measures created legal obligations which both Parties were required to comply with.

264. With regard to the question whether Uganda has complied with the obligations incumbent upon it as a result of the Order of 1 July 2000, the Court observes that the Order indicated three provisional measures, as referred to in the DRC's fifth submission. The Court notes that the DRC put forward no specific evidence demonstrating that after July 2000 Uganda committed acts in violation of each of the three provisional measures indicated by the Court. The Court however observes that in the present Judgment it has found that Uganda is responsible for acts in violation of international human rights law and international humanitarian law carried out by its military forces in the territory of the DRC (see paragraph 220 above). The evidence shows that such violations were com-

mitted throughout the period when Ugandan troops were present in the DRC, including the period from 1 July 2000 until practically their final withdrawal on 2 June 2003 (see paragraphs 206-211 above). The Court thus concludes that Uganda did not comply with the Court's Order on provisional measures of 1 July 2000.

265. The Court further notes that the provisional measures indicated in the Order of 1 July 2000 were addressed to both Parties. The Court's finding in paragraph 264 is without prejudice to the question as to whether the DRC did not also fail to comply with the provisional measures indicated by the Court.

* * *

COUNTER-CLAIMS: ADMISSIBILITY OF OBJECTIONS

266. It is recalled that, in its Counter-Memorial, Uganda submitted three counter-claims (see paragraph 5 above). Uganda's counter-claims were presented in Chapter XVIII of the Counter-Memorial. Uganda's first counter-claim related to acts of aggression allegedly committed by the DRC against Uganda. Uganda contended that the DRC had acted in violation of the principle of the non-use of force incorporated in Article 2, paragraph 4, of the United Nations Charter and found in customary international law, and of the principle of non-intervention in matters within the domestic jurisdiction of States. Uganda's second counter-claim related to attacks on Ugandan diplomatic premises and personnel in Kinshasa, and on Ugandan nationals, for which the DRC is alleged to be responsible. Uganda contended that the acts of the DRC amounted to an illegal use of force, and were in breach of certain rules of conventional or customary international law relating to the protection of persons and property. Uganda's third counter-claim related to alleged violations by the DRC of specific provisions of the Lusaka Agreement. Uganda also requested that the Court reserve the issue of reparation in relation to the counter-claims for a subsequent stage of the proceedings (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 664, para. 4).

267. By an Order of 29 November 2001 the Court found, with regard to the first and second counter-claims, that the Parties' respective claims in both cases related to facts of the same nature and formed part of the same factual complex, and that the Parties were moreover pursuing the same legal aims. The Court accordingly concluded that these two

counter-claims were admissible as such (*I.C.J. Reports 2001*, pp. 678-682, paras. 38-41, 45 and 51). By contrast, the Court found that Uganda's third counter-claim was inadmissible as such, since it was not directly connected with the subject-matter of the DRC's claims (*ibid.*, pp. 680-682, paras. 42-43, 45 and 51).

* *

268. The DRC maintains that the joinder of Uganda's first and second counter-claims to the proceedings does not imply that preliminary objections cannot be raised against them. The DRC contends that it is therefore entitled to raise objections to the admissibility of the counter-claims at this stage of the proceedings. Furthermore, the DRC states that it had "clearly indicated in its written observations on Uganda's counter-claims, in June 2001, that is to say *prior to* the Order made by the Court in November 2001, that it reserved the right to submit preliminary objections in its Reply" (emphasis in the original). As it was unable to comply literally with Article 79, which does not expressly contemplate the submission of preliminary objections in respect of counter-claims, the DRC states that it applied the principle of that provision, *mutatis mutandis*, to the situation with which it was confronted, i.e. it submitted the objections in the first written pleading following both the submission of counter-claims by Uganda in its Counter-Memorial and the Order whereby the Court ruled on the admissibility of those claims as counter-claims. According to the DRC, the Court only ruled in its Order of 29 November 2001 "on the admissibility of this claim *as a counter-claim*, without prejudging any other question which might arise with respect to it" (emphasis in the original). The DRC further argues that the Court's decision is limited to the context of Article 80 of its Rules, and in no way "constitutes a ruling on the admissibility of the counter-claims as new claims joined to the proceedings".

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269. Uganda asserts that the DRC is no longer entitled at this stage of the proceedings to plead the inadmissibility of the counter-claims, since the Court's Order of 29 November 2001 is a definitive determination on counter-claims under Article 80 of the Rules of Court and precludes any discussion on the admissibility of the counter-claims themselves. Uganda further contends that the DRC never submitted its preliminary objections in the form or within the time-limit prescribed by Article 79 of the Rules of Court.

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270. In its consideration of the counter-claims submitted by Uganda, the Court must first address the question whether the DRC is entitled to challenge at this stage of the proceedings the admissibility of the counter-claims.

271. The Court notes that in the *Oil Platforms* case it was called upon to resolve the same issue now raised by Uganda. In that case, the Court concluded that Iran was entitled to challenge the admissibility of the United States counter-claim in general, even though the counter-claim had previously been found admissible under Article 80 of the Rules (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 210, para. 105). Discussing its prior Order, the Court declared:

> "When in that Order the Court ruled on the 'admissibility' of the counter-claim, the task of the Court at that stage was only to verify whether or not the requirements laid down by Article 80 of the Rules of Court were satisfied, namely, that there was a direct connection of the counter-claim with the subject-matter of the [principal] claims . . ." *(Ibid.)*

272. There is nothing in the facts of the present case that compels a different conclusion. On the contrary, the language of the Court's Order of 29 November 2001 clearly calls for the same outcome as the Court reached in the *Oil Platforms* case. After finding the first and second counter-claim admissible under the Article 80 connection test, the Court emphasized in its Order of 29 November 2001 that "a decision given on the admissibility of a counter-claim taking account of the requirements of Article 80 of the Rules of Court in no way prejudges any question with which the Court would have to deal during the remainder of the proceedings" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 681, para. 46).

273. The enquiry under Article 80 as to admissibility is only in regard to the question whether a counter-claim is directly connected with the subject-matter of the principal claim; it is not an over-arching test of admissibility. Thus the Court, in its Order of 29 November 2001, intended only to settle the question of a "direct connection" within the meaning of Article 80. At that point in time it had before it only an objection to admissibility founded on the absence of such a connection.

274. With regard to Uganda's contention that the preliminary objections of the DRC are inadmissible because they failed to conform to Article 79 of the Rules of Court, the Court would observe that Article 79 concerns the case of an "objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on

the merits". It is inapplicable to the case of an objection to counter-claims which have been joined to the original proceedings. The Court notes that nonetheless, the DRC raised objections to the counter-claims in its Reply, i.e., the first pleading following the submission of Uganda's Counter-Memorial containing its counter-claims.

275. In light of the findings above, the Court concludes that the DRC is still entitled, at this stage of the proceedings, to challenge the admissibility of Uganda's counter-claims.

* *

FIRST COUNTER-CLAIM

276. In its first counter-claim, Uganda contends that, since 1994, it has been the victim of military operations and other destabilizing activities carried out by hostile armed groups based in the DRC (which between 1971 and 1997 was called Zaire) and either supported or tolerated by successive Congolese governments. Uganda asserts that elements of these anti-Ugandan armed groups were supported by the Sudan and fought in co-operation with the Sudanese and Congolese armed forces. Uganda further claims that the DRC cultivated its military alliance with the Government of the Sudan, pursuant to which the Sudanese army occupied airfields in north-eastern Congo for the purpose of delivering arms, supplies and troops to the anti-Ugandan rebels.

277. Uganda maintains that actions taken in support of the anti-Ugandan insurgents on the part of the Congolese authorities constitute a violation of the general rule forbidding the use of armed force in international relations, as well as a violation of the principle of non-intervention in the internal affairs of a State. Uganda recalls in particular that

> "[i]n the *Corfu Channel* case, the International Court of Justice pointed out that 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' is a 'general and well-recognized principle' (*I.C.J. Reports 1949*, pp. 22-23)".

In Uganda's view, from this principle there flows not only a duty to refrain from providing any support to groups carrying out subversive or terrorist activities against another State, but also a duty of vigilance to ensure that such activities are not tolerated. In the present case, Uganda contends that "the DRC not only tolerated the anti-Ugandan rebels, but also supported them very effectively in various ways, before simply incorporating some of them into its armed forces".

278. In the context of the DRC's alleged involvement in supporting anti-Ugandan irregular forces from May 1997 to August 1998, Uganda contends that it is not necessary to prove the involvement of the DRC in each attack; it suffices to prove that "President Kabila and his government were co-ordinating closely with the anti-Ugandan rebels prior to August 1998".

279. According to Uganda, the DRC's support for anti-Ugandan armed irregular forces cannot be justified as a form of self-defence in response to the alleged armed aggression by Uganda, since the DRC's military alliances with the rebel groups and the Sudan and their activities preceded Uganda's decision of 11 September 1998 to send its troops into the DRC (see paragraphs 37, 39 and 121 above).

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280. In rebutting Uganda's first counter-claim, the DRC divides it into three periods of time, corresponding to distinct factual and legal situations: *(a)* the period prior to President Laurent-Désiré Kabila coming to power; *(b)* the period starting from the accession to power of President Kabila until 2 August 1998, the date on which Uganda's military attack was launched; and *(c)* the period subsequent to 2 August 1998. It submits that, in so far as the alleged claim that the DRC was involved in armed attacks against Uganda covers the first period, it is inadmissible and, in the alternative, groundless. It further asserts that the claim has no basis in fact for the second period and that it is not founded in fact or in law regarding the third period.

281. With regard to the first period, before President Kabila came to power in May 1997, the DRC contends that the Ugandan counter-claim is inadmissible on the basis that Uganda renounced its right to invoke the international responsibility of the DRC (Zaire at the time) in respect of acts dating back to that period. In particular, the DRC contends that "Uganda never expressly imputed international responsibility to Zaire" and did not "express any intention of formally invoking such responsibility". The DRC further states that the close collaboration between the two States after President Kabila came to power, including in the area of security, justifiably led the Congolese authorities to believe that "Uganda had no intention of resurrecting certain allegations from the period concerned and of seeking to engage the Congo's international responsibility on that basis".

282. In the alternative, the DRC claims that the first Ugandan counter-claim in respect of this period is devoid of foundation, since the documents presented in support of Uganda's contention, "emanating

unilaterally from Uganda, fail to meet the judicial standard of proof" and that Uganda has made no efforts to provide further proof.

283. In any event, the DRC denies having breached any duty of vigilance, during the period when Marshal Mobutu was in power, by having failed to prevent Ugandan rebel groups from using its territory to launch attacks in Uganda. The DRC also denies having provided political and military support to those groups during the period concerned.

284. Regarding the second period, from May 1997 to early August 1998, the DRC reiterates that it has always denied having provided military support for Ugandan rebel groups or having participated in their military operations. According to the DRC, Uganda has failed to demonstrate not only that the rebel groups were its *de facto* agents, but also that the DRC had planned, prepared or participated in any attack or that the DRC had provided support to Ugandan irregular forces.

285. The DRC further contends that no evidence has been adduced to support the claim that, in early August 1998, the DRC entered into a military alliance with the Sudan. In the view of the DRC, Uganda has failed to provide proof either of the alleged meeting which was said to have taken place between the President of the DRC and the President of the Sudan in May 1998, or of the alleged agreement concluded between the DRC and the Sudan that same month and designed to destabilize Uganda.

286. With regard to the third period, the DRC maintains that the documents presented by Uganda, which were prepared by the Ugandan authorities themselves, are not sufficient to establish that the DRC was involved in any attacks against Uganda after the beginning of August 1998. Likewise, the DRC states that the allegations of general support by the DRC for the anti-Ugandan rebels cannot be substantiated by the documents submitted by Uganda.

287. The DRC argues in the alternative that, in any event, from a legal perspective it was in a position of self-defence from that date onwards; and that, in view of the involvement of the UPDF in the airborne operation at Kitona on 4 August 1998, the DRC would have been entitled to use force to repel the aggression against it, as well as to seek support from other States.

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288. In response to the foregoing arguments of the DRC as set out in paragraphs 280 to 281 above, Uganda states the following.

289. It disagrees that the first counter-claim should be divided into three historical periods, namely, from 1994 to 1997 (under Mobutu's presidency), from May 1997 to 2 August 1998, and the period beginning

on 2 August 1998. Uganda argues that in its Order of 29 November 2001 the Court found that "Uganda's counter-claim satisfied the direct connection requirement laid down by Article 80 of the Rules of Court and did so for the entire period since 1994". In Uganda's view, this shows that the Court "refuses to accept the DRC's argument that three periods should be distinguished in the history of recent relations between the Congo and Uganda". Uganda further asserts that by attempting to "slice" a continuing wrongful act into separate periods the DRC is seeking to "limit Uganda's counter-claim". Uganda maintains that Zaire and the DRC "are not distinct entities" and that "by virtue of the State continuity principle, it is precisely the same legal person" which is responsible for the acts complained of in the first counter-claim.

290. With reference to the objection raised by the DRC that Uganda is precluded from filing a claim in relation to alleged violations of its territorial sovereignty on the grounds that it renounced its right to do so, Uganda argues that the conditions required in international law for the waiver of an international claim to be recognized are not satisfied in the present case. In terms of fact, Uganda asserts that, during the Mobutu years, it repeatedly protested against Zaire's passive and active support of anti-Ugandan forces directly to Zaire and to the United Nations. Uganda also repeatedly informed the United Nations of Zaire's joint efforts with the Sudan to destabilize Uganda. Uganda further argues that its co-operation with Laurent-Désiré Kabila's AFDL movement, aimed at improving security along the common border area, did not amount to a waiver of any earlier claims against Zaire. In terms of law, Uganda asserts that in any event the absence of protest does not validate illegal acts and that any failure to address complaints to the Security Council should not be regarded as a cause of inadmissibility. Uganda concludes that the DRC's objections to its first counter-claim should therefore be dismissed.

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291. The Court has taken note that Uganda disagrees with the division of the first counter-claim of Uganda into three periods as argued by the DRC. The Court recalls that, in paragraph 39 of its Order on Counter-Claims of 29 November 2001, it considered that "the first counter-claim submitted by Uganda is . . . directly connected, in regard to the entire period covered, with the subject-matter of the Congo's claims". The DRC does not contest this finding, but rather argues that the first counter-claim is partially inadmissible and not founded as to the merits. The Court observes that its Order of 29 November 2001 does not deal with questions of admissibility outside the scope of Article 80 of the

Rules, nor does it deal with the merits of the first counter-claim. Neither does the Order prejudge any question as to the possibility of dividing this counter-claim according to specific periods of time. The Court is not therefore precluded, if it is justified by the circumstances of the case, from considering the first counter-claim following specific time periods. In the present case, in view of the fact that the historical periods identified by the DRC indeed differ in their factual context and are clearly distinguishable, the Court does not see any obstacle to examining Uganda's first counter-claim following these three periods of time and for practical purposes deems it useful to do so.

292. The Court now turns to the question of admissibility of the part of the first counter-claim of Uganda relating to the period prior to May 1997. The Court observes that the DRC has not presented any evidence showing an express renunciation by Uganda of its right to bring a counter-claim in relation to facts dating back to the Mobutu régime. Rather, it argues that Uganda's subsequent conduct amounted to an implied waiver of whatever claims it might have had against the DRC as a result of the actions or inaction of the Mobutu régime.

293. The Court observes that waivers or renunciations of claims or rights must either be express or unequivocally implied from the conduct of the State alleged to have waived or renounced its right. In the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, the Court rejected a similar argument of waiver put forth by Australia, which argued that Nauru had renounced certain of its claims; noting the absence of any express waiver, the Court furthermore considered that a waiver of those claims could not be implied on the basis of the conduct of Nauru (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 247-250, paras. 12-21). Similarly, the International Law Commission, in its commentary on Article 45 of the Draft Articles on Responsibility of States for internationally wrongful acts, points out that "[a]lthough it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal" (ILC report, doc. A/56/10, 2001, p. 308). In the Court's view, nothing in the conduct of Uganda in the period after May 1997 can be considered as implying an unequivocal waiver of its right to bring a counter-claim relating to events which occurred during the Mobutu régime.

294. The period of friendly relations enjoyed between the DRC and Uganda between May 1997 and July 1998 does nothing to affect this outcome. A period of good or friendly relations between two States should not, without more, be deemed to prevent one of the States from raising a pre-existing claim against the other, either when relations between the two States have again deteriorated or even while the good relations

continue. The political climate between States does not alter their legal rights.

295. The Court further observes that, in a situation where there is a delay on the part of a State in bringing a claim, it is "for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 254, para. 32). In the circumstances of the present case, the long period of time between the events at stake during the Mobutu régime and the filing of Uganda's counter-claims has not rendered inadmissible Uganda's first counter-claim for the period prior to May 1997.

296. The Court accordingly finds that the DRC's objection cannot be upheld.

297. Regarding the merits of Uganda's first counter-claim for the period prior to May 1997, Uganda alleges that the DRC breached its duty of vigilance by allowing anti-Ugandan rebel groups to use its territory to launch attacks on Uganda, and by providing political and military support to those groups during this period.

298. The Court considers that Uganda has not produced sufficient evidence to show that the Zairean authorities were involved in providing political and military support for specific attacks against Ugandan territory. The bulk of the evidence submitted consists of uncorroborated Ugandan military intelligence material and generally fails to indicate the sources from which it is drawn. Many such statements are unsigned. In addition, many documents were submitted as evidence by Uganda, such as the address by President Museveni to the Ugandan Parliament on 28 May 2000, entitled "Uganda's Role in the Democratic Republic of the Congo", and a document entitled "Chronological Illustration of Acts of Destabilization by Sudan and Congo based Dissidents". In the circumstances of this case, these documents are of limited probative value to the extent that they were neither relied on by the other Party nor corroborated by impartial, neutral sources. Even the documents that purportedly relate eyewitness accounts are vague and thus unconvincing. For example, the information allegedly provided by an ADF deserter, reproduced in Annex 60 to the Counter-Memorial, is limited to the following: "In 1996 during Mobutu era before Mpondwe attack, ADF received several weapons from Sudan government with the help of Zaire government." The few reports of non-governmental organizations put forward by Uganda (e.g. a report by HRW) are too general to support a claim of Congolese involvement rising to a level engaging State responsibility.

299. In sum, none of the documents submitted by Uganda, taken

separately or together, can serve as a sound basis for the Court to conclude that the alleged violations of international law occurred. Thus Uganda has failed to discharge its burden of proof with regard to its allegation that Zaire provided political and military support to anti-Ugandan rebel groups operating in its territory during the Mobutu régime.

300. As to the question of whether the DRC breached its duty of vigilance by tolerating anti-Ugandan rebels on its territory, the Court notes that this is a different issue from the question of active support for the rebels, because the Parties do not dispute the presence of the anti-Ugandan rebels on the territory of the DRC as a factual matter. The DRC recognized that anti-Ugandan groups operated on the territory of the DRC from at least 1986. Under the Declaration on Friendly Relations, "every State has the duty to refrain from . . . acquiescing in organized activities within its territory directed towards the commission of such acts" (e.g., terrorist acts, acts of internal strife) and also "no State shall . . . tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State . . .". As stated earlier, these provisions are declaratory of customary international law (see paragraph 162 above).

301. The Court has noted that, according to Uganda, the rebel groups were able to operate "unimpeded" in the border region between the DRC and Uganda "because of its mountainous terrain, its remoteness from Kinshasa (more than 1,500 km), and the almost complete absence of central government presence or authority in the region during President Mobutu's 32-year term in office".

During the period under consideration both anti-Ugandan and anti-Zairean rebel groups operated in this area. Neither Zaire nor Uganda were in a position to put an end to their activities. However, in the light of the evidence before it, the Court cannot conclude that the absence of action by Zaire's Government against the rebel groups in the border area is tantamount to "tolerating" or "acquiescing" in their activities. Thus, the part of Uganda's first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be upheld.

302. With regard to the second period, from May 1997 until 2 August 1998, the DRC does not contest the admissibility of Uganda's counter-claim. Rather, it argues simply that the counter-claim has no basis in fact.

303. In relation to this period, the Court finds that Uganda has failed to provide conclusive evidence of actual support for anti-Ugandan rebel groups by the DRC. Whereas in the first period the counter-claim suffered from a general lack of evidence showing the DRC's support for anti-Ugandan rebels, the second period is marked by clear action by the DRC against the rebels. Relations between the DRC and Uganda during

this second period improved and the two Governments undertook joint actions against the anti-Ugandan rebels. The DRC consented to the deployment of Ugandan troops in the border area. In April 1998 the DRC and Uganda even concluded an agreement on security along the common border (see paragraph 46 above). The DRC was thus acting against the rebels, not in support of them. It appears, however, that, due to the difficulty and remoteness of the terrain discussed in relation to the first period, neither State was capable of putting an end to all the rebel activities despite their efforts in this period. Therefore, Uganda's counter-claim with respect to this second period also must fail.

304. In relation to the third period, following 2 August 1998, the Court has already found that the legal situation after the military intervention of the Ugandan forces into the territory of the DRC was, after 7 August, essentially one of illegal use of force by Uganda against the DRC (see paragraph 149 above). In view of the finding that Uganda engaged in an illegal military operation against the DRC, the Court considers that the DRC was entitled to use force in order to repel Uganda's attacks. The Court also notes that it has never been claimed that this use of force was not proportionate nor can the Court conclude this from the evidence before it. It follows that any military action taken by the DRC against Uganda during this period could not be deemed wrongful since it would be justified as action taken in self-defence under Article 51 of the United Nations Charter. Moreover, the Court has already found that the facts alleged by Uganda in its counter-claim in respect of this period, namely the participation of DRC regular troops in attacks by anti-Ugandan rebels against the UPDF and the training, arming, equipping, financing and supplying of anti-Ugandan insurgents, cannot be considered as proven (see paragraphs 121-147 above). Consequently, Uganda's first counter-claim cannot be upheld as regards the period following 2 August 1998.

305. The Court thus concludes that the first counter-claim submitted by Uganda fails in its entirety.

* *

SECOND COUNTER-CLAIM

306. In its second counter-claim, Uganda claims that Congolese armed forces carried out three separate attacks on the Ugandan Embassy in Kinshasa in August, September and November 1998; confiscated

property belonging to the Government of Uganda, Ugandan diplomats and Ugandan nationals; and maltreated diplomats and other Ugandan nationals present on the premises of the mission.

307. In particular, Uganda contends that on or around 11 August 1998 Congolese soldiers stormed the Ugandan Embassy in Kinshasa, threatened the ambassador and other diplomats, demanding the release of certain Rwandan nationals. According to Uganda, the Congolese soldiers also stole money found in the Chancery. Uganda alleges that, despite protests by Ugandan Embassy officials, the Congolese Government took no action.

308. Uganda further asserts that, prior to their evacuation from the DRC on 20 August 1998, 17 Ugandan nationals and Ugandan diplomats were likewise subjected to inhumane treatment by FAC troops stationed at Ndjili International Airport. Uganda alleges that, before releasing the Ugandans, the FAC troops confiscated their money, valuables and briefcases. Uganda states that a Note of protest with regard to this incident was sent by the Embassy of Uganda to the Ministry of Foreign Affairs of the DRC on 21 August 1998.

309. Uganda claims that in September 1998, following the evacuation of the remaining Ugandan diplomats from the DRC, FAC troops forcibly seized the Ugandan Chancery and the official residence of the Ugandan Ambassador in Kinshasa. Uganda maintains that the Congolese troops stole property from the premises, including four embassy vehicles. According to Uganda, on 23 November 1998 FAC troops again forcibly entered the Ugandan Chancery and the official residence of the Ugandan Ambassador in Kinshasa and stole property, including embassy furniture, household and personal effects belonging to the Ambassador and to other diplomatic staff, embassy office equipment, Ugandan flags and four vehicles belonging to Ugandan nationals. Uganda alleges that the Congolese army also occupied the Chancery and the official residence of the Ugandan Ambassador.

310. Uganda states that on 18 December 1998 the Ministry of Foreign Affairs of Uganda sent a Note of protest to the Ministry of Foreign affairs of the DRC, in which it referred to the incidents of September 1998 and 23 November 1998 and demanded, *inter alia*, that the Government of the DRC return all the property taken from the Embassy premises, that all Congolese military personnel vacate the two buildings and that the mission be protected from any further intrusion.

311. Uganda alleges, moreover, that "[t]he Congolese government permitted WNBF commander Taban Amin, the son of former Ugandan dictator Idi Amin, to occupy the premises of the Uganda Embassy in Kinshasa and establish his official headquarters and residence at those facilities". In this regard, Uganda refers to a Note of protest dated 21 March 2001, whereby the Ministry of Foreign Affairs of Uganda

requested that the Government of the DRC ask Mr. Taban Amin to vacate the Ugandan Embassy's premises in Kinshasa.

312. Uganda further refers to a visit on 28 September 2002 by a joint delegation of Ugandan and Congolese officials to the Chancery and the official residence of the Ambassador of Uganda in Kinshasa. Uganda notes that the Status Report, signed by the representatives of both Parties following the visit, indicates that "at the time of the inspection, both premises were occupied" and that the joint delegation "did not find any movable property belonging to the Uganda embassy or its former officials". Uganda states that the joint delegation also "found the buildings in a state of total disrepair". As a result of that situation, Uganda claims that it was recently obliged to rent premises for its diplomatic and consular mission in Kinshasa.

313. Uganda argues that the DRC's actions are in breach of international diplomatic and consular law, in particular Articles 22 (inviolability of the premises of the mission), 29 (inviolability of the person of diplomatic agents), 30 (inviolability of the private residence of a diplomatic agent) and 24 (inviolability of archives and documents of the mission) of the 1961 Vienna Convention on Diplomatic Relations. In addition, Uganda contends that,

> "[t]he inhumane treatment and threats to the security and freedom of nationals of Uganda . . . constitute a series of breaches of the international minimum standard relating to the treatment of foreign nationals lawfully on State territory, which standard forms a part of customary or general international law";

and that, in respect of the seizure of the Embassy of Uganda, the official residence of the Ambassador and official cars of the mission, these actions constitute an unlawful expropriation of the public property of Uganda.

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314. The DRC contends that Uganda's second counter-claim is partially inadmissible on the ground that Uganda has ascribed new legal bases in its Rejoinder to the DRC's responsibility by including claims based on the violation of the Vienna Convention on Diplomatic Relations. According to the DRC, Uganda thus breaks the connection with the principal claim, which refers to "the violation of the United Nations Charter provisions on the use of force and on non-intervention, as well as the Hague and Geneva Conventions on the protection of persons and property in time of occupation and armed conflict". The DRC also asserts that the alleged modification of the subject-matter of this part of the dispute is manifestly incompatible with the Court's Order of 29 November 2001.

315. The DRC further argues that the claim based on the inhumane treatment of Ugandan nationals cannot be admitted, because the requirements for admissibility of a diplomatic protection claim are not satisfied. As for the first condition relating to the nationality of the alleged victims, the DRC claims that Uganda has not shown that the persons on whose behalf it is claiming to act are of Ugandan nationality and not Rwandan or of any dual nationality. Regarding the second condition relating to the exhaustion of local remedies, the DRC contends that,

> "since it seems that these individuals left the Democratic Republic of the Congo in a group in August 1998 and that is when they allegedly suffered the unspecified, unproven injuries, it would not appear that the requirement of exhaustion of local remedies has been satisfied".

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316. Uganda, for its part, claims that Chapter XVIII of its Counter-Memorial "clearly shows, with no possibility of doubt, that since the beginning of the dispute Uganda has invoked violation of the 1961 Vienna Convention in support of its position on the responsibility of the Congo". Uganda further notes that in its Order of 29 November 2001, in the context of Uganda's second counter-claim, the Court concluded that the Parties were pursuing the same legal aims by seeking "to establish the responsibility of the other by invoking, in connection with the alleged illegal use of force, certain rules of conventional or customary international law relating to the protection of persons and property" (*I.C.J. Reports 2001*, p. 679, para. 40). Uganda contends that the reference to "conventional . . . law" must necessarily relate to the Vienna Convention on Diplomatic Relations, "the only conventional instrument expressly named in that part of the Counter-Memorial devoted to the second claim". Thus Uganda argues that it has not changed the subject-matter of the dispute.

317. As to the inadmissibility of the part of the claim relating to the alleged maltreatment of certain Ugandan nationals, according to Uganda it is not linked to any claims of Ugandan nationals; its claim is based on violations by the DRC, directed against Uganda itself, of general rules of international law relating to diplomatic relations, of which Ugandan nationals present in the premises of the mission were indirect victims. Uganda considers that local remedies need not be exhausted when the individual is only the indirect victim of a violation of a State-to-State obligation. Uganda states that "[t]he breaches of the Convention also constitute direct injury to Uganda and the local remedies rule is therefore inapplicable". Uganda contends that, even assuming that this aspect of the second claim could be interpreted as the exercise by Uganda of diplomatic protection, the local remedies rule would not in any event

be applicable because the principle is that the rule can only apply when effective remedies are available in the national system. In this regard, Uganda argues that any remedy before Congolese courts would be ineffective, due to the lack of impartiality within the Congolese justice system. Additionally, Uganda contends that

> "[t]he inhumane treatment and threats to the security and freedom of nationals of Uganda . . . constitute a series of breaches of the international minimum standard relating to the treatment of foreign nationals lawfully on State territory, which standard forms a part of customary or general international law".

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318. As to the merits of the second counter-claim, the DRC, without prejudice to its arguments on the inadmissibility of the second counter-claim, argues that in any event Uganda has been unable to establish the factual and legal bases of its claims. According to the DRC, "none of these accusations made against [the DRC] by the Respondent has any serious and credible factual basis". The DRC also challenges the evidentiary value "in law" of the documents adduced by Uganda to support its claims.

319. The DRC denies having subjected Ugandan nationals to inhumane treatment during an alleged attack on the Ugandan Embassy in Kinshasa on 11 August 1998 and denies that further attacks occurred in September and November 1998. According to the DRC, the Ugandan diplomatic buildings in Kinshasa were never seized or expropriated, nor has the DRC ever sought to prevent Uganda from reoccupying its property. The DRC further states that it did not expropriate Ugandan public property in Kinshasa in August 1998, nor did it misappropriate the vehicles of the Ugandan diplomatic mission in Kinshasa, or remove the archives or seize movable property from those premises.

320. The DRC likewise contests the assertion that it allowed the commander of the WNBF to occupy the premises of the Ugandan Embassy in Kinshasa and to establish his official headquarters and residence there. The DRC also refutes the allegation that on 20 August 1998 various Ugandan nationals were maltreated by the FAC at Ndjili International Airport in Kinshasa.

321. The DRC contends that the part of the claim relating to the alleged expropriation of Uganda's public property is unfounded because Uganda has been unable to establish the factual and legal bases of its claims. According to the DRC, Uganda has not adduced any credible evidence to show that either the two buildings (the Embassy and the

Ambassador's residence) or the four official vehicles were seized by the DRC.

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322. The Court will first turn to the DRC's challenge to the admissibility of the second counter-claim on the grounds that, by formally invoking the Vienna Convention on Diplomatic Relations for the first time in its Rejoinder of 6 December 2002, Uganda has "[sought] improperly to enlarge the subject-matter of the dispute, contrary to the Statute and Rules of Court" and contrary to the Court's Order of 29 November 2001.

323. The Court first recalls that the Vienna Convention on Diplomatic Relations continues to apply notwithstanding the state of armed conflict that existed between the Parties at the time of the alleged maltreatment. The Court recalls that, according to Article 44 of the Vienna Convention on Diplomatic Relations:

> "The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property."

324. Further, Article 45 of the Vienna Convention provides as follows:

> "If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:
>
> *(a)* the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
>
> *(b)* the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;
>
> *(c)* the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State."

In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the Court emphasized that

> "[e]ven in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, . . . must be respected by the receiving State" (*Judgment, I.C.J. Reports 1980*, p. 40, para. 86).

325. In relation to the DRC's claim that the Court's Order of 29 November 2001 precludes the subsequent invocation of the Vienna

Convention on Diplomatic Relations, the Court recalls the language of this Order:

> "each Party holds the other responsible for various acts of oppression allegedly accompanying an illegal use of force . . . each Party seeks to establish the responsibility of the other by invoking, in connection with the alleged illegal use of force, certain rules of conventional or customary international law *relating to the protection of persons and property*" (*I.C.J. Reports 2001*, p. 679, para. 40; emphasis added).

326. The Court finds this formulation sufficiently broad to encompass claims based on the Vienna Convention on Diplomatic Relations, taking note that the new claims are based on the same factual allegation, i.e. the alleged illegal use of force. The Court was entirely aware, when making its Order, that the alleged attacks were on Embassy premises. Later reference to specific additional legal elements, in the context of an alleged illegal use of force, does not alter the nature or subject-matter of the dispute. It was the use of force on Embassy premises that brought this counter-claim within the scope of Article 80 of the Rules, but that does not preclude examination of the special status of the Embassy. As the jurisprudence of the Court reflects, counter-claims do not have to rely on identical instruments to meet the "connection" test of Article 80 (see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 318-319).

327. The Court therefore finds that Uganda's second counter-claim is not rendered inadmissible in so far as Uganda has subsequently invoked Articles 22, 24, 29, and 30 of the Vienna Convention on Diplomatic Relations.

328. The Court will now consider the DRC's challenge to the admissibility of the second counter-claim on the ground that it is in reality a claim founded on diplomatic protection and as such fails, as Uganda has not shown that the requirements laid down by international law for the exercise of diplomatic protection have been satisfied.

329. The Court notes that Uganda relies on two separate legal bases in its allegations concerning the maltreatment of persons. With regard to diplomats, Uganda relies on Article 29 of the Vienna Convention on Diplomatic Relations. With regard to other Ugandan nationals not enjoying diplomatic status, Uganda grounds its claim in general rules of international law relating to diplomatic relations and in the international minimum standard relating to the treatment of foreign nationals who are present on a State's territory. The Court will now address both of these bases in turn.

330. First, as to alleged acts of maltreatment committed against Ugan-

dan diplomats finding themselves both within embassy premises and elsewhere, the Court observes that Uganda's second counter-claim aims at obtaining reparation for the injuries suffered by Uganda itself as a result of the alleged violations by the DRC of Article 29 of the Vienna Convention on Diplomatic Relations. Therefore Uganda is not exercising diplomatic protection on behalf of the victims but vindicating its own rights under the Vienna Convention. Accordingly, the Court finds that the failure to exhaust local remedies does not pose a barrier to Uganda's counter-claim under Article 29 of the Vienna Convention on Diplomatic Relations, and the claim is thus admissible.

331. As to acts of maltreatment committed against other persons on the premises of the Ugandan Embassy at the time of the incidents, the Court observes that the substance of this counter-claim currently before the Court as a direct claim, brought by Uganda in its sovereign capacity, concerning its Embassy in Kinshasa, falls within the ambit of Article 22 of the Vienna Convention on Diplomatic Relations. Consequently, the objection advanced by the DRC to the admissibility of this part of Uganda's second counter-claim cannot be upheld, and this part of the counter-claim is also admissible.

332. The Court turns now to the part of Uganda's second counter-claim which concerns acts of maltreatment by FAC troops of Ugandan nationals not enjoying diplomatic status who were present at Ndjili International Airport as they attempted to leave the country.

333. The Court notes that Uganda bases this part of the counter-claim on the international minimum standard relating to the treatment of foreign nationals who are present on a State's territory. The Court thus considers that this part of Uganda's counter-claim concerns injury to the particular individuals in question and does not relate to a violation of an international obligation by the DRC causing a direct injury to Uganda. The Court is of the opinion that in presenting this part of the counter-claim Uganda is attempting to exercise its right to diplomatic protection with regard to its nationals. It follows that Uganda would need to meet the conditions necessary for the exercise of diplomatic protection as recognized in general international law, namely the requirement of Ugandan nationality of the claimants and the prior exhaustion of local remedies. The Court observes that no specific documentation can be found in the case file identifying the individuals concerned as Ugandan nationals. The Court thus finds that, this condition not being met, Uganda's counter-claim concerning the alleged maltreatment of its nationals not enjoying diplomatic status at Ndjili International Airport is inadmissible.

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334. Regarding the merits of Uganda's second counter-claim, the Court finds that there is sufficient evidence to prove that there were attacks against the Embassy and acts of maltreatment against Ugandan diplomats at Ndjili International Airport.

335. The Court observes that various Ugandan diplomatic Notes addressed to the Congolese Foreign Ministry or to the Congolese Embassy in Kampala make reference to attacks by Congolese troops against the premises of the Ugandan Embassy and to the occupation by the latter of the buildings of the Chancery. In particular, the Court considers important the Note of 18 December 1998 from the Ministry of Foreign Affairs of Uganda to the Ministry of Foreign Affairs of the DRC, protesting against Congolese actions in detriment of the Ugandan Chancery and property therein in September and November 1998, in violation of international law and the 1961 Vienna Convention on Diplomatic Relations. This Note deserves special attention because it was sent in duplicate to the Secretary-General of the United Nations and to the Secretary-General of the OAU, requesting them to urge the DRC to meet its obligations under the Vienna Convention. The Court takes particular note of the fact that the DRC did not reject this accusation at the time at which it was made.

336. Although some of the other evidence is inconclusive or appears to have been prepared unilaterally for purposes of litigation, the Court was particularly persuaded by the Status Report on the Residence and Chancery, jointly prepared by the DRC and Uganda under the Luanda Agreement. The Court has given special attention to this report, which was prepared on site and was drawn up with the participation of both Parties. Although the report does not offer a clear picture regarding the alleged attacks, it does demonstrate the resulting long-term occupation of the Ugandan Embassy by Congolese forces.

337. Therefore, the Court finds that, as regards the attacks on Uganda's diplomatic premises in Kinshasa, the DRC has breached its obligations under Article 22 of the Vienna Convention on Diplomatic Relations.

338. Acts of maltreatment by DRC forces of persons within the Ugandan Embassy were necessarily consequential upon a breach of the inviolability of the Embassy premises prohibited by Article 22 of the Vienna Convention on Diplomatic Relations. This is true regardless of whether the persons were or were not nationals of Uganda or Ugandan diplomats. In so far as the persons attacked were in fact diplomats, the DRC further breached its obligations under Article 29 of the Vienna Convention.

339. Finally, there is evidence that some Ugandan diplomats were maltreated at Ndjili International Airport when leaving the country. The

Court considers that a Note of Protest sent by the Embassy of Uganda to the Ministry of Foreign Affairs of the DRC on 21 August 1998, i.e. on the day following the incident, which at the time did not lead to a reply by the DRC denying the incident, shows that the DRC committed acts of maltreatment of Ugandan diplomats at Ndjili International Airport. The fact that the assistance of the dean of the diplomatic corps (Ambassador of Switzerland) was needed in order to organize an orderly departure of Ugandan diplomats from the airport is also an indication that the DRC failed to provide effective protection and treatment required under international law on diplomatic relations. The Court therefore finds that, through acts of maltreatment inflicted on Ugandan diplomats at the airport when they attempted to leave the country, the DRC acted in violation of its obligations under international law on diplomatic relations.

340. In summary, the Court concludes that, through the attacks by members of the Congolese armed forces on the premises of the Ugandan Embassy in Kinshasa, and their maltreatment of persons who found themselves at the Embassy at the time of the attacks, the DRC breached its obligations under Article 22 of the Vienna Convention on Diplomatic Relations. The Court further concludes that by the maltreatment by members of the Congolese armed forces of Ugandan diplomats on Embassy premises and at Ndjili International Airport, the DRC also breached its obligations under Article 29 of the Vienna Convention.

341. As to the claim concerning Ugandan public property, the Court notes that the original wording used by Uganda in its Counter-Memorial was that property belonging to the Government of Uganda and Ugandan diplomats had been "confiscated", and that later pleadings referred to "expropriation" of Ugandan public property. However, there is nothing to suggest that in this case any confiscation or expropriation took place in the technical sense. The Court therefore finds neither term suitable in the present context. Uganda appears rather to be referring to an illegal appropriation in the general sense of the term. The seizures clearly constitute an unlawful use of that property, but no valid transfer of the title to the property has occurred and the DRC has not become, at any point in time, the lawful owner of such property.

342. Regarding evidentiary issues, the Status Report on the Residence and Chancery, jointly prepared by the DRC and Uganda under the Luanda Agreement, provides sufficient evidence for the Court to conclude that Ugandan property was removed from the premises of the official residence and Chancery. It is not necessary for the Court to make a determination as to who might have removed the property reported missing. The Vienna Convention on Diplomatic Relations not only prohibits any infringements of the inviolability of the mission by the receiving State

itself but also puts the receiving State under an obligation to prevent others — such as armed militia groups — from doing so (see *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 30-32, paras. 61-67). Therefore, although the evidence available is insufficient to identify with precision the individuals who removed Ugandan property, the mere fact that items were removed is enough to establish that the DRC breached its obligations under the Vienna Convention on Diplomatic Relations. At this stage, the Court considers that it has found sufficient evidence to hold that the removal of Ugandan property violated the rules of international law on diplomatic relations, whether it was committed by actions of the DRC itself or by the DRC's failure to prevent such acts on the part of armed militia groups. Similarly, the Court need not establish a precise list of items removed — a point of disagreement between the Parties — in order to conclude at this stage of the proceedings that the DRC breached its obligations under the relevant rules of international law. Although these issues will become important should there be a reparation stage, they are not relevant for the Court's finding on the legality or illegality of the acts of the DRC.

343. In addition to the issue of the taking of Ugandan public property described in paragraph 309, above, Uganda has specifically pleaded that the removal of "almost all of the documents in their archives and working files" violates Article 24 of the Vienna Convention on Diplomatic Relations. The same evidence discussed in paragraph 342 also supports this contention, and the Court accordingly finds the DRC in violation of its obligations under Article 24 of the Vienna Convention.

344. The Court notes that, at this stage of the proceedings, it suffices for it to state that the DRC bears responsibility for the breach of the inviolability of the diplomatic premises, the maltreatment of Ugandan diplomats at the Ugandan Embassy in Kinshasa, the maltreatment of Ugandan diplomats at Ndjili International Airport, and for attacks on and seizure of property and archives from Ugandan diplomatic premises, in violation of international law on diplomatic relations. It would only be at a subsequent phase, failing an agreement between the Parties, that the specific circumstances of these violations as well as the precise damage suffered by Uganda and the extent of the reparation to which it is entitled would have to be demonstrated.

* * *

345. For these reasons,

THE COURT,

(1) By sixteen votes to one,

*Finds* that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; *Judge* ad hoc Verhoeven;

AGAINST: *Judge* ad hoc Kateka;

(2) Unanimously,

*Finds* admissible the claim submitted by the Democratic Republic of the Congo relating to alleged violations by the Republic of Uganda of its obligations under international human rights law and international humanitarian law in the course of hostilities between Ugandan and Rwandan military forces in Kisangani;

(3) By sixteen votes to one,

*Finds* that the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; *Judge* ad hoc Verhoeven;

AGAINST: *Judge* ad hoc Kateka;

(4) By sixteen votes to one,

*Finds* that the Republic of Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of

the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; *Judge* ad hoc Verhoeven;

AGAINST: *Judge* ad hoc Kateka;

(5) Unanimously,

*Finds* that the Republic of Uganda is under obligation to make reparation to the Democratic Republic of the Congo for the injury caused;

(6) Unanimously,

*Decides* that, failing agreement between the Parties, the question of reparation due to the Democratic Republic of the Congo shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case;

(7) By fifteen votes to two,

*Finds* that the Republic of Uganda did not comply with the Order of the Court on provisional measures of 1 July 2000;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; *Judge* ad hoc Verhoeven;

AGAINST: *Judge* Kooijmans; *Judge* ad hoc Kateka;

(8) Unanimously,

*Rejects* the objections of the Democratic Republic of the Congo to the admissibility of the first counter-claim submitted by the Republic of Uganda;

(9) By fourteen votes to three,

*Finds* that the first counter-claim submitted by the Republic of Uganda cannot be upheld;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Abraham; *Judge* ad hoc Verhoeven;

AGAINST: *Judges* Kooijmans, Tomka; *Judge* ad hoc Kateka;

(10) Unanimously,

*Rejects* the objection of the Democratic Republic of the Congo to the

admissibility of the part of the second counter-claim submitted by the Republic of Uganda relating to the breach of the Vienna Convention on Diplomatic Relations of 1961;

(11) By sixteen votes to one,

*Upholds* the objection of the Democratic Republic of the Congo to the admissibility of the part of the second counter-claim submitted by the Republic of Uganda relating to the maltreatment of individuals other than Ugandan diplomats at Ndjili International Airport on 20 August 1998;

IN FAVOUR: *President* Shi; *Vice-President* Ranjeva; *Judges* Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Simma, Tomka, Abraham; *Judge* ad hoc Verhoeven;

AGAINST: *Judge* ad hoc Kateka;

(12) Unanimously,

*Finds* that the Democratic Republic of the Congo, by the conduct of its armed forces, which attacked the Ugandan Embassy in Kinshasa, maltreated Ugandan diplomats and other individuals on the Embassy premises, maltreated Ugandan diplomats at Ndjili International Airport, as well as by its failure to provide the Ugandan Embassy and Ugandan diplomats with effective protection and by its failure to prevent archives and Ugandan property from being seized from the premises of the Ugandan Embassy, violated obligations owed to the Republic of Uganda under the Vienna Convention on Diplomatic Relations of 1961;

(13) Unanimously,

*Finds* that the Democratic Republic of the Congo is under obligation to make reparation to the Republic of Uganda for the injury caused;

(14) Unanimously,

*Decides* that, failing agreement between the Parties, the question of reparation due to the Republic of Uganda shall be settled by the Court, and reserves for this purpose the subsequent procedure in the case.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this nineteenth day of December, two thousand and five, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-

cratic Republic of the Congo and the Government of the Republic of Uganda, respectively.

(*Signed*) SHI Jiuyong,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Judge KOROMA appends a declaration to the Judgment of the Court; Judges PARRA-ARANGUREN, KOOIJMANS, ELARABY and SIMMA append separate opinions to the Judgment of the Court; Judge TOMKA and Judge *ad hoc* VERHOEVEN append declarations to the Judgment of the Court; Judge *ad hoc* KATEKA appends a dissenting opinion to the Judgment of the Court.

(*Initialled*) J.Y.S.
(*Initialled*) Ph.C.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA *v.* SERBIA AND MONTENEGRO)

**JUDGMENT OF 26 FEBRUARY 2007**

# 2007

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE À L'APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)

**ARRÊT DU 26 FÉVRIER 2007**

Official citation:

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JUDGMENT

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APPLICATION DE LA CONVENTION POUR LA PRÉVENTION
ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)

26 FÉVRIER 2007

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LIST OF ACRONYMS

| *Abbreviation* | *Full name* | *Comments* |
|---|---|---|
| ARBiH | Army of the Republic of Bosnia and Herzegovina | |
| FRY | Federal Republic of Yugoslavia | Name of Serbia and Montenegro between 27 April 1992 (adoption of the Constitution) and 3 February 2003 |
| ICTR | International Criminal Tribunal for Rwanda | |
| ICTY | International Criminal Tribunal for the former Yugoslavia | |
| ILC | International Law Commission | |
| JNA | Yugoslav People's Army | Army of the SFRY (ceased to exist on 27 April 1992, with the creation of the VJ) |
| MUP | Ministarstvo Unutrašnjih Pollova | Ministry of the Interior |
| NATO | North Atlantic Treaty Organization | |
| SFRY | Socialist Federal Republic of Yugoslavia | |
| TO | Teritorijalna Odbrana | Territorial Defence Forces |
| UNHCR | United Nations High Commissioner for Refugees | |
| UNPROFOR | United Nations Protection Force | |
| VJ | Yugoslav Army | Army of the FRY, under the Constitution of 27 April 1992 (succeeded to the JNA) |
| VRS | Army of the Republika Srpska | |

INTERNATIONAL COURT OF JUSTICE

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# CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA *v.* SERBIA AND MONTENEGRO)

## JUDGMENT

*Present:* *President* HIGGINS; *Vice-President* AL-KHASAWNEH; *Judges* RANJEVA, SHI, KOROMA, OWADA, SIMMA, TOMKA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV; *Judges* ad hoc MAHIOU, KREĆA; *Registrar* COUVREUR.

In the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide,

*between*

Bosnia and Herzegovina,

represented by

Mr. Sakib Softić,

as Agent;

Mr. Phon van den Biesen, Attorney at Law, Amsterdam,

as Deputy Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the United Nations International Law Commission,

Mr. Thomas M. Franck, Professor Emeritus of Law, New York University School of Law,

Ms Brigitte Stern, Professor at the University of Paris I,

Mr. Luigi Condorelli, Professor at the Faculty of Law of the University of Florence,
Ms Magda Karagiannakis, B.Ec., LL.B., LL.M., Barrister at Law, Melbourne, Australia,
Ms Joanna Korner Q.C., Barrister at Law, London,
Ms Laura Dauban, LL.B. (Hons),
Mr. Antoine Ollivier, Temporary Lecturer and Research Assistant, University of Paris X-Nanterre,

as Counsel and Advocates;

Mr. Morten Torkildsen, BSc., MSc., Torkildsen Granskin og Rådgivning, Norway,

as Expert Counsel and Advocate;

H.E. Mr. Fuad Šabeta, Ambassador of Bosnia and Herzegovina to the Kingdom of the Netherlands,
Mr. Wim Muller, LL.M., M.A.,
Mr. Mauro Barelli, LL.M. (University of Bristol),
Mr. Ermin Sarajlija, LL.M.,
Mr. Amir Bajrić, LL.M.,
Ms Amra Mehmedić, LL.M.,
Ms Isabelle Moulier, Research Student in International Law, University of Paris I,
Mr. Paolo Palchetti, Associate Professor at the University of Macerata, Italy,

as Counsel,

*and*

Serbia and Montenegro,

represented by

H.E. Mr. Radoslav Stojanović, S.J.D., Head of the Law Council of the Ministry of Foreign Affairs of Serbia and Montenegro, Professor at the Belgrade University School of Law,

as Agent;

Mr. Saša Obradović, First Counsellor of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,
Mr. Vladimir Cvetković, Second Secretary of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,

as Co-Agents;

Mr. Tibor Varady, S.J.D. (Harvard), Professor of Law at the Central European University, Budapest, and Emory University, Atlanta,
Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Member of the International Law Commission, member of the English Bar, Distinguished Fellow of All Souls College, Oxford,
Mr. Xavier de Roux, Maîtrise de droit, avocat à la cour, Paris,
Ms Nataša Fauveau-Ivanović, avocat à la cour, Paris, member of the Council of the International Criminal Bar,
Mr. Andreas Zimmerman, LL.M. (Harvard), Professor of Law at the University of Kiel, Director of the Walther-Schücking Institute,

Mr. Vladimir Djerić, LL.M. (Michigan), Attorney at Law, Mikijelj, Janković & Bogdanović, Belgrade, President of the International Law Association of Serbia and Montenegro,
Mr. Igor Olujić, Attorney at Law, Belgrade,

as Counsel and Advocates;

Ms Sanja Djajić, S.J.D, Associate Professor at the Novi Sad University School of Law,
Ms Ivana Mroz, LL.M. (Minneapolis),
Mr. Svetislav Rabrenović, Expert-associate at the Office of the Prosecutor for War Crimes of the Republic of Serbia,
Mr. Aleksandar Djurdjić, LL.M., First Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,
Mr. Miloš Jastrebić, Second Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,
Mr. Christian J. Tams, LL.M., Ph.D. (Cambridge), Walther-Schücking Institute, University of Kiel,
Ms Dina Dobrkovic, LL.B.,

as Assistants,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina (with effect from 14 December 1995 "Bosnia and Herzegovina") filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro" and with effect from 3 June 2006, the Republic of Serbia — see paragraphs 67 and 79 below) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter "the Genocide Convention" or "the Convention"), as well as various matters which Bosnia and Herzegovina claimed were connected therewith. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Application was immediately communicated to the Government of the Federal Republic of Yugoslavia (hereinafter "the FRY") by the Registrar; and in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. In conformity with Article 43 of the Rules of Court, the Registrar addressed the notification provided for in Article 63, paragraph 1, of the Statute to all the States appearing on the list of the parties to the Genocide Convention held by the Secretary-General of the United Nations as depositary. The Registrar also sent to the Secretary-General the notification provided for in Article 34, paragraph 3, of the Statute.

4. On 20 March 1993, immediately after the filing of its Application, Bosnia

and Herzegovina submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court. On 31 March 1993, Bosnia and Herzegovina filed in the Registry, and invoked as an additional basis of jurisdiction, the text of a letter dated 8 June 1992, addressed jointly by the President of the then Republic of Montenegro and the President of the then Republic of Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia. On 1 April 1993, the FRY submitted written observations on Bosnia and Herzegovina's request for provisional measures, in which it, in turn, recommended that the Court indicate provisional measures to be applied to Bosnia and Herzegovina. By an Order dated 8 April 1993, the Court, after hearing the Parties, indicated certain provisional measures with a view to the protection of rights under the Genocide Convention.

5. By an Order dated 16 April 1993, the President of the Court fixed 15 October 1993 as the time-limit for the filing of the Memorial of Bosnia and Herzegovina and 15 April 1994 as the time-limit for the filing of the Counter-Memorial of the FRY.

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Bosnia and Herzegovina chose Mr. Elihu Lauterpacht and the FRY chose Mr. Milenko Kreća.

7. On 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures. By letters of 6 August and 10 August 1993, the Agent of Bosnia and Herzegovina indicated that his Government wished to invoke additional bases of jurisdiction in the case: the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities, signed at Saint-Germain-en-Laye on 10 September 1919, and customary and conventional international laws of war and international humanitarian law. By a letter of 13 August 1993, the Agent of Bosnia and Herzegovina confirmed his Government's intention also to rely on the above-mentioned letter from the Presidents of Montenegro and Serbia dated 8 June 1992 as an additional basis of jurisdiction (see paragraph 4).

8. On 10 August 1993, the FRY also submitted a request for the indication of provisional measures and on 10 August and 23 August 1993, it filed written observations on Bosnia and Herzegovina's new request. By an Order dated 13 September 1993, the Court, after hearing the Parties, reaffirmed the measures indicated in its Order of 8 April 1993 and stated that those measures should be immediately and effectively implemented.

9. By an Order dated 7 October 1993, the Vice-President of the Court, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Memorial to 15 April 1994 and accordingly extended the time-limit for the filing of the Counter-Memorial to 15 April 1995. Bosnia and Herzegovina filed its Memorial within the time-limit thus extended. By a letter dated 9 May 1994, the Agent of the FRY submitted that the Memorial filed by Bosnia and Herzegovina failed to meet the requirements of Article 43 of the Statute and Articles 50 and 51 of the Rules of Court. By letter of 30 June 1994, the Registrar, acting on the instructions of the Court, requested Bosnia and Herzegovina, pursuant to Article 50, paragraph 2, of the Rules of Court, to file as annexes to its Memorial the extracts of the documents to which it referred therein. Bosnia and

Herzegovina accordingly filed Additional Annexes to its Memorial on 4 January 1995.

10. By an Order dated 21 March 1995, the President of the Court, at the request of the FRY, extended the time-limit for the filing of the Counter-Memorial to 30 June 1995. Within the time-limit thus extended, the FRY, referring to Article 79, paragraph 1, of the Rules of Court of 14 April 1978, raised preliminary objections concerning the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 July 1995, the President of the Court noted that, by virtue of Article 79, paragraph 3, of the 1978 Rules of Court, the proceedings on the merits were suspended, and fixed 14 November 1995 as the time-limit within which Bosnia and Herzegovina might present a written statement of its observations and submissions on the preliminary objections raised by the FRY. Bosnia and Herzegovina filed such a statement within the time-limit thus fixed.

11. By a letter dated 2 February 1996, the Agent of the FRY submitted to the Court the text of the General Framework Agreement for Peace in Bosnia and Herzegovina and the annexes thereto, initialled in Dayton, Ohio, on 21 November 1995, and signed in Paris on 14 December 1995 (hereinafter the "Dayton Agreement").

12. Public hearings were held on preliminary objections between 29 April and 3 May 1996. By a Judgment of 11 July 1996, the Court dismissed the preliminary objections and found that it had jurisdiction to adjudicate on the dispute on the basis of Article IX of the Genocide Convention and that the Application was admissible.

13. By an Order dated 23 July 1996, the President fixed 23 July 1997 as the time-limit for the filing of the Counter-Memorial of the FRY. The Counter-Memorial, which was filed on 22 July 1997, contained counter-claims. By a letter dated 28 July 1997, Bosnia and Herzegovina, invoking Article 80 of the 1978 Rules of Court, challenged the admissibility of the counter-claims. On 22 September 1997, at a meeting held between the President of the Court and the Agents of the Parties, the Agents accepted that their respective Governments submit written observations on the question of the admissibility of the counter-claims. Bosnia and Herzegovina and the FRY submitted their observations to the Court on 10 October 1997 and 24 October 1997, respectively. By an Order dated 17 December 1997, the Court found that the counter-claims submitted by the FRY were admissible as such and formed part of the current proceedings since they fulfilled the conditions set out in Article 80, paragraphs 1 and 2, of the 1978 Rules of Court. The Court further directed Bosnia and Herzegovina to submit a Reply and the FRY to submit a Rejoinder relating to the claims of both Parties and fixed 23 January 1998 and 23 July 1998 as the respective time-limits for the filing of those pleadings. The Court also reserved the right of Bosnia and Herzegovina to present its views on the counter-claims of the FRY in an additional pleading.

14. By an Order dated 22 January 1998, the President, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Reply of Bosnia and Herzegovina to 23 April 1998 and accordingly extended the time-limit for the filing of the Rejoinder of the FRY to 22 January 1999.

15. On 15 April 1998, the Co-Agent of the FRY filed "Additional Annexes

to the Counter-Memorial of the Federal Republic of Yugoslavia". By a letter dated 14 May 1998, the Deputy Agent of Bosnia and Herzegovina, referring to Articles 50 and 52 of the Rules of Court, objected to the admissibility of these documents in view of their late filing. On 22 September 1998, the Parties were informed that the Court had decided that the documents in question "[were] admissible as Annexes to the Counter-Memorial to the extent that they were established, in the original language, on or before the date fixed by the Order of 23 July 1996 for the filing of the Counter-Memorial" and that "[a]ny such document established after that date [would] have to be submitted as an Annex to the Rejoinder, if Yugoslavia so wishe[d]".

16. On 23 April 1998, within the time-limit thus extended, Bosnia and Herzegovina filed its Reply. By a letter dated 27 November 1998, the FRY requested the Court to extend the time-limit for the filing of its Rejoinder to 22 April 1999. By a letter dated 9 December 1998, Bosnia and Herzegovina objected to any extension of the time-limit fixed for the filing of the Rejoinder. By an Order of 11 December 1998, the Court, having regard to the fact that Bosnia and Herzegovina had been granted an extension of the time-limit for the filing of its Reply, extended the time-limit for the filing of the Rejoinder of the FRY to 22 February 1999. The FRY filed its Rejoinder within the time-limit thus extended.

17. On 19 April 1999, the President of the Court held a meeting with the representatives of the Parties in order to ascertain their views with regard to questions of procedure. Bosnia and Herzegovina indicated that it did not intend to file an additional pleading concerning the counter-claims made by the FRY and considered the case ready for oral proceedings. The Parties also expressed their views about the organization of the oral proceedings.

18. By a letter dated 9 June 1999, the then Chairman of the Presidency of Bosnia and Herzegovina, Mr. Zivko Radisić, informed the Court of the appointment of a Co-Agent, Mr. Svetozar Miletić. By a letter dated 10 June 1999, the thus appointed Co-Agent informed the Court that Bosnia and Herzegovina wished to discontinue the case. By a letter of 14 June 1999, the Agent of Bosnia and Herzegovina asserted that the Presidency of Bosnia and Herzegovina had taken no action to appoint a Co-Agent or to terminate the proceedings before the Court. By a letter of 15 June 1999, the Agent of the FRY stated that his Government accepted the discontinuance of the proceedings. By a letter of 21 June 1999, the Agent of Bosnia and Herzegovina reiterated that the Presidency had not made any decision to discontinue the proceedings and transmitted to the Court letters from two members of the Presidency, including the new Chairman of the Presidency, confirming that no such decision had been made.

19. By letters dated 30 June 1999 and 2 September 1999, the President of the Court requested the Chairman of the Presidency to clarify the position of Bosnia and Herzegovina regarding the pendency of the case. By a letter dated 3 September 1999, the Agent of the FRY submitted certain observations on this matter, concluding that there was an agreement between the Parties to discontinue the case. By a letter dated 15 September 1999, the Chairman of the Presidency of Bosnia and Herzegovina informed the Court that at its 58th session held on 8 September 1999, the Presidency had concluded that: (i) the Presidency "did not make a decision to discontinue legal proceedings before the International Court of Justice"; (ii) the Presidency "did not make a decision to name a Co-Agent in this case"; (iii) the Presidency would "inform [the Court] timely about any further decisions concerning this case".

20. By a letter of 20 September 1999, the President of the Court informed

the Parties that the Court intended to schedule hearings in the case beginning in the latter part of February 2000 and requested the Chairman of the Presidency of Bosnia and Herzegovina to confirm that Bosnia and Herzegovina's position was that the case should so proceed. By a letter of 4 October 1999, the Agent of Bosnia and Herzegovina confirmed that the position of his Government was that the case should proceed and he requested the Court to set a date for the beginning of the oral proceedings as soon as possible. By a letter dated 10 October 1999, the member of the Presidency of Bosnia and Herzegovina from the Republika Srpska informed the Court that the letter of 15 September 1999 from the Chairman of the Presidency was "without legal effects" *inter alia* because the National Assembly of the Republika Srpska, acting pursuant to the Constitution of Bosnia and Herzegovina, had declared the decision of 15 September "destructive of a vital interest" of the Republika Srpska. On 22 October 1999, the President informed the Parties that, having regard to the correspondence received on this matter, the Court had decided not to hold hearings in the case in February 2000.

21. By a letter dated 23 March 2000 transmitting to the Court a letter dated 20 March 2000 from the Chairman of the Presidency, the Agent of Bosnia and Herzegovina reaffirmed that the appointment of a Co-Agent by the former Chairman of the Presidency of Bosnia and Herzegovina on 9 June 1999 lacked any legal basis and that the communications of the Co-Agent did not reflect the position of Bosnia and Herzegovina. Further, the Agent asserted that, contrary to the claims of the member of the Presidency of Bosnia and Herzegovina from the Republic of Srpska, the letter of 15 September 1999 was not subject to the veto mechanism contained in the Constitution of Bosnia and Herzegovina. The Agent requested the Court to set a date for oral proceedings at its earliest convenience.

22. By a letter dated 13 April 2000, the Agent of the FRY transmitted to the Court a document entitled "Application for the Interpretation of the Decision of the Court on the Pendency of the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia)", requesting an interpretation of the decision of the Court to which the President of the Court had referred in his letter dated 22 October 1999. By a letter dated 18 April 2000, the Registrar informed the Agent of the FRY that, according to Article 60 of the Statute, a request for interpretation could relate only to a judgment of the Court and therefore the document transmitted to the Court on 13 April 2000 could not constitute a request for interpretation and had not been entered on the Court's General List. The Registrar further explained that the sole decision to which reference was made in the letter of 22 October 1999 was that no hearings would be held in February 2000. The Registrar requested the Agent to transmit as soon as possible any comments he might have on the letter dated 23 March 2000 from the Agent of Bosnia and Herzegovina and the letter from the Chairman of the Presidency enclosed therewith. By a letter dated 25 April 2000, the Agent of the FRY submitted such comments to the Court and requested that the Court record and implement the agreement for the discontinuance of the case evidenced by the exchange of the letter of the Co-Agent of the Applicant dated 10 June 1999 and the letter of the Agent of the FRY dated 15 June 1999. By a letter dated 8 May 2000, the Agent of Bosnia and Herzegovina submitted certain observations regarding the letter dated 25 April 2000 from the Agent of the FRY and reiterated the wish of his Government to continue with the proceedings in the case. By letters dated 8 June, 26 June and 4 October 2000 from the

FRY and letters dated 9 June and 21 September 2000 from Bosnia and Herzegovina, the Agents of the Parties restated their positions.

23. By a letter dated 29 September 2000, Mr. Svetozar Miletić, who had purportedly been appointed Co-Agent on 9 June 1999 by the then Chairman of the Presidency of Bosnia and Herzegovina, reiterated his position that the case had been discontinued. By a letter dated 6 October 2000, the Agent of Bosnia and Herzegovina stated that this letter and the recent communication from the Agent of the FRY had not altered the commitment of the Government of Bosnia and Herzegovina to continue the proceedings.

24. By letters dated 16 October 2000 from the President of the Court and from the Registrar, the Parties were informed that, at its meeting of 10 October 2000, the Court, having examined all the correspondence received on this question, had found that Bosnia and Herzegovina had not demonstrated its will to withdraw the Application in an unequivocal manner. The Court had thus concluded that there had been no discontinuance of the case by Bosnia and Herzegovina. Consequently, in accordance with Article 54 of the Rules, the Court, after having consulted the Parties, would, at an appropriate time, fix a date for the opening of the oral proceedings.

25. By a letter dated 18 January 2001, the Minister for Foreign Affairs of the FRY requested the Court to grant a stay of the proceedings or alternatively to postpone the opening of the oral proceedings for a period of 12 months due, *inter alia*, to the change of Government of the FRY and the resulting fundamental change in the policies and international position of that State. By a letter dated 25 January 2001, the Agent of Bosnia and Herzegovina communicated the views of his Government on the request made by the FRY and reserved his Government's final judgment on the matter, indicating that, in the intervening period, Bosnia and Herzegovina's position continued to be that there should be an expedited resolution of the case.

26. By a letter dated 20 April 2001, the Agent of the FRY informed the Court that his Government wished to withdraw the counter-claims submitted by the FRY in its Counter-Memorial. The Agent also informed the Court that his Government was of the opinion that the Court did not have jurisdiction *ratione personae* over the FRY and further that the FRY intended to submit an application for revision of the Judgment of 11 July 1996. On 24 April 2001, the FRY filed in the Registry of the Court an Application instituting proceedings whereby, referring to Article 61 of the Statute, it requested the Court to revise the Judgment delivered on Preliminary Objections on 11 July 1996 (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina)*, hereinafter referred to as "the *Application for Revision* case"). In the present case the Agent of the FRY submitted, under cover of a letter dated 4 May 2001, a document entitled "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia", accompanied by one volume of annexes (hereinafter "the Initiative"). The Agent informed the Court that the Initiative was based on facts and arguments which were essentially identical to those submitted in the FRY's Application for revision of the Judgment of 11 July 1996 since his Government believed that these were both appropriate procedural avenues. In the Initiative, the FRY requested the Court to adjudge and declare that it had no jurisdiction *ratione personae* over the FRY, contending that it had not been a party to the Statute of the Court until its admission to the United Nations on 1 November 2000, that it had not been

and still was not a party to the Genocide Convention; it added moreover that its notification of accession to that Convention dated 8 March 2001 contained a reservation to Article IX thereof. The FRY asked the Court to suspend the proceedings on the merits until a decision was rendered on the Initiative.

27. By a letter dated 12 July 2001 and received in the Registry on 15 August 2001, Bosnia and Herzegovina informed the Court that it had no objection to the withdrawal of the counter-claims by the FRY and stated that it intended to submit observations regarding the Initiative. By an Order dated 10 September 2001, the President of the Court placed on record the withdrawal by the FRY of the counter-claims submitted in its Counter-Memorial.

28. By a letter dated 3 December 2001, Bosnia and Herzegovina provided the Court with its views regarding the Initiative and transmitted a memorandum on "differences between the Application for Revision of 23 April 2001 and the 'Initiative' of 4 May 2001" as well as a copy of the written observations and annexes filed by Bosnia and Herzegovina on 3 December 2001 in the *Application for Revision* case. In that letter, Bosnia and Herzegovina submitted that "there [was] no basis in fact nor in law to honour this so-called 'Initiative'" and requested the Court *inter alia* to "respond in the negative to the request embodied in the 'Initiative'".

29. By a letter dated 22 February 2002 to the President of the Court, Judge *ad hoc* Lauterpacht resigned from the case.

30. Under cover of a letter of 18 April 2002, the Registrar, referring to Article 34, paragraph 3, of the Statute, transmitted copies of the written proceedings to the Secretary-General of the United Nations.

31. In its Judgment of 3 February 2003 in the *Application for Revision* case, the Court found that the FRY's Application for revision, under Article 61 of the Statute of the Court, of the Judgment of 11 July 1996 on preliminary objections was inadmissible.

32. By a letter dated 5 February 2003, the FRY informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro". The title of the case was duly changed and the name "Serbia and Montenegro" was used thereafter for all official purposes of the Court.

33. By a letter of 17 February 2003, Bosnia and Herzegovina reaffirmed its position with respect to the Initiative, as stated in the letter of 3 December 2001, and expressed its desire to proceed with the case. By a letter dated 8 April 2003, Serbia and Montenegro submitted that, due to major new developments since the filing of the last written pleading, additional written pleadings were necessary in order to make the oral proceedings more effective and less time-consuming. On 24 April 2003, the President of the Court held a meeting with the Agents of the Parties to discuss questions of procedure. Serbia and Montenegro stated that it maintained its request for the Court to rule on its Initiative while Bosnia and Herzegovina considered that there was no need for additional written pleadings. The possible dates and duration of the oral proceedings were also discussed.

34. By a letter dated 25 April 2003, Bosnia and Herzegovina chose Mr. Ahmed Mahiou to sit as judge *ad hoc* in the case.

35. By a letter of 12 June 2003, the Registrar informed Serbia and Montenegro that the Court could not accede to its request that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised in the Initiative; however, should it wish to do so, Serbia and Montenegro would be free to present further argument on jurisdictional questions during the oral proceedings on the merits. In further letters of the same date, the Parties were informed that the Court, having considered Serbia and Montenegro's request, had decided not to authorize the filing of further written pleadings in the case.

36. In an exchange of letters in October and November 2003, the Agents of the Parties made submissions as to the scheduling of the oral proceedings.

37. Following a further exchange of letters between the Parties in March and April 2004, the President held a meeting with the Agents of the Parties on 25 June 2004, at which the Parties presented their views on, *inter alia*, the scheduling of the hearings and the calling of witnesses and experts.

38. By letters dated 26 October 2004, the Parties were informed that, after examining the list of cases before it ready for hearing and considering all the relevant circumstances, the Court had decided to fix Monday 27 February 2006 for the opening of the oral proceedings in the case.

39. On 14 March 2005, the President met with the Agents of the Parties in order to ascertain their views with regard to the organization of the oral proceedings. At this meeting, both Parties indicated that they intended to call witnesses and experts.

40. By letters dated 19 March 2005, the Registrar, referring to Articles 57 and 58 of the Rules of Court, requested the Parties to provide, by 9 September 2005, details of the witnesses, experts and witness-experts whom they intended to call and indications of the specific point or points to which the evidence of the witness, expert or witness-expert would be directed. By a letter of 8 September 2005, the Agent of Serbia and Montenegro transmitted to the Court a list of eight witnesses and two witness-experts whom his Government wished to call during the oral proceedings. By a further letter of the same date, the Agent of Serbia and Montenegro communicated a list of five witnesses whose attendance his Government requested the Court to arrange pursuant to Article 62, paragraph 2, of the Rules of Court. By a letter dated 9 September 2005, Bosnia and Herzegovina transmitted to the Court a list of three experts whom it wished to call at the hearings.

41. By a letter dated 5 October 2005, the Deputy Agent of Bosnia and Herzegovina informed the Registry of Bosnia and Herzegovina's views with regard to the time that it considered necessary for the hearing of the experts it wished to call and made certain submissions, *inter alia*, with respect to the request made by Serbia and Montenegro pursuant to Article 62, paragraph 2, of the Rules of Court. By letters of 4 and 11 October 2005, the Agent and the Co-Agent of Serbia and Montenegro, respectively, informed the Registry of the views of their Government with respect to the time necessary for the hearing of the witnesses and witness-experts whom it wished to call.

42. By letters of 15 November 2005, the Registrar informed the Parties, *inter alia*, that the Court had decided that it would hear the three experts and ten witnesses and witness-experts that Bosnia and Herzegovina and Serbia and Montenegro respectively wished to call and, moreover, that it had decided not to arrange for the attendance, pursuant to Article 62, paragraph 2, of the Rules

of Court, of the five witnesses proposed by Serbia and Montenegro. However, the Court reserved the right to exercise subsequently, if necessary, its powers under that provision to call persons of its choosing on its own initiative. The Registrar also requested the Parties to provide certain information related to the hearing of the witnesses, experts and witness-experts including, *inter alia*, the language in which each witness, expert or witness-expert would speak and, in respect of those speaking in a language other than English or French, the arrangements which the Party intended to make, pursuant to Article 70, paragraph 2, of the Rules of Court, for interpretation into one of the official languages of the Court. Finally the Registrar transmitted to the Parties the calendar for the oral proceedings as adopted by the Court.

43. By a letter dated 12 December 2005, the Agent of Serbia and Montenegro informed the Court, *inter alia*, that eight of the ten witnesses and witness-experts it wished to call would speak in Serbian and outlined the arrangements that Serbia and Montenegro would make for interpretation from Serbian to one of the official languages of the Court. By a letter dated 15 December 2005, the Deputy Agent of Bosnia and Herzegovina informed the Court, *inter alia,* that the three experts called by Bosnia and Herzegovina would speak in one of the official languages of the Court.

44. By a letter dated 28 December 2005, the Deputy Agent of Bosnia and Herzegovina, on behalf of the Government, requested that the Court call upon Serbia and Montenegro, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. By a letter dated 16 January 2006, the Agent of Serbia and Montenegro informed the Court of his Government's views on this request. By a letter dated 19 January 2006, the Registrar, acting on the instructions of the Court, asked Bosnia and Herzegovina to provide certain further information relating to its request under Article 49 of the Statute and Article 62, paragraph 2, of the Rules of Court. By letters dated 19 and 24 January 2006, the Deputy Agent of Bosnia and Herzegovina submitted additional information and informed the Court that Bosnia and Herzegovina had decided, for the time being, to restrict its request to the redacted sections of certain documents. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro communicated his Government's views regarding this modified request. By letters dated 2 February 2006, the Registrar informed the Parties that the Court had decided, at this stage of the proceedings, not to call upon Serbia and Montenegro to produce the documents in question. However, the Court reserved the right to exercise subsequently, if necessary, its powers under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to request, *proprio motu*, the production by Serbia and Montenegro of the documents in question.

45. By a letter dated 16 January 2006, the Deputy Agent of Bosnia and Herzegovina transmitted to the Registry copies of new documents that Bosnia and Herzegovina wished to produce pursuant to Article 56 of the Rules of Court. Under cover of the same letter and of a letter dated 23 January 2006, the Deputy Agent of Bosnia and Herzegovina also transmitted to the Registry copies of video material, extracts of which Bosnia and Herzegovina intended to present at the oral proceedings. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro informed the Court that his Government did not object to the production of the new documents by Bosnia and Herzegovina. Nor did it object to the video material being shown at the oral proceedings. By

letters of 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objections had been raised by Serbia and Montenegro, the Court had decided to authorize the production of the new documents by Bosnia and Herzegovina pursuant to Article 56 of the Rules of Court and that it had further decided that Bosnia and Herzegovina could show extracts of the video material at the hearings.

46. Under cover of a letter dated 18 January 2006 and received on 20 January 2006, the Agent of Serbia and Montenegro provided the Registry with copies of new documents which his Government wished to produce pursuant to Article 56 of the Rules of Court. By a letter of 1 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not object to the production of the said documents by Serbia and Montenegro. By a letter dated 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objection had been raised by Bosnia and Herzegovina, the Court had decided to authorize the production of the new documents by Serbia and Montenegro. By a letter dated 9 February 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court certain missing elements of the new documents submitted on 20 January 2006 and made a number of observations concerning the new documents produced by Bosnia and Herzegovina. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not intend to make any observations regarding the new documents produced by Serbia and Montenegro.

47. Under cover of a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court a list of public documents that his Government would refer to in its first round of oral argument. By a further letter dated 14 February 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court copies of folders containing the public documents referred to in the list submitted on 31 January 2006 and informed the Court that Serbia and Montenegro had decided not to submit the video materials included in that list. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina had no observations to make regarding the list of public documents submitted by Serbia and Montenegro on 31 January 2006. He also stated that Bosnia and Herzegovina would refer to similar sources during its pleadings and was planning to provide the Court and the Respondent, at the end of the first round of its oral argument, with a CD-ROM containing materials it had quoted (see below, paragraph 54).

48. By a letter dated 26 January 2006, the Registrar informed the Parties of certain decisions taken by the Court with regard to the hearing of the witnesses, experts and witness-experts called by the Parties including, *inter alia*, that, exceptionally, the verbatim records of the sittings at which the witnesses, experts and witness-experts were heard would not be made available to the public or posted on the website of the Court until the end of the oral proceedings.

49. By a letter dated 13 February 2006, the Agent of Serbia and Montenegro informed the Court that his Government had decided not to call two of the witnesses and witness-experts included in the list transmitted to the Court on 8 September 2005 and that the order in which the remaining witnesses and witness-expert would be heard had been modified. By a letter dated 21 February 2006, the Agent of Serbia and Montenegro requested the Court's per-

mission for the examination of three of the witnesses called by his Government to be conducted in Serbian (namely, Mr. Dušan Mihajlović, Mr. Vladimir Milićević, Mr. Dragoljub Mićunović). By a letter dated 22 February 2006, the Registrar informed the Agent of Serbia and Montenegro that there was no objection to such a procedure being followed, pursuant to the provisions of Article 39, paragraph 3, of the Statute and Article 70 of the Rules of Court.

50. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

51. Public sittings were held from 27 February to 9 May 2006, at which the Court heard the oral arguments and replies of:

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| *For Bosnia and Herzegovina:* | Mr. Sakib Softić,<br>Mr. Phon van den Biesen,<br>Mr. Alain Pellet,<br>Mr. Thomas M. Franck,<br>Ms Brigitte Stern,<br>Mr. Luigi Condorelli,<br>Ms Magda Karagiannakis,<br>Ms Joanna Korner,<br>Ms Laura Dauban,<br>Mr. Antoine Ollivier,<br>Mr. Morten Torkildsen. |
| *For Serbia and Montenegro:* | H.E. Mr. Radoslav Stojanović,<br>Mr. Saša Obradović,<br>Mr. Vladimir Cvetković,<br>Mr. Tibor Varady,<br>Mr. Ian Brownlie,<br>Mr. Xavier de Roux,<br>Ms Nataša Fauveau-Ivanović,<br>Mr. Andreas Zimmerman,<br>Mr. Vladimir Djerić,<br>Mr. Igor Olujić. |

52. On 1 March 2006, the Registrar, on the instructions of the Court, requested Bosnia and Herzegovina to specify the precise origin of each of the extracts of video material and of the graphics, charts and photographs shown or to be shown at the oral proceedings. On 2 March 2006 Bosnia and Herzegovina provided the Court with certain information regarding the extracts of video material shown at the sitting on 1 March 2006 and those to be shown at the sittings on 2 March 2006 including the source of such video material. Under cover of a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina transmitted to the Court a list detailing the origin of the extracts of video material, graphics, charts and photographs shown or to be shown by it during its first round of oral argument, as well as transcripts, in English and in French, of the above-mentioned extracts of video material.

53. By a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina informed the Court that it wished to withdraw one of the experts it had intended to call. In that letter, the Agent of Bosnia and Herzegovina also asked the Court to request each of the Parties to provide a one-page outline per wit-

ness, expert or witness-expert detailing the topics which would be covered in his evidence or statement. By letters dated 7 March 2006, the Parties were informed that the Court requested them to provide, at least three days before the hearing of each witness, expert or witness-expert, a one-page summary of the latter's evidence or statement.

54. On 7 March 2006, Bosnia and Herzegovina provided the Court and the Respondent with a CD-ROM containing "ICTY Public Exhibits and other Documents cited by Bosnia and Herzegovina during its Oral Pleadings (07/03/2006)". By a letter dated 10 March 2006, Serbia and Montenegro informed the Court that it objected to the production of the CD-ROM on the grounds that the submission at such a late stage of so many documents "raise[d] serious concerns related to the respect for the Rules of Court and the principles of fairness and equality of the parties". It also pointed out that the documents included on the CD-ROM "appear[ed] questionable from the point of [view of] Article 56, paragraph 4, of the Rules [of Court]". By a letter dated 13 March 2006, the Agent of Bosnia and Herzegovina informed the Court of his Government's views regarding the above-mentioned objections raised by Serbia and Montenegro. In that letter, the Agent submitted, *inter alia*, that all the documents on the CD-ROM had been referred to by Bosnia and Herzegovina in its oral argument and were documents which were in the public domain and were readily available within the terms of Article 56, paragraph 4, of the Rules of Court. The Agent added that Bosnia and Herzegovina was prepared to withdraw the CD-ROM if the Court found it advisable. By a letter of 14 March 2006, the Registrar informed Bosnia and Herzegovina that, given that Article 56, paragraph 4, of the Rules of Court did not require or authorize the submission to the Court of the full text of a document to which reference was made during the oral proceedings pursuant to that provision and since it was difficult for the other Party and the Court to come to terms, at the late stage of the proceedings, with such an immense mass of documents, which in any case were in the public domain and could thus be consulted if necessary, the Court had decided that it was in the interests of the good administration of justice that the CD-ROM be withdrawn. By a letter dated 16 March 2006, the Agent of Bosnia and Herzegovina withdrew the CD-ROM which it had submitted on 7 March 2006.

55. On 17 March 2006, Bosnia and Herzegovina submitted a map for use during the statement to be made by one of its experts on the morning of 20 March 2006. On 20 March 2006, Bosnia and Herzegovina produced a folder of further documents to be used in the examination of that expert. Serbia and Montenegro objected strongly to the production of the documents at such a late stage since its counsel would not have time to prepare for cross-examination. On 20 March 2006, the Court decided that the map submitted on 17 March 2006 could not be used during the statement of the expert. Moreover, having consulted both Parties, the Court decided to cancel the morning sitting and instead hear the expert during an afternoon sitting in order to allow Serbia and Montenegro to be ready for cross-examination.

56. On 20 March 2006, Serbia and Montenegro informed the Court that one of the witnesses it had intended to call finally would not be giving evidence.

57. The following experts were called by Bosnia and Herzegovina and made their statements at public sittings on 17 and 20 March 2006: Mr. András J. Riedlmayer and General Sir Richard Dannatt. The experts were examined by

counsel for Bosnia and Herzegovina and cross-examined by counsel for Serbia and Montenegro. The experts were subsequently re-examined by counsel for Bosnia and Herzegovina. Questions were put to Mr. Riedlmayer by Judges Kreća, Tomka, Simma and the Vice-President and replies were given orally. Questions were put to General Dannatt by the President, Judge Koroma and Judge Tomka and replies were given orally.

58. The following witnesses and witness-expert were called by Serbia and Montenegro and gave evidence at public sittings on 23, 24, 27 and 28 March 2006: Mr. Vladimir Lukić; Mr. Vitomir Popović; General Sir Michael Rose; Mr. Jean-Paul Sardon (witness-expert); Mr. Dušan Mihajlović; Mr. Vladimir Milićević; Mr. Dragoljub Mićunović. The witnesses and witness-expert were examined by counsel for Serbia and Montenegro and cross-examined by counsel for Bosnia and Herzegovina. General Rose, Mr. Mihajlović and Mr. Milićević were subsequently re-examined by counsel for Serbia and Montenegro. Questions were put to Mr. Lukić by Judges Ranjeva, Simma, Tomka and Bennouna and replies were given orally. Questions were put to General Rose by the Vice-President and Judges Owada and Simma and replies were given orally.

59. With the exception of General Rose and Mr. Jean-Paul Sardon, the above-mentioned witnesses called by Serbia and Montenegro gave their evidence in Serbian and, in accordance with Article 39, paragraph 3, of the Statute and Article 70, paragraph 2, of the Rules of Court, Serbia and Montenegro made the necessary arrangements for interpretation into one of the official languages of the Court and the Registry verified this interpretation. Mr. Stojanović conducted his examination of Mr. Dragoljub Mićunović in Serbian in accordance with the exchange of correspondence between Serbia and Montenegro and the Court on 21 and 22 February 2006 (see paragraph 49 above).

60. In the course of the hearings, questions were put by Members of the Court, to which replies were given orally and in writing, pursuant to Article 61, paragraph 4, of the Rules of Court.

61. By a letter of 8 May 2006, the Agent of Bosnia and Herzegovina requested the Court to allow the Deputy Agent to take the floor briefly on 9 May 2006, in order to correct an assertion about one of the counsel of and one of the experts called by Bosnia and Herzegovina which had been made by Serbia and Montenegro in its oral argument. By a letter dated 9 May 2006, the Agent of Serbia and Montenegro communicated the views of his Government on that matter. On 9 May 2006, the Court decided, in the particular circumstances of the case, to authorize the Deputy Agent of Bosnia and Herzegovina to make a very brief statement regarding the assertion made about its counsel.

62. By a letter dated 3 May 2006, the Agent of Bosnia and Herzegovina informed the Court that there had been a number of errors in references included in its oral argument presented on 2 March 2006 and provided the Court with the corrected references. By a letter dated 8 May 2006, the Agent of Serbia and Montenegro, "in light of the belated corrections by the Applicant, and for the sake of the equality between the parties", requested the Court to accept a paragraph of its draft oral argument of 2 May 2006 which responded to one of the corrections made by Bosnia and Herzegovina but had been left out of the final version of its oral argument "in order to fit the schedule of [Serbia and Montenegro's] presentations". By a letter dated 7 June 2006, the Parties were informed that the Court had taken due note of both the explana-

tion given by the Agent of Bosnia and Herzegovina and the observations made in response by the Agent of Serbia and Montenegro.

63. In January 2007, Judge Parra-Aranguren, who had attended the oral proceedings in the case, and had participated in part of the deliberation, but had for medical reasons been prevented from participating in the later stages thereof, informed the President of the Court, pursuant to Article 24, paragraph 1, of the Statute, that he considered that he should not take part in the decision of the case. The President took the view that the Court should respect and accept Judge Parra-Aranguren's position, and so informed the Court.

*

64. In its Application, the following requests were made by Bosnia and Herzegovina:

> "Accordingly, while reserving the right to revise, supplement or amend this Application, and subject to the presentation to the Court of the relevant evidence and legal arguments, Bosnia and Herzegovina requests the Court to adjudge and declare as follows:
>
> *(a)* that Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II *(a)*, II *(b)*, II *(c)*, II *(d)*, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV and V of the Genocide Convention;
>
> *(b)* that Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the People and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;
>
> *(c)* that Yugoslavia (Serbia and Montenegro) has violated and continues to violate Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;
>
> *(d)* that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;
>
> *(e)* that in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1 (3), 55 and 56 of the United Nations Charter;
>
> *(f)* that Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4) and 33 (1), of the United Nations Charter;
>
> *(g)* that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;

(h) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:

— armed attacks against Bosnia and Herzegovina by air and land;

— aerial trespass into Bosnian airspace;
— efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;

(i) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;

(j) that Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2 (4), of the United Nations Charter, as well as its obligations under general and customary international law;

(k) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend Itself and its People under United Nations Charter Article 51 and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;

(l) that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under United Nations Charter Article 51 and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment, supplies, troops, etc.);

(m) that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

(n) that all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

(o) that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United

Nations Charter and in accordance with the customary doctrine of *ultra vires*;

*(p)* that pursuant to the right of collective self-defence recognized by United Nations Charter Article 51, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina — at its request — including by means of immediately providing It with weapons, military equipment and supplies, and armed forces (soldiers, sailors, air-people, etc.);

*(q)* that Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:

— from its systematic practice of so-called 'ethnic cleansing' of the citizens and sovereign territory of Bosnia and Herzegovina;
— from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;

— from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;

— from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
— from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
— from the starvation of the civilian population in Bosnia and Herzegovina;
— from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;
— from all use of force — whether direct or indirect, overt or covert — against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;
— from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;
— from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;

*(r)* that Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro)."

65. In the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Bosnia and Herzegovina,*

in the Memorial:

"On the basis of the evidence and legal arguments presented in this Memorial, the Republic of Bosnia and Herzegovina,

Requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia (Serbia and Montenegro), directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population, by

— killing members of the group;
— causing deliberate bodily or mental harm to members of the group;
— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
— imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia (Serbia and Montenegro) is required to pay, and the Republic of Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the

amount to be determined by the Court in a subsequent phase of the proceedings in this case.

The Republic of Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings.

The Republic of Bosnia and Herzegovina also respectfully draws the attention of the Court to the fact that it has not reiterated, at this point, several of the requests it made in its Application, on the formal assumption that the Federal Republic of Yugoslavia (Serbia and Montenegro) has accepted the jurisdiction of this Court under the terms of the Convention on the Prevention and Punishment of the Crime of Genocide. If the Respondent were to reconsider its acceptance of the jurisdiction of the Court under the terms of that Convention — which it is, in any event, not entitled to do — the Government of Bosnia and Herzegovina reserves its right to invoke also all or some of the other existing titles of jurisdiction and to revive all or some of its previous submissions and requests."

*On behalf of the Government of Serbia and Montenegro,*

in the Counter-Memorial[1]:

"The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,

— since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or

— if some have been committed, there was absolutely no intention of committing genocide, and/or

— they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group, consequently, they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,

— since they have not been committed by the organs of the Federal Republic of Yugoslavia,

— since they have not been committed on the territory of the Federal Republic of Yugoslavia,

— since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,

— since there is no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

[1] Submissions 3 to 6 relate to counter-claims which were subsequently withdrawn (see paragraphs 26 and 27 above).

therefore the Court rejects all claims of the Applicant; and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

— because it has incited acts of genocide by the 'Islamic Declaration', and in particular by the position contained in it that 'there can be no peace or coexistence between "Islamic faith" and "non-Islamic" social and political institutions',

— because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth, and in particular by the verses of a 'Patriotic Song' which read as follows:

'Dear mother, I'm going to plant willows,
We'll hang Serbs from them.
Dear mother, I'm going to sharpen knives,
We'll soon fill pits again';

— because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that 'Each Muslim must name a Serb and take oath to kill him';

— because public calls for the execution of Serbs were broadcast on radio 'Hajat' and thereby acts of genocide were incited;

— because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;

— because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all consequences of the violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and provide adequate compensation."

*On behalf of the Government of Bosnia and Herzegovina,*

in the Reply:

"Therefore the Applicant persists in its claims as presented to this Court on 14 April 1994, and recapitulates its Submissions in their entirety.

Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia, directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of Bosnia and Herzegovina, including in particular the Muslim population, by

— killing members of the group;
— causing deliberate bodily or mental harm to members of the group;
— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
— imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia is required to pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the amount to be determined by the Court in a subsequent phase of the proceedings in this case.

Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings;

8. On the very same grounds the conclusions and submissions of the Federal Republic of Yugoslavia with regard to the submissions of Bosnia and Herzegovina need to be rejected;

9. With regard to the Respondent's counter-claims the Applicant comes to the following conclusion. There is no basis in fact and no basis in law

for the proposition that genocidal acts have been committed against Serbs in Bosnia and Herzegovina. There is no basis in fact and no basis in law for the proposition that any such acts, if proven, would have been committed under the responsibility of Bosnia and Herzegovina or that such acts, if proven, would be attributable to Bosnia and Herzegovina. Also, there is no basis in fact and no basis in law for the proposition that Bosnia and Herzegovina has violated any of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. On the contrary, Bosnia and Herzegovina has continuously done everything within its possibilities to adhere to its obligations under the Convention, and will continue to do so;

10. For these reasons, Bosnia and Herzegovina requests the International Court of Justice to reject the counter-claims submitted by the Respondent in its Counter-Memorial of 23 July 1997."

*On behalf of the Government of Serbia and Montenegro,*

in the Rejoinder[2] :

"The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,

— since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or

— if some have been committed, there was absolutely no intention of committing genocide, and/or
— they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group,

consequently they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,

— since they have not been committed by the organs of the Federal Republic of Yugoslavia,
— since they have not been committed on the territory of the Federal Republic of Yugoslavia,
— since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,
— since there are no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

[2] Submissions 3 to 6 relate to counter-claims which were subsequently withdrawn (see paragraphs 26 and 27 above).

therefore the Court rejects all the claims of the Applicant, and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

— because it has incited acts of genocide by the 'Islamic Declaration', and in particular by the position contained in it that *'there can be no peace or coexistence between "Islamic faith" and "non-Islamic" social and political institutions'*,

— because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth, and in particular by the verses of a 'Patriotic Song' which read as follows:

'Dear mother, I'm going to plant willows,
We'll hang Serbs from them.
Dear mother, I'm going to sharpen knives,
We'll soon fill pits again';

— because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that 'Each Muslim' must name a Serb and take oath to kill him;

— because public calls for the execution of Serbs were broadcast on radio 'Hajat' and thereby acts of genocide were incited;

— because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;

— because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all the consequences of violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and to provide adequate compensation."

66. At the oral proceedings, the following final submissions were presented by the Parties:

*On behalf of the Government of Bosnia and Herzegovina,*

at the hearing of 24 April 2006:

"Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare:

1. That Serbia and Montenegro, through its organs or entities under its control, has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying in part the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population, by

— killing members of the group;
— causing serious bodily or mental harm to members of the group;
— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
— imposing measures intended to prevent births within the group;
— forcibly transferring children of the group to another group;

2. Subsidiarily:

(i) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by complicity in genocide as defined in paragraph 1, above; and/or

(ii) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals, groups and entities engaged in acts of genocide, as defined in paragraph 1 above;

3. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide and by inciting to commit genocide, as defined in paragraph 1 above;

4. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed to prevent genocide;

5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

6. That the violations of international law set out in submissions 1 to 5 constitute wrongful acts attributable to Serbia and Montenegro which entail its international responsibility, and, accordingly,

*(a)* that Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act pro-

hibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

(*b*) that Serbia and Montenegro must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused. That, in particular, the compensation shall cover any financially assessable damage which corresponds to:

(i) damage caused to natural persons by the acts enumerated in Article III of the Convention, including non-material damage suffered by the victims or the surviving heirs or successors and their dependants;

(ii) material damage caused to properties of natural or legal persons, public or private, by the acts enumerated in Article III of the Convention;

(iii) material damage suffered by Bosnia and Herzegovina in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from the acts enumerated in Article III of the Convention;

(*c*) that the nature, form and amount of the compensation shall be determined by the Court, failing agreement thereon between the Parties one year after the Judgment of the Court, and that the Court shall reserve the subsequent procedure for that purpose;

(*d*) that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court;

7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

*On behalf of the Government of Serbia and Montenegro,*

at the hearing of 9 May 2006:

"Serbia and Montenegro asks the Court to adjudge and declare:

— that this Court has no jurisdiction because the Respondent had no access to the Court at the relevant moment; or, in the alternative;

— that this Court has no jurisdiction over the Respondent because the Respondent never remained or became bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and because there is no other ground on which jurisdiction over the Respondent could be based.

In case the Court determines that jurisdiction exists Serbia and Montenegro asks the Court to adjudge and declare:

— That the requests in paragraphs 1 to 6 of the Submissions of Bosnia

and Herzegovina relating to alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide be rejected as lacking a basis either in law or in fact.

— In any event, that the acts and/or omissions for which the respondent State is alleged to be responsible are not attributable to the respondent State. Such attribution would necessarily involve breaches of the law applicable in these proceedings.
— Without prejudice to the foregoing, that the relief available to the applicant State in these proceedings, in accordance with the appropriate interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide, is limited to the rendering of a declaratory judgment.
— Further, without prejudice to the foregoing, that any question of legal responsibility for alleged breaches of the Orders for the indication of provisional measures, rendered by the Court on 8 April 1993 and 13 September 1993, does not fall within the competence of the Court to provide appropriate remedies to an applicant State in the context of contentious proceedings, and, accordingly, the request in paragraph 7 of the Submissions of Bosnia and Herzegovina should be rejected."

* * *

## II. Identification of the Respondent Party

67. The Court has first to consider a question concerning the identification of the Respondent Party before it in these proceedings. After the close of the oral proceedings, by a letter dated 3 June 2006, the President of the Republic of Serbia informed the Secretary-General of the United Nations that, following the Declaration of Independence adopted by the National Assembly of Montenegro on 3 June 2006, "the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organisations of the United Nations system, [would be] continued by the Republic of Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro". He further stated that "in the United Nations the name 'Republic of Serbia' [was] to be henceforth used instead of the name 'Serbia and Montenegro' " and added that the Republic of Serbia "remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter".

68. By a letter of 16 June 2006, the Minister for Foreign Affairs of the Republic of Serbia informed the Secretary-General, *inter alia*, that "[t]he Republic of Serbia continue[d] to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro" and requested that "the Republic of Serbia be considered a party to all international agreements in force, instead of Serbia and Montenegro". By a letter addressed to the Secretary-General dated 30 June

2006, the Minister for Foreign Affairs confirmed the intention of the Republic of Serbia to continue to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro. He specified that "all treaty actions undertaken by Serbia and Montenegro w[ould] continue in force with respect to the Republic of Serbia with effect from 3 June 2006", and that, "all declarations, reservations and notifications made by Serbia and Montenegro w[ould] be maintained by the Republic of Serbia until the Secretary-General, as depositary, [were] duly notified otherwise".

69. On 28 June 2006, by its resolution 60/264, the General Assembly admitted the Republic of Montenegro (hereinafter "Montenegro") as a new Member of the United Nations.

70. By letters dated 19 July 2006, the Registrar requested the Agent of Bosnia and Herzegovina, the Agent of Serbia and Montenegro and the Foreign Minister of Montenegro to communicate to the Court the views of their Governments on the consequences to be attached to the above-mentioned developments in the context of the case. By a letter dated 26 July 2006, the Agent of Serbia and Montenegro explained that, in his Government's opinion, "there [was] continuity between Serbia and Montenegro and the Republic of Serbia (on the grounds of Article 60 of the Constitutional Charter of Serbia and Montenegro)". He noted that the entity which had been Serbia and Montenegro "ha[d] been replaced by two distinct States, one of them [was] Serbia, the other [was] Montenegro". In those circumstances, the view of his Government was that "the Applicant ha[d] first to take a position, and to decide whether it wishe[d] to maintain its original claim encompassing both Serbia and Montenegro, or whether it [chose] to do otherwise".

71. By a letter to the Registrar dated 16 October 2006, the Agent of Bosnia and Herzegovina referred to the letter of 26 July 2006 from the Agent of Serbia and Montenegro, and observed that Serbia's definition of itself as the continuator of the former Serbia and Montenegro had been accepted both by Montenegro and the international community. He continued however as follows:

> "this acceptance cannot have, and does not have, any effect on the applicable rules of state responsibility. Obviously, these cannot be altered bilaterally or retroactively. At the time when genocide was committed and at the time of the initiation of this case, Serbia and Montenegro constituted a single state. Therefore, Bosnia and Herzegovina is of the opinion that both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute the cause of action in this case."

72. By a letter dated 29 November 2006, the Chief State Prosecutor of Montenegro, after indicating her capacity to act as legal representative of the Republic of Montenegro, referred to the letter from the Agent of

Bosnia and Herzegovina dated 16 October 2006, quoted in the previous paragraph, expressing the view that "both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute[s] the cause of action in this case". The Chief State Prosecutor stated that the allegation concerned the liability in international law of the sovereign State of Montenegro, and that Montenegro regarded it as an attempt to have it become a participant in this way, without its consent, "i.e. to become a respondent in this procedure". The Chief State Prosecutor drew attention to the fact that, following the referendum held in Montenegro on 21 May 2006, the National Assembly of Montenegro had adopted a decision pronouncing the independence of the Republic of Montenegro. In the view of the Chief State Prosecutor, the Republic of Montenegro had become "an independent state with full international legal personality within its existing administrative borders", and she continued:

> "The issue of international-law succession of [the] State union of Serbia and Montenegro is regulated in Article 60 of [the] Constitutional Charter, and according to [that] Article the legal successor of [the] State union of Serbia and Montenegro is the Republic of Serbia, which, as a sovereign state, [has] become [the] follower of all international obligations and successor in international organizations."

The Chief State Prosecutor concluded that in the dispute before the Court, "the Republic of Montenegro may not have [the] capacity of respondent, [for the] above mentioned reasons".

73. By a letter dated 11 December 2006, the Agent of Serbia referred to the letters from the Applicant and from Montenegro described in paragraphs 71 and 72 above, and observed that there was "an obvious contradiction between the position of the Applicant on the one hand and the position of Montenegro on the other regarding the question whether these proceedings may or may not yield a decision which would result in the international responsibility of Montenegro" for the unlawful conduct invoked by the Applicant. The Agent stated that "Serbia is of the opinion that this issue needs to be resolved by the Court".

74. The Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State.

75. The Court notes that Serbia has accepted "continuity between Serbia and Montenegro and the Republic of Serbia" (paragraph 70 above), and has assumed responsibility for "its commitments deriving from international treaties concluded by Serbia and Montenegro" (paragraph 68 above), thus including commitments under the Genocide Convention. Montenegro, on the other hand, does not claim to be the continuator of Serbia and Montenegro.

76. The Court recalls a fundamental principle that no State may be subject to its jurisdiction without its consent; as the Court observed in the case of *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, the Court's "jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it . . ." (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 260, para. 53). In its Judgment of 11 July 1996 (see paragraph 12 above), the significance of which will be explained below, the Court found that such consent existed, for the purposes of the present case, on the part of the FRY, which subsequently assumed the name of Serbia and Montenegro, without however any change in its legal personality. The events related in paragraphs 67 to 69 above clearly show that the Republic of Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the present case. It is also clear from the letter of 29 November 2006 quoted in paragraph 72 above that it does not give its consent to the jurisdiction of the Court over it for the purposes of the present dispute. Furthermore, the Applicant did not in its letter of 16 October 2006 assert that Montenegro is still a party to the present case; it merely emphasized its views as to the joint and several liability of Serbia and of Montenegro.

77. The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. Accordingly, any findings that the Court may make in the operative part of the present Judgment are to be addressed to Serbia.

78. That being said, it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro.

79. The Court observes that the Republic of Montenegro is a party to the Genocide Convention. Parties to that Convention have undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.

* * *

## III. The Court's Jurisdiction

### *(1) Introduction: The Jurisdictional Objection of Serbia and Montenegro*

80. Notwithstanding the fact that in this case the stage of oral proceedings on the merits has been reached, and the fact that in 1996 the Court gave a judgment on preliminary objections to its jurisdiction (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 595, hereinafter "the 1996 Judgment"), an important issue of a jurisdictional character has

since been raised by the Initiative, and the Court has been asked to rule upon it (see paragraphs 26-28 above). The basis of jurisdiction asserted by the Applicant, and found applicable by the Court by the 1996 Judgment, is Article IX of the Genocide Convention. The Socialist Federal Republic of Yugoslavia (hereinafter "the SFRY") became a party to that Convention on 29 August 1950. In substance, the central question now raised by the Respondent is whether at the time of the filing of the Application instituting the present proceedings the Respondent was or was not the continuator of the SFRY. The Respondent now contends that it was not a continuator State, and that therefore not only was it not a party to the Genocide Convention when the present proceedings were instituted, but it was not then a party to the Statute of the Court by virtue of membership in the United Nations; and that, not being such a party, it did not have access to the Court, with the consequence that the Court had no jurisdiction *ratione personae* over it.

81. This contention was first raised, in the context of the present case, by the "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia" filed by the Respondent on 4 May 2001 (paragraph 26 above). The circumstances underlying that Initiative will be examined in more detail below (paragraphs 88-99). Briefly stated, the situation was that the Respondent, after claiming that since the break-up of the SFRY in 1992 it was the continuator of that State, and as such maintained the membership of the SFRY in the United Nations, had on 27 October 2000 applied, "in light of the implementation of the Security Council resolution 777 (1992)", to be admitted to the Organization as a new Member, thereby in effect relinquishing its previous claim. The Respondent contended that it had in 2000 become apparent that it had not been a Member of the United Nations in the period 1992-2000, and was thus not a party to the Statute at the date of the filing of the Application in this case; and that it was not a party to the Genocide Convention on that date. The Respondent concluded that "the Court has no jurisdiction over [the Respondent] *ratione personae*". It requested the Court "to suspend proceedings regarding the merits of the Case until a decision on this Initiative is rendered".

82. By a letter of 12 June 2003, the Registrar, acting on the instructions of the Court, informed the Respondent that the Court could not accede to the request made in that document, that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised therein. The Respondent was informed, nevertheless, that the Court "w[ould] not give judgment on the merits in the present case unless it [was] satisfied that it ha[d] jurisdiction" and that, "[s]hould Serbia and Montenegro wish to present further argument to the Court on jurisdictional questions during the oral proceedings on the merits, it w[ould] be free to do so". The Respondent accordingly raised, as an "issue of procedure", the question whether the Respondent had access to the Court at the date of the Application, and each of the parties has now addressed

argument to the Court on that question. It has however at the same time been argued by the Applicant that the Court may not deal with the question, or that the Respondent is debarred from raising it at this stage of the proceedings. These contentions will be examined below.

83. Subsequently, on 15 December 2004, the Court delivered judgment in eight cases brought by Serbia and Montenegro against Member States of NATO (cases concerning the *Legality of Use of Force*). The Applications instituting proceedings in those cases had been filed on 29 April 1999, that is to say prior to the admission of Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. In each of these cases, the Court held that it had no jurisdiction to entertain the claims made in the Application (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 328, para. 129), on the grounds that "Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute" (*ibid.*, p. 327, para. 127). It held, "in light of the legal consequences of the new development since 1 November 2000", that "Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application . . ." (*ibid.*, p. 311, para. 79). No finding was made in those judgments on the question whether or not the Respondent was a party to the Genocide Convention at the relevant time.

84. Both Parties recognize that each of these Judgments has the force of *res judicata* in the specific case for the parties thereto; but they also recognize that these Judgments, not having been rendered in the present case, and involving as parties States not parties to the present case, do not constitute *res judicata* for the purposes of the present proceedings. In view however of the findings in the cases concerning the *Legality of Use of Force* as to the status of the FRY vis-à-vis the United Nations and the Court in 1999, the Respondent has invoked those decisions as supportive of its contentions in the present case.

85. The grounds upon which, according to Bosnia and Herzegovina, the Court should, at this late stage of the proceedings, decline to examine the questions raised by the Respondent as to the status of Serbia and Montenegro in relation to Article 35 of the Statute, and its status as a party to the Genocide Convention, are because the conduct of the Respondent in relation to the case has been such as to create a sort of *forum prorogatum,* or an estoppel, or to debar it, as a matter of good faith, from asserting at this stage of the proceedings that it had no access to the Court at the date the proceedings were instituted; and because the questions raised by the Respondent had already been resolved by the 1996 Judgment, with the authority of *res judicata*.

86. As a result of the Initiative of the Respondent (paragraph 81 above), and its subsequent argument on what it has referred to as an "issue of procedure", the Court has before it what is essentially an objection by the Respondent to its jurisdiction, which is preliminary in the sense that, if it is upheld, the Court will not proceed to determine the merits. The Applicant objects in turn to the Court examining further the Respondent's jurisdictional objection. These matters evidently require to be examined as preliminary points, and it was for this reason that the Court instructed the Registrar to write to the Parties the letter of 12 June 2003, referred to in paragraph 82 above. The letter was intended to convey that the Court would listen to any argument raised by the Initiative which might be put to it, but not as an indication of what its ruling might be on any such arguments.

87. In order to make clear the background to these issues, the Court will first briefly review the history of the relationship between the Respondent and the United Nations during the period from the break-up of the SFRY in 1992 to the admission of Serbia and Montenegro (then called the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. The previous decisions of the Court in this case, and in the *Application for Revision* case, have been briefly recalled above (paragraphs 4, 8, 12 and 31). They will be referred to more fully below (paragraphs 105-113) for the purpose of (in particular) an examination of the contentions of Bosnia and Herzegovina on the question of *res judicata*.

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*(2) History of the Status of the FRY with Regard to the United Nations*

88. In the early 1990s the SFRY, a founding Member State of the United Nations, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to disintegrate. On 25 June 1991 Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia were admitted as Members to the United Nations; as was the former Yugoslav Republic of Macedonia on 8 April 1993.

89. On 27 April 1992 the "participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" had adopted a declaration, stating in pertinent parts:

> ". . . . . .
>
> 1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,
>
> . . . . . .
>
> Remaining bound by all obligations to international organizations and institutions whose member it is . . ." (United Nations doc. A/46/915, Ann. II).

90. An official Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General of the United Nations, stated *inter alia* that:

> "The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.
>
> Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915, Ann. I.)

91. On 30 May 1992, the Security Council adopted resolution 757 (1992), in which, *inter alia*, it noted that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted".

92. On 19 September 1992, the Security Council adopted resolution 777 (1992) which read as follows:

> "*The Security Council,*
>
> *Reaffirming* its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

*Considering* that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

*Recalling* in particular resolution 757 (1992) which notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted',

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Decides* to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."

The resolution was adopted by 12 votes in favour, none against, and 3 abstentions.

93. On 22 September 1992 the General Assembly adopted resolution 47/1, according to which:

"*The General Assembly,*

*Having received* the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *decides* that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Takes note* of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."

The resolution was adopted by 127 votes to 6, with 26 abstentions.

94. On 25 September 1992, the Permanent Representatives of Bosnia and Herzegovina and Croatia addressed a letter to the Secretary-General, in which, with reference to Security Council resolution 777 (1992) and

General Assembly resolution 47/1, they stated their understanding as follows: "At this moment, there is no doubt that the Socialist Federal Republic of Yugoslavia is not a member of the United Nations any more. At the same time, the Federal Republic of Yugoslavia is clearly not yet a member." They concluded that "[t]he flag flying in front of the United Nations and the name-plaque bearing the name 'Yugoslavia' do not represent anything or anybody any more" and "kindly request[ed] that [the Secretary-General] provide a legal explanatory statement concerning the questions raised" (United Nations doc. A/47/474).

95. In response, on 29 September 1992, the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia, in which he stated that the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" was as follows:

> "While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.
>
> On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign 'Yugoslavia'. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1." (United Nations doc. A/47/485; emphasis in the original.)

96. On 29 April 1993, the General Assembly, upon the recommendation contained in Security Council resolution 821 (1993) (couched in terms similar to those of Security Council resolution 777 (1992)), adopted resolution 47/229 in which it decided that "the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council".

97. In its Judgments in the cases concerning the *Legality of Use of Force* (paragraph 83 above), the Court commented on this sequence of events by observing that "all these events testify to the rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period" (*Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 308, para. 73), and earlier the Court, in another context, had referred to the "*sui generis* position which the FRY found itself in" during the period between 1992 to 2000 (*loc. cit.*, citing *I.C.J. Reports 2003*, p. 31, para. 71).

98. This situation, however, came to an end with a new development in 2000. On 24 September 2000, Mr. Koštunica was elected President of the FRY. In that capacity, on 27 October 2000 he sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations, in the following terms:

> "In the wake of fundamental democratic changes that took place in the Federal Republic of Yugoslavia, in the capacity of President, I have the honour to request the admission of the Federal Republic of Yugoslavia to the United Nations *in light of the implementation of the Security Council resolution 777 (1992)*." (United Nations doc. A/55/528-S/2000/1043; emphasis added.)

99. Acting upon this application by the FRY for membership in the United Nations, the Security Council on 31 October 2000 "*recommend[ed]* to the General Assembly that the Federal Republic of Yugoslavia be admitted to membership in the United Nations" (United Nations doc. S/RES/1326). On 1 November 2000, the General Assembly, by resolution 55/12, "*[h]aving received* the recommendation of the Security Council of 31 October 2000" and "*[h]aving considered* the application for membership of the Federal Republic of Yugoslavia", decided to "admit the Federal Republic of Yugoslavia to membership in the United Nations".

* *

*(3) The Response of Bosnia and Herzegovina*

100. The Court will now consider the Applicant's response to the jurisdictional objection raised by the Respondent, that is to say the conten-

tion of Bosnia and Herzegovina that the Court should not examine the question, raised by the Respondent in its Initiative (paragraph 81 above), of the status of the Respondent at the date of the filing of the Application instituting proceedings. It is first submitted by Bosnia and Herzegovina that the Respondent was under a duty to raise the issue of whether the FRY (Serbia and Montenegro) was a Member of the United Nations at the time of the proceedings on the preliminary objections, in 1996, and that since it did not do so, the principle of *res judicata*, attaching to the Court's 1996 Judgment on those objections, prevents it from reopening the issue. Secondly, the Applicant argues that the Court itself, having decided in 1996 that it had jurisdiction in the case, would be in breach of the principle of *res judicata* if it were now to decide otherwise, and that the Court cannot call in question the authority of its decisions as *res judicata*.

101. The first contention, as to the alleged consequences of the fact that Serbia did not raise the question of access to the Court under Article 35 at the preliminary objection stage, can be dealt with succinctly. Bosnia and Herzegovina has argued that to uphold the Respondent's objection "would mean that a respondent, after having asserted one or more preliminary objections, could still raise others, to the detriment of the effective administration of justice, the smooth conduct of proceedings, and, in the present case, the doctrine of *res judicata*". It should however be noted that if a party to proceedings before the Court chooses not to raise an issue of jurisdiction by way of the preliminary objection procedure under Article 79 of the Rules, that party is not necessarily thereby debarred from raising such issue during the proceedings on the merits of the case. As the Court stated in the case of *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*,

> "There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 52, para. 13). However, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits." (*Judgment, I.C.J. Reports 2004*, p. 29, para. 24).

This first contention of Bosnia and Herzegovina must thus be understood as a claim that the Respondent, by its conduct in relation to the case, including the failure to raise the issue of the application of Article 35 of the Statute, by way of preliminary objection or otherwise, at an earlier stage of the proceedings, should be held to have acquiesced in jurisdiction. This contention is thus parallel to the argument mentioned above (paragraph 85), also advanced by Bosnia and Herzegovina, that the Respondent is debarred from asking the Court to examine that issue for

reasons of good faith, including estoppel and the principle *allegans contraria nemo audietur.*

102. The Court does not however find it necessary to consider here whether the conduct of the Respondent could be held to constitute an acquiescence in the jurisdiction of the Court. Such acquiescence, if established, might be relevant to questions of consensual jurisdiction, and in particular jurisdiction *ratione materiae* under Article IX of the Genocide Convention, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court.

The latter question may be regarded as an issue prior to that of jurisdiction *ratione personae*, or as one constitutive element within the concept of jurisdiction *ratione personae*. Either way, unlike the majority of questions of jurisdiction, it is not a matter of the consent of the parties. As the Court observed in the cases concerning the *Legality of Use of Force*,

> "a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent. The question is whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 295, para. 36; emphasis in the original.)

103. It follows that, whether or not the Respondent should be held to have acquiesced in the jurisdiction of the Court in this case, such acquiescence would in no way debar the Court from examining and ruling upon the question stated above. The same reasoning applies to the argument that the Respondent is estopped from raising the matter at this stage, or debarred from doing so by considerations of good faith. All such considerations can, at the end of the day, only amount to attributing to the Respondent an implied acceptance, or deemed consent, in relation to the jurisdiction of the Court; but, as explained above, *ad hoc* consent of a party is distinct from the question of its capacity to be a party to proceedings before the Court.

104. However Bosnia and Herzegovina's second contention is that,

objectively and apart from any effect of the conduct of the Respondent, the question of the application of Article 35 of the Statute in this case has already been resolved as a matter of *res judicata,* and that if the Court were to go back on its 1996 decision on jurisdiction, it would disregard fundamental rules of law. In order to assess the validity of this contention, the Court will first review its previous decisions in the present case in which its jurisdiction, or specifically the question whether Serbia and Montenegro could properly appear before the Court, has been in issue.

* *

*(4) Relevant Past Decisions of the Court*

105. On 8 April 1993, the Court made an Order in this case indicating certain provisional measures. In that Order the Court briefly examined the circumstances of the break-up of the SFRY, and the claim of the Respondent (then known as "Yugoslavia (Serbia and Montenegro)") to continuity with that State, and consequent entitlement to continued membership in the United Nations. It noted that "the solution adopted" within the United Nations was "not free from legal difficulties", but concluded that "the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* p. 14 para. 18). This conclusion was based in part on a provisional view taken by the Court as to the effect of the proviso to Article 35, paragraph 2, of the Statute (*ibid.*, para. 19). The Order contained the reservation, normally included in orders on requests for provisional measures, that "the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case . . . and leaves unaffected the right of the Governments of Bosnia-Herzegovina and Yugoslavia to submit arguments in respect of [that question]" (*ibid.*, p. 23, para. 51). It is therefore evident that no question of *res judicata* arises in connection with the Order of 8 April 1993. A further Order on provisional measures was made on 13 September 1993, but contained nothing material to the question now being considered.

106. In 1995 the Respondent raised seven preliminary objections (one of which was later withdrawn), three of which invited the Court to find that it had no jurisdiction in the case. None of these objections were however founded on a contention that the FRY was not a party to the Statute at the relevant time; that was not a contention specifically advanced in the proceedings on the preliminary objections. At the time of those

proceedings, the FRY was persisting in the claim, that it was continuing the membership of the former SFRY in the United Nations; and while that claim was opposed by a number of States, the position taken by the various organs gave rise to a "confused and complex state of affairs . . . within the United Nations" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004,* p. 308, para. 73). Neither party raised the matter before the Court: Bosnia and Herzegovina as Applicant, while denying that the FRY was a Member of the United Nations as a continuator of the SFRY, was asserting before this Court that the FRY was nevertheless a party to the Statute, either under Article 35, paragraph 2, thereof, or on the basis of the declaration of 27 April 1992 (see paragraphs 89 to 90 above); and for the FRY to raise the issue would have involved undermining or abandoning its claim to be the continuator of the SFRY as the basis for continuing membership of the United Nations.

107. By the 1996 Judgment, the Court rejected the preliminary objections of the Respondent, and found that, "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 623, para. 47 (2) *(a)*). It also found that the Application was admissible, and stated that "the Court may now proceed to consider the merits of the case . . ." (*ibid.*, p. 622, para. 46).

108. However, on 24 April 2001 Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) filed an Application instituting proceedings seeking revision, under Article 61 of the Statute, of the 1996 Judgment on jurisdiction in this case. That Article requires that there exist "some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court . . .". The FRY claimed in its Application that:

> "The admission of the FRY to the United Nations as a new Member on 1 November 2000 is certainly a new fact . . .
>
> . . . . . .
>
> The admission of the FRY to the United Nations as a new Member clears ambiguities and sheds a different light on the issue of the membership of the FRY in the United Nations, in the Statute and in the Genocide Convention." (*Application for Revision, I.C.J. Reports 2003,* p. 12, para. 18.)

Essentially the contention of the FRY was that its admission to membership in 2000 necessarily implied that it was not a Member of the United Nations and thus not a party to the Statute in 1993, when the proceed-

ings in the present case were instituted, so that the Court would have had no jurisdiction in the case.

109. The history of the relationship between the FRY and the United Nations, from the break-up of the SFRY in 1991-1992 up to the admission of the FRY as a new Member in 2000, has been briefly recalled in paragraphs 88 to 99 above. That history has been examined in detail on more than one occasion, both in the context of the Application for revision referred to in paragraph 108 and in the Court's Judgments in 2004 in the cases concerning the *Legality of Use of Force*. In its Judgment of 3 February 2003 on the Application for revision, the Court carefully studied that relationship; it also recalled the terms of its 1996 Judgment finding in favour of jurisdiction. The Court noted that

> "the FRY claims that the facts which existed at the time of the 1996 Judgment and upon the discovery of which its request for revision of that Judgment is based 'are that the FRY was *not* a party to the Statute, and that it did *not* remain bound by the Genocide Convention continuing the personality of the former Yugoslavia'. It argues that these 'facts' were 'revealed' by its admission to the United Nations on 1 November 2000 and by [a letter from the United Nations Legal Counsel] of 8 December 2000.
>
> . . . . . .
>
> In the final version of its argument, the FRY claims that its admission to the United Nations and the Legal Counsel's letter of 8 December 2000 simply 'revealed' two facts which had existed in 1996 but had been unknown at the time: that it was not then a party to the Statute of the Court and that it was not bound by the Genocide Convention." (*I.C.J. Reports 2003*, p. 30, paras. 66 and 69.)

110. The Court did not consider that the admission of the FRY to membership was itself a "new fact", since it occurred after the date of the Judgment of which the revision was sought (*ibid.*, para. 68). As to the argument that facts on which an application for revision could be based were "revealed" by the events of 2000, the Court ruled as follows:

> "In advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61. The FRY's argument cannot accordingly be upheld." (*Ibid.*, pp. 30-31, para. 69.)

111. The Court therefore found the Application for revision inadmissible. However, as the Court has observed in the cases concerning *Legal-*

*ity of Use of Force*, it did not, in its Judgment on the Application for revision,

> "regard the alleged 'decisive facts' specified by Serbia and Montenegro as 'facts that existed in 1996' for the purpose of Article 61. The Court therefore did not have to rule on the question whether 'the legal consequences' could indeed legitimately be deduced from the later facts; in other words, it did not have to say whether it was correct that Serbia and Montenegro had not been a party to the Statute or to the Genocide Convention in 1996." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 313, para. 87.)

112. In a subsequent paragraph of the 2003 Judgment on the Application for revision of the 1996 Judgment, the Court had stated:

> "It follows from the foregoing that it has not been established that the request of the FRY is based upon the discovery of 'some fact' which was 'when the judgment was given, unknown to the Court and also to the party claiming revision'. The Court therefore concludes that one of the conditions for the admissibility of an application for revision prescribed by paragraph 1 of Article 61 of the Statute has not been satisfied." (*I.C.J. Reports 2003*, p. 31, para. 72.)

In its 2004 decisions in the *Legality of Use of Force* cases the Court further commented on this finding:

> "The Court thus made its position clear that there could have been no retroactive modification of the situation in 2000, which would amount to a new fact, and that therefore the conditions of Article 61 were not satisfied. This, however, did not entail any finding by the Court, in the revision proceedings, as to what that situation actually was." (*Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 314, para. 89.)

113. For the purposes of the present case, it is thus clear that the Judgment of 2003 on the Application by the FRY for revision, while binding between the parties, and final and without appeal, did not contain any finding on the question whether or not that State had actually been a Member of the United Nations in 1993. The question of the status of the FRY in 1993 formed no part of the issues upon which the Court pronounced judgment when dismissing that Application.

* *

### (5) *The Principle of* Res Judicata

114. The Court will now consider the principle of *res judicata*, and its application to the 1996 Judgment in this case. The Applicant asserts that the 1996 Judgment, whereby the Court found that it had jurisdiction

under the Genocide Convention, "enjoys the authority of *res judicata* and is not susceptible of appeal" and that "any ruling whereby the Court reversed the 1996 Judgment . . . would be incompatible both with the *res judicata* principle and with Articles 59, 60 and 61 of the Statute". The Applicant submits that, like its judgments on the merits, "the Court's decisions on jurisdiction are *res judicata*". It further observes that, pursuant to Article 60 of the Statute, the Court's 1996 Judgment is "final and without appeal" subject only to the possibility of a request for interpretation and revision; and the FRY's request for revision was rejected by the Court in its Judgment of 3 February 2003. The Respondent contends that jurisdiction once upheld may be challenged by new objections; and considers that this does not contravene the principle of *res judicata* or the wording of Article 79 of the Rules of Court. It emphasizes "the right and duty of the Court to act *proprio motu*" to examine its jurisdiction, mentioned in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)* (see paragraph 118 below), and contends that the Court cannot "forfeit" that right by not having itself raised the issue in the preliminary objections phase.

115. There is no dispute between the Parties as to the existence of the principle of *res judicata* even if they interpret it differently as regards judgments deciding questions of jurisdiction. The fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal; Article 61 places close limits of time and substance on the ability of the parties to seek the revision of the judgment. The Court stressed those limits in 2003 when it found inadmissible the Application made by Serbia and Montenegro for revision of the 1996 Judgment in the *Application for Revision* case (*I.C.J. Reports 2003*, p. 12, para. 17).

116. Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court's function, according to Article 38 of its Statute, is to "decide", that is, to bring to an end, "such disputes as are submitted to it". Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articu-

lates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.

117. It has however been suggested by the Respondent that a distinction may be drawn between the application of the principle of *res judicata* to judgments given on the merits of a case, and judgments determining the Court's jurisdiction, in response to preliminary objections; specifically, the Respondent contends that "decisions on preliminary objections do not and cannot have the same consequences as decisions on the merits". The Court will however observe that the decision on questions of jurisdiction, pursuant to Article 36, paragraph 6, of the Statute, is given by a judgment, and Article 60 of the Statute provides that "[t]he judgment is final and without appeal", without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits. In its Judgment of 25 March 1999 on the request for interpretation of the Judgment of 11 June 1998 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court expressly recognized that the 1998 Judgment, given on a number of preliminary objections to jurisdiction and admissibility, constituted *res judicata*, so that the Court could not consider a submission inconsistent with that judgment (*Judgment, I.C.J. Reports 1999 (I)*, p. 39, para. 16). Similarly, in its Judgment of 3 February 2003 in the *Application for Revision* case, the Court, when it began by examining whether the conditions for the opening of the revision procedure, laid down by Article 61 of the Statute, were satisfied, undoubtedly recognized that an application could be made for revision of a judgment on preliminary objections; this could in turn only derive from a recognition that such a judgment is "final and without appeal". Furthermore, the contention put forward by the Respondent would signify that the principle of *res judicata* would not prevent a judgment dismissing a preliminary objection from remaining open to further challenge indefinitely, while a judgment upholding such an objection, and putting an end to the case, would in the nature of things be final and determinative as regards that specific case.

118. The Court recalls that, as it has stated in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, it "must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Judgment, I.C.J. Reports 1972*, p. 52, para. 13). That decision in its context (in a case in which there was no question of reopening a previous decision of the Court) does not support the Respondent's contention. It does not signify that jurisdictional decisions remain reviewable indefinitely, nor that the Court may, *proprio motu* or otherwise, reopen matters already decided with the force of *res judicata*. The Respondent has argued that there is a principle that "an international court may consider or reconsider the issue of juris-

diction at any stage of the proceedings". It has referred in this connection both to the dictum just cited from the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, and to the *Corfu Channel (United Kingdom* v. *Albania)* case. It is correct that the Court, having in the first phase of that case rejected Albania's preliminary objection to jurisdiction, and having decided that proceedings on the merits were to continue (*Preliminary Objection, Judgment, I.C.J. Reports 1947-1948*, p. 15), did at the merits stage consider and rule on a challenge to its jurisdiction, in particular whether it had jurisdiction to assess compensation (*I.C.J. Reports 1949*, pp. 23-26; 171). But no reconsideration at all by the Court of its earlier Judgment was entailed in this because, following that earlier Judgment, the Parties had concluded a special agreement submitting to the Court, *inter alia*, the question of compensation. The later challenge to jurisdiction concerned only the scope of the jurisdiction conferred by that subsequent agreement.

119. The Respondent also invokes certain international conventions and the rules of other international tribunals. It is true that the European Court of Human Rights may reject, at any stage of the proceedings, an application which it considers inadmissible; and the International Criminal Court may, in exceptional circumstances, permit the admissibility of a case or the jurisdiction of the Court to be challenged after the commencement of the trial. However, these specific authorizations in the instruments governing certain other tribunals reflect their particular admissibility procedures, which are not identical with the procedures of the Court in the field of jurisdiction. They thus do not support the view that there exists a general principle which would apply to the Court, whose Statute not merely contains no such provision, but declares, in Article 60, the *res judicata* principle without exception. The Respondent has also cited certain jurisprudence of the European Court of Human Rights, and an arbitral decision of the German-Polish Mixed Arbitral Tribunal (*von Tiedemann* case); but, in the view of the Court, these too, being based on their particular facts, and the nature of the jurisdictions involved, do not indicate the existence of a principle of sufficient generality and weight to override the clear provisions of the Court's Statute, and the principle of *res judicata*.

120. This does not however mean that, should a party to a case believe that elements have come to light subsequent to the decision of the Court which tend to show that the Court's conclusions may have been based on incorrect or insufficient facts, the decision must remain final, even if it is in apparent contradiction to reality. The Statute provides for only one procedure in such an event: the procedure under Article 61, which offers the possibility for the revision of judgments, subject to the restrictions stated in that Article. In the interests of the stability of legal relations, those restrictions must be rigorously applied. As noted above (para-

graph 110) the FRY's Application for revision of the 1996 Judgment in this case was dismissed, as not meeting the conditions of Article 61. Subject only to this possibility of revision, the applicable principle is *res judicata pro veritate habetur*, that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events.

* *

*(6) Application of the Principle of* Res Judicata *to the 1996 Judgment*

121. In the light of these considerations, the Court reverts to the effect and significance of the 1996 Judgment. That Judgment was essentially addressed, so far as questions of jurisdiction were concerned, to the question of the Court's jurisdiction under the Genocide Convention. It resolved in particular certain questions that had been raised as to the status of Bosnia and Herzegovina in relation to the Convention; as regards the FRY, the Judgment stated simply as follows:

> "the former Socialist Federal Republic of Yugoslavia . . . signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:
>
> > 'The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'
>
> This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17.)

122. Nothing was stated in the 1996 Judgment about the status of the FRY in relation to the United Nations, or the question whether it could participate in proceedings before the Court; for the reasons already mentioned above (paragraph 106), both Parties had chosen to refrain from asking for a decision on these matters. The Court however considers it necessary to emphasize that the question whether a State may properly come before the Court, on the basis of the provisions of the Statute, whether it be classified as a matter of capacity to be a party to the proceedings or as an aspect of jurisdiction *ratione personae*, is a matter which precedes that of jurisdiction *ratione materiae*, that is, whether that State has consented to the settlement by the Court of the specific dispute brought before it. The question is in fact one which the Court is bound to raise and examine, if necessary, ex officio, and if appropriate after notification to the parties. Thus if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits.

123. The operative part of a judgment of the Court possesses the force of *res judicata*. The operative part of the 1996 Judgment stated, in paragraph 47 (2) *(a)*, that the Court found "that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to decide upon the dispute". That jurisdiction is thus established with the full weight of the Court's judicial authority. For a party to assert today that, at the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is, for the reason given in the preceding paragraph, to call in question the force as *res judicata* of the operative clause of the Judgment. At first sight, therefore, the Court need not examine the Respondent's objection to jurisdiction based on its contention as to its lack of status in 1993.

124. The Respondent has however advanced a number of arguments tending to show that the 1996 Judgment is not conclusive on the matter, and the Court will now examine these. The passage just quoted from the 1996 Judgment is of course not the sole provision of the operative clause of that Judgment: as, the Applicant has noted, the Court first dismissed *seriatim* the specific preliminary objections raised (and not withdrawn) by the Respondent; it then made the finding quoted in paragraph 123 above; and finally it dismissed certain additional bases of jurisdiction invoked by the Applicant. The Respondent suggests that, for the purposes of applying the principle of *res judicata* to a judgment of this kind on preliminary objections, the operative clause *(dispositif)* to be taken into account and given the force of *res judicata* is the decision rejecting specified preliminary objections, rather than "the broad ascertainment

upholding jurisdiction". The Respondent has drawn attention to the provisions of Article 79, paragraph 7, of the 1978 Rules of Court, which provides that the judgment on preliminary objections shall, in respect of each objection "either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". The Respondent suggests therefore that only the clauses of a judgment on preliminary objections that are directed to these ends have the force of *res judicata*, which is, it contends, consistent with the view that new objections may be raised subsequently.

125. The Court does not however consider that it was the purpose of Article 79 of the Rules of Court to limit the extent of the force of *res judicata* attaching to a judgment on preliminary objections, nor that, in the case of such judgment, such force is necessarily limited to the clauses of the *dispositif* specifically rejecting particular objections. There are many examples in the Court's jurisprudence of decisions on preliminary objections which contain a general finding that the Court has jurisdiction, or that the application is admissible, as the case may be; and it would be going too far to suppose that all of these are necessarily superfluous conclusions. In the view of the Court, if any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given (cf. *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, pp. 218-219, para. 48).

126. For this purpose, in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all. Thus an application for interpretation of a judgment under Article 60 of the Statute may well require the Court to settle "[a] difference of opinion [between the parties] as to whether a particular point has or has not been decided with binding force" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J. Series A, No. 13*, pp. 11-12). If a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it.

127. In particular, the fact that a judgment may, in addition to rejecting specific preliminary objections, contain a finding that "the Court has jurisdiction" in the case does not necessarily prevent subsequent examination of any jurisdictional issues later arising that have not been resolved, with the force of *res judicata*, by such judgment. The Parties have each referred in this connection to the successive decisions in the *Corfu Chan-*

*nel* case, which the Court has already considered above (paragraph 118). Mention may also be made of the judgments on the merits in the two cases concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland) (Federal Republic of Germany* v. *Iceland)* (*I.C.J. Reports 1974*, p. 20, para. 42; pp. 203-204, para. 74), which dealt with minor issues of jurisdiction despite an express finding of jurisdiction in previous judgments (*I.C.J. Reports 1973*, p. 22, para. 46; p. 66, para. 46). Even where the Court has, in a preliminary judgment, specifically reserved certain matters of jurisdiction for later decision, the judgment may nevertheless contain a finding that "the Court has jurisdiction" in the case, this being understood as being subject to the matters reserved (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 113 (1) *(c)*, and pp. 425-426, para. 76; cf. also, in connection with an objection to admissibility, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1998*, p. 29, para. 51, and pp. 30-31, paras. 53 (2) *(b)* and 53 (3); p. 134, para. 50, and p. 156, paras. 53 (2) *(b)* and 53 (3)).

128. On the other hand, the fact that the Court has in these past cases dealt with jurisdictional issues after having delivered a judgment on jurisdiction does not support the contention that such a judgment can be reopened at any time, so as to permit reconsideration of issues already settled with the force of *res judicata*. The essential difference between the cases mentioned in the previous paragraph and the present case is this: the jurisdictional issues examined at a late stage in those cases were such that the decision on them would not contradict the finding of jurisdiction made in the earlier judgment. In the *Fisheries Jurisdiction* cases, the issues raised related to the extent of the jurisdiction already established in principle with the force of *res judicata*; in the *Military and Paramilitary Activities* case, the Court had clearly indicated in the 1984 Judgment that its finding in favour of jurisdiction did not extend to a definitive ruling on the interpretation of the United States reservation to its optional clause declaration. By contrast, the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment; that indeed is their purpose.

129. The Respondent has contended that the issue whether the FRY had access to the Court under Article 35 of the Statute has in fact never been decided in the present case, so that no barrier of *res judicata* would prevent the Court from examining that issue at the present stage of the

proceedings. It has drawn attention to the fact that when commenting on the 1996 Judgment, in its 2004 Judgments in the cases concerning the *Legality of Use of Force*, the Court observed that "[t]he question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised and the Court saw no reason to examine it" (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), I.C.J. Reports 2004*, p. 311, para. 82), and that "in its pronouncements in incidental proceedings" in the present case, the Court "did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute" (*ibid.*, pp. 308-309, para. 74).

130. That does not however signify that in 1996 the Court was unaware of the fact that the solution adopted in the United Nations to the question of continuation of the membership of the SFRY "[was] not free from legal difficulties", as the Court had noted in its Order of 8 April 1993 indicating provisional measures in the case (*I.C.J. Reports 1993*, p. 14, para. 18; above, paragraph 105). The FRY was, at the time of the proceedings on its preliminary objections culminating in the 1996 Judgment, maintaining that it was the continuator State of the SFRY. As the Court indicated in its Judgments in the cases concerning the *Legality of Use of Force*,

> "No specific assertion was made in the Application [of 1993, in the present case] that the Court was open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute of the Court, but it was later made clear that the Applicant claimed to be a Member of the United Nations and thus a party to the Statute of the Court, by virtue of Article 93, paragraph 1, of the Charter, at the time of filing of the Application . . . [T]his position was expressly stated in the Memorial filed by Serbia and Montenegro on 4 January 2000 . . ." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004,* p. 299, para. 47.)

The question whether the FRY was a continuator or a successor State of the SFRY was mentioned in the Memorial of Bosnia and Herzegovina. The view of Bosnia and Herzegovina was that, while the FRY was not a Member of the United Nations, as a successor State of the SFRY which had expressly declared that it would abide by the international commitments of the SFRY, it was nevertheless a party to the Statute. It is also essential, when examining the text of the 1996 Judgment, to take note of the context in which it was delivered, in particular as regards the contemporary state of relations between the Respondent and the United Nations, as recounted in paragraphs 88 to 99 above.

131. The "legal difficulties" referred to were finally dissipated when in 2000 the FRY abandoned its former insistence that it was the continuator of the SFRY, and applied for membership in the United Nations (paragraph 98 above). As the Court observed in its 2004 Judgments in the cases concerning the *Legality of Use of Force*,

> "the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 310-311, para. 79.)

As the Court here recognized, in 1999 — and even more so in 1996 — it was by no means so clear as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations at the relevant time. The inconsistencies of approach expressed by the various United Nations organs are apparent from the passages quoted in paragraphs 91 to 96 above.

132. As already noted, the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment. The Court stated, as mentioned in paragraph 121 above, that "Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17), and found that "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*ibid.*, p. 623, para. 47 (2) *(a)*). Since, as observed above, the question of a State's capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae*, and one which the Court must, if necessary, raise ex officio (see

paragraph 122 above), this finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of *res judicata*. The Court does not need, for the purpose of the present proceedings, to go behind that finding and consider on what basis the Court was able to satisfy itself on the point. Whether the Parties classify the matter as one of "access to the Court" or of "jurisdiction *ratione personae*", the fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court.

133. In the view of the Court, the express finding in the 1996 Judgment that the Court had jurisdiction in the case *ratione materiae*, on the basis of Article IX of the Genocide Convention, seen in its context, is a finding which is only consistent, in law and logic, with the proposition that, in relation to both Parties, it had jurisdiction *ratione personae* in its comprehensive sense, that is to say, that the status of each of them was such as to comply with the provisions of the Statute concerning the capacity of States to be parties before the Court. As regards Bosnia and Herzegovina, there was no question but that it was a party to the Statute at the date of filing its Application instituting proceedings; and in relation to the Convention, the Court found that it "could . . . become a party to the Convention" from the time of its admission to the United Nations (*I.C.J. Reports 1996 (II)*, p. 611, para. 19), and had in fact done so. As regards the FRY, the Court found that it "was bound by the provisions of the Convention", i.e. was a party thereto, "on the date of the filing of the Application" (*ibid.*, p. 610, para. 17); in this respect the Court took note of the declaration made by the FRY on 27 April 1992, set out in paragraph 89 above, whereby the FRY "continuing the State, international legal and political personality" of the SFRY, declared that it would "strictly abide by" the international commitments of the SFRY. The determination by the Court that it had jurisdiction under the Genocide Convention is thus to be interpreted as incorporating a determination that all the conditions relating to the capacity of the Parties to appear before it had been met.

134. It has been suggested by the Respondent that the Court's finding of jurisdiction in the 1996 Judgment was based merely upon an assumption: an assumption of continuity between the SFRY and the FRY. It has drawn attention to passages, already referred to above (paragraph 129), in the Judgments in the *Legality of Use of Force* cases, to the effect that in 1996 the Court saw no reason to examine the question of access, and that, in its pronouncements in incidental proceedings, the Court did not commit itself to a definitive position on the issue of the legal status of the Respondent.

135. That the FRY had the capacity to appear before the Court in

accordance with the Statute was an element in the reasoning of the 1996 Judgment which can — and indeed must — be read into the Judgment as a matter of logical construction. That element is not one which can at any time be reopened and re-examined, for the reasons already stated above. As regards the passages in the 2004 Judgments relied on by the Respondent, it should be borne in mind that the concern of the Court was not then with the scope of *res judicata* of the 1996 Judgment, since in any event such *res judicata* could not extend to the proceedings in the cases that were then before it, between different parties. It was simply appropriate in 2004 for the Court to consider whether there was an expressly stated finding in another case that would throw light on the matters before it. No such express finding having been shown to exist, the Court in 2004 did not, as it has in the present case, have to go on to consider what might be the unstated foundations of a judgment given in another case, between different parties.

136. The Court thus considers that the 1996 Judgment contained a finding, whether it be regarded as one of jurisdiction *ratione personae*, or as one anterior to questions of jurisdiction, which was necessary as a matter of logical construction, and related to the question of the FRY's capacity to appear before the Court under the Statute. The force of *res judicata* attaching to that judgment thus extends to that particular finding.

137. However it has been argued by the Respondent that even were that so,

> "the fundamental nature of access as a precondition for the exercise of the Court's judicial function means that positive findings on access cannot be taken as definitive and final until the final judgment is rendered in proceedings, because otherwise it would be possible that the Court renders its final decision with respect to a party over which it cannot exercise [its] judicial function. In other words, access is so fundamental that, until the final judgment, it overrides the principle of *res judicata*. Thus, even if the 1996 Judgment had made a finding on access, *quod non*, that would not be a bar for the Court to re-examine this issue until the end of the proceedings."

A similar argument advanced by the Respondent is based on the principle that the jurisdiction of the Court derives from a treaty, namely the Statute of the Court; the Respondent questions whether the Statute could have endowed the 1996 Judgment with any effects at all, since the Respondent was, it alleges, not a party to the Statute. Counsel for the Respondent argued that

> "Today it is known that in 1996 when the decision on preliminary objections was rendered, the Respondent was not a party to the Statute. Thus, there was no foothold, Articles 36 (6), 59, and 60 did

not represent a binding treaty provision providing a possible basis for deciding on jurisdiction with *res judicata* effects."

138. It appears to the Court that these contentions are inconsistent with the nature of the principle of *res judicata*. That principle signifies that once the Court has made a determination, whether on a matter of the merits of a dispute brought before it, or on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case. However fundamental the question of the capacity of States to be parties in cases before the Court may be, it remains a question to be determined by the Court, in accordance with Article 36, paragraph 6, of the Statute, and once a finding in favour of jurisdiction has been pronounced with the force of *res judicata*, it is not open to question or re-examination, except by way of revision under Article 61 of the Statute. There is thus, *as a matter of law*, no possibility that the Court might render "its final decision with respect to a party over which it cannot exercise its judicial function", because the question whether a State is or is not a party subject to the jurisdiction of the Court is one which is reserved for the sole and authoritative decision of the Court.

139. Counsel for the Respondent contended further that, in the circumstances of the present case, reliance on the *res judicata* principle "would justify the Court's *ultra vires* exercise of its judicial functions contrary to the mandatory requirements of the Statute". However, the operation of the "mandatory requirements of the Statute" falls to be determined by the Court in each case before it; and once the Court has determined, with the force of *res judicata*, that it has jurisdiction, then for the purposes of that case no question of *ultra vires* action can arise, the Court having sole competence to determine such matters under the Statute. For the Court *res judicata pro veritate habetur*, and the judicial truth within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations.

* *

*(7) Conclusion: Jurisdiction Affirmed*

140. The Court accordingly concludes that, in respect of the contention that the Respondent was not, on the date of filing of the Application instituting proceedings, a State having the capacity to come before the Court under the Statute, the principle of *res judicata* precludes any reopening of the decision embodied in the 1996 Judgment. The Respondent

has however also argued that the 1996 Judgment is not *res judicata* as to the further question whether the FRY was, at the time of institution of proceedings, a party to the Genocide Convention, and has sought to show that at that time it was not, and could not have been, such a party. The Court however considers that the reasons given above for holding that the 1996 Judgment settles the question of jurisdiction in this case with the force of *res judicata* are applicable *a fortiori* as regards this contention, since on this point the 1996 Judgment was quite specific, as it was not on the question of capacity to come before the Court. The Court does not therefore find it necessary to examine the argument of the Applicant that the failure of the Respondent to advance at the time the reasons why it now contends that it was not a party to the Genocide Convention might raise considerations of estoppel, or *forum prorogatum* (cf. paragraphs 85 and 101 above). The Court thus concludes that, as stated in the 1996 Judgment, it has jurisdiction, under Article IX of the Genocide Convention, to adjudicate upon the dispute brought before it by the Application filed on 20 March 1993. It follows from the above that the Court does not find it necessary to consider the questions, extensively addressed by the Parties, of the status of the Respondent under the Charter of the United Nations and the Statute of the Court, and its position in relation to the Genocide Convention at the time of the filing of the Application.

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141. There has been some reference in the Parties' arguments before the Court to the question whether Article 35, paragraphs 1 and 2, of the Statute apply equally to applicants and to respondents. This matter, being one of interpretation of the Statute, would be one for the Court to determine. However, in the light of the conclusion that the Court has reached as to the *res judicata* status of the 1996 decision, it does not find at present the necessity to do so.

* * *

## IV. The Applicable Law: The Convention on the Prevention and Punishment of the Crime of Genocide

### *(1) The Convention in Brief*

142. The Contracting Parties to the Convention, adopted on 9 December 1948, offer the following reasons for agreeing to its text:

> "The Contracting Parties,
>
> Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary

to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided . . .”

143. Under Article I “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Article II defines genocide in these terms:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

*(a)* Killing members of the group;
*(b)* Causing serious bodily or mental harm to members of the group;
*(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
*(d)* Imposing measures intended to prevent births within the group;
*(e)* Forcibly transferring children of the group to another group.”

Article III provides as follows:

“The following acts shall be punishable:

*(a)* Genocide;
*(b)* Conspiracy to commit genocide;
*(c)* Direct and public incitement to commit genocide;
*(d)* Attempt to commit genocide;
*(e)* Complicity in genocide.”

144. According to Article IV, persons committing any of those acts shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. Article V requires the parties to enact the necessary legislation to give effect to the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or other acts enumerated in Article III. Article VI provides that

“[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

Article VII provides for extradition.

145. Under Article VIII

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

146. Article IX provides for certain disputes to be submitted to the Court:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

The remaining ten Articles are final clauses dealing with such matters as parties to the Convention and its entry into force.

147. The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (*I.C.J. Reports 1996 (II)*, pp. 617-621, paras. 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. The Parties disagree on whether the Court finally decided the scope and meaning of that provision in its 1996 Judgment and, if it did not, on the matters over which the Court has jurisdiction under that provision. The Court rules on those two matters in following sections of this Judgment. It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.

148. As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them (e.g. case concerning *Armed Activities on the Territory of the Congo (New Appli-*

*cation: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127).

149. The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those "relating to the interpretation, application or fulfilment" of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.

* *

*(2) The Court's 1996 Decision about the Scope and Meaning of Article IX*

150. According to the Applicant, the Court in 1996 at the preliminary objections stage decided that it had jurisdiction under Article IX of the Convention to adjudicate upon the responsibility of the respondent State, as indicated in that Article, "for genocide or any of the other acts enumerated in article III", and that that reference "does not exclude any form of State responsibility". The issue, it says, is *res judicata*. The Respondent supports a narrower interpretation of the Convention: the Court's jurisdiction is confined to giving a declaratory judgment relating to breaches of the duties to prevent and punish the commission of genocide by individuals.

151. The Respondent accepts that the first, wider, interpretation "was preferred by the majority of the Court in the preliminary objections phase" and quotes the following passage in the Judgment:

> "The Court now comes to the second proposition advanced by Yugoslavia [in support of one of its preliminary objections], regarding the type of State responsibility envisaged in Article IX of the Convention. According to Yugoslavia, that Article would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.
>
> *The Court would observe that the reference to Article IX to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III', does not exclude any form of State responsibility.*
>
> *Nor is the responsibility of a State for acts of its organs excluded*

*by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'.*

In the light of the foregoing, the Court considers that it must reject the fifth preliminary objection of Yugoslavia. It would moreover observe that it is sufficiently apparent from the very terms of that objection that the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions, including Article IX. For the Court, there is accordingly no doubt that there exists a dispute between them relating to 'the interpretation, application or fulfilment of the . . . Convention, including . . . the responsibility of a State for genocide . . .', according to the form of words employed by that latter provision (cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988,* pp. 27-32)." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 616-617, paras. 32-33; emphasis now added to 1996 text.)

The Applicant relies in particular on the sentences in paragraph 32 which have been emphasized in the above quotation. The Respondent submits that

"this expression of opinion is of marked brevity and is contingent upon the dismissal of the preliminary objection based upon the existence or otherwise of a dispute relating to the interpretation of the Genocide Convention. The interpretation adopted in this provisional mode by the Court is not buttressed by any reference to the substantial preparatory work of the Convention.

In the circumstances, there is no reason of principle or consideration of common sense indicating that the issue of interpretation is no longer open."

While submitting that the Court determined the issue and spoke emphatically on the matter in 1996 the Applicant also says that this present phase of the case

"will provide an additional opportunity for this Court to rule on [the] important matter, not only for the guidance of the Parties here before you, but for the benefit of future generations that should not have to fear the immunity of States from responsibility for their genocidal acts".

152. The Court has already examined above the question of the authority of *res judicata* attaching to the 1996 Judgment, and indicated that it cannot reopen issues decided with that authority. Whether or not the issue now raised by the Respondent falls in that category, the Court

observes that the final part of paragraph 33 of that Judgment, quoted above, must be taken as indicating that "the meaning and legal scope" of Article IX and of other provisions of the Convention remain in dispute. In particular a dispute "exists" about whether the only obligations of the Contracting Parties for the breach of which they may be held responsible under the Convention are to legislate, and to prosecute or extradite, or whether the obligations extend to the obligation not to commit genocide and the other acts enumerated in Article III. That dispute "exists" and was left by the Court for resolution at the merits stage. In these circumstances, and taking into account the positions of the Parties, the Court will determine at this stage whether the obligations of the Parties under the Convention do so extend. That is to say, the Court will decide "the meaning and legal scope" of several provisions of the Convention, including Article IX with its reference to "the responsibility of a State for genocide or any of the other acts enumerated in Article III".

* *

*(3) The Court's 1996 Decision about the Territorial Scope of the Convention*

153. A second issue about the *res judicata* effect of the 1996 Judgment concerns the territorial limits, if any, on the obligations of the States parties to prevent and punish genocide. In support of one of its preliminary objections the Respondent argued that it did not exercise jurisdiction over the Applicant's territory at the relevant time. In the final sentence of its reasons for rejecting this argument the Court said this: "[t]he Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention" (*I.C.J. Reports 1996 (II)*, p. 616, para. 31).

154. The Applicant suggests that the Court in that sentence ruled that the obligation extends without territorial limit. The Court does not state the obligation in that positive way. The Court does not say that the obligation is "territorially unlimited by the Convention". Further, earlier in the paragraph, it had quoted from Article VI (about the obligation of any State in the territory of which the act was committed to prosecute) as "the only provision relevant to" territorial "problems" related to the application of the Convention. The quoted sentence is therefore to be understood as relating to the undertaking stated in Article I. The Court did not in 1996 rule on the territorial scope of each particular obligation arising under the Convention. Accordingly the Court has still to rule on that matter. It is not *res judicata*.

* *

*(4) The Obligations Imposed by the Convention on the Contracting Parties*

155. The Applicant, in the words of its Agent, contends that "[t]his case is about State responsibility and seeks to establish the responsibilities of a State which, through its leadership, through its organs, committed the most brutal violations of one of the most sacred instruments of international law". The Applicant has emphasized that in its view, the Genocide Convention "created a universal, treaty-based concept of State responsibility", and that "[i]t is State responsibility for genocide that this legal proceeding is all about". It relies in this respect on Article IX of the Convention, which, it argues, "quite explicitly impose[s] on States a direct responsibility themselves not to commit genocide or to aid in the commission of genocide". As to the obligation of prevention under Article I, a breach of that obligation, according to the Applicant, "is established — it might be said is 'eclipsed' — by the fact that [the Respondent] is *itself* responsible for the genocide committed; . . . a State which commits genocide has not fulfilled its commitment to prevent it" (emphasis in the original). The argument moves on from alleged breaches of Article I to "violations [by the Respondent] of its obligations under Article III . . . to which express reference is made in Article IX, violations which stand at the heart of our case. This fundamental provision establishes the obligations whose violation engages the responsibility of States parties." It follows that, in the contention of the Applicant, the Court has jurisdiction under Article IX over alleged violations by a Contracting Party of those obligations.

156. The Respondent contends to the contrary that

> "the Genocide Convention does not provide for the responsibility of States for acts of genocide as such. The duties prescribed by the Convention relate to 'the prevention and punishment of the crime of genocide' when this crime is committed by individuals: and the provisions of Articles V and VI [about enforcement and prescription] . . . make this abundantly clear."

It argues that the Court therefore does not have jurisdiction *ratione materiae* under Article IX; and continues:

> "[t]hese provisions [Articles I, V, VI and IX] do not extend to the responsibility of a Contracting Party as such for acts of genocide but [only] to responsibility for failure to prevent or to punish acts of genocide committed by individuals within its territory or . . . its control".

The sole remedy in respect of that failure would, in the Respondent's view, be a declaratory judgment.

157. As a subsidiary argument, the Respondent also contended that

> "for a State to be responsible under the Genocide Convention, the facts must first be established. As genocide is a crime, it can only be established in accordance with the rules of criminal law, under which the first requirement to be met is that of individual responsibility. The State can incur responsibility only when the existence of genocide has been established beyond all reasonable doubt. In addition, it must then be shown that the person who committed the genocide can engage the responsibility of the State . . ."

(This contention went on to mention responsibility based on breach of the obligation to prevent and punish, matters considered later in this Judgment.)

158. The Respondent has in addition presented what it refers to as "alternative arguments concerning solely State responsibility for breaches of Articles II and III". Those arguments addressed the necessary conditions, especially of intent, as well as of attribution. When presenting those alternative arguments, counsel for the Respondent repeated the principal submission set out above that "the Convention does not suggest in any way that States themselves can commit genocide".

159. The Court notes that there is no disagreement between the Parties that the reference in Article IX to disputes about "the responsibility of a State" as being among the disputes relating to the interpretation, application or fulfilment of the Convention which come within the Court's jurisdiction, indicates that provisions of the Convention do impose obligations on States in respect of which they may, in the event of breach, incur responsibility. Articles V, VI and VII requiring legislation, in particular providing effective penalties for persons guilty of genocide and the other acts enumerated in Article III, and for the prosecution and extradition of alleged offenders are plainly among them. Because those provisions regulating punishment also have a deterrent and therefore a preventive effect or purpose, they could be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide stated in Article I and mentioned in the title. On that basis, in support of the Respondent's principal position, that Article would rank as merely hortatory, introductory or purposive and as preambular to those specific obligations. The remaining specific provision, Article VIII about competent organs of the United Nations taking action, may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility.

160. The Court observes that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of

the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion. Those propositions, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, are well recognized as part of customary international law: see *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 174, para. 94; case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004,* p. 48, para. 83; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* p. 501, para. 99; and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002,* p. 645, para. 37, and the other cases referred to in those decisions.

161. To determine what are the obligations of the Contracting Parties under the Genocide Convention, the Court will begin with the terms of its Article I. It contains two propositions. The first is the affirmation that genocide is a crime under international law. That affirmation is to be read in conjunction with the declaration that genocide is a crime under international law, unanimously adopted by the General Assembly two years earlier in its resolution 96 (I), and referred to in the Preamble to the Convention (paragraph 142, above). The affirmation recognizes the existing requirements of customary international law, a matter emphasized by the Court in 1951:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention) . . .
>
> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human

> groups and on the other to confirm and endorse the most elementary principles of morality." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

Later in that Opinion, the Court referred to "the moral and humanitarian principles which are its basis" (*ibid.,* p. 24). In earlier phases of the present case the Court has also recalled resolution 96 (I) (*I.C.J. Reports 1993*, p. 23; see also pp. 348 and 440) and has quoted the 1951 statement (*I.C.J. Reports 1996 (II)*, p. 616). The Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo* v. *Rwanda)*, paragraph 64, when it added that the norm prohibiting genocide was assuredly a peremptory norm of international law *(jus cogens)*.

162. Those characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I — the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent. Several features of that undertaking are significant. The ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties (cf., for example, International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966), Art. 2, para. 1; International Covenant on Civil and Political Rights (16 December 1966), Art. 2, para. 1, and 3, for example). It is not merely hortatory or purposive. The undertaking is unqualified (a matter considered later in relation to the scope of the obligation of prevention); and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

163. The conclusion is confirmed by two aspects of the preparatory work of the Convention and the circumstances of its conclusion as referred to in Article 32 of the Vienna Convention. In 1947 the United Nations General Assembly, in requesting the Economic and Social Council to submit a report and a draft convention on genocide to the Third Session of the Assembly, declared "that genocide is an international crime entailing national and international responsibility on the part of individuals and States" (A/RES/180 (II)). That duality of responsibilities

is also to be seen in two other associated resolutions adopted on the same day, both directed to the newly established International Law Commission (hereinafter "the ILC"): the first on the formulation of the Nuremberg principles, concerned with the rights (Principle V) and duties of individuals, and the second on the draft declaration on the rights and duties of States (A/RES/177 and A/RES/178 (II)). The duality of responsibilities is further considered later in this Judgment (paragraphs 173-174).

164. The second feature of the drafting history emphasizes the operative and non-preambular character of Article I. The Preamble to the draft Convention, prepared by the *Ad Hoc* Committee on Genocide for the Third Session of the General Assembly and considered by its Sixth Committee, read in part as follows:

> "The High Contracting Parties
>
> . . . . . .
>
> Being convinced that the prevention and punishment of genocide requires international co-operation,
>
> *Hereby agree to prevent and punish the crime as hereinafter provided*."

The first Article would have provided "[g]enocide is a crime under international law whether committed in time of peace or in time of war" (report of the *Ad Hoc* Committee on Genocide, 5 April to 10 May 1948, United Nations, *Official Records of the Economic and Social Council, Seventh Session, Supplement No. 6*, doc. E/794, pp. 2, 18).

Belgium was of the view that the undertaking to prevent and punish should be made more effective by being contained in the operative part of the Convention rather than in the Preamble and proposed the following Article I to the Sixth Committee of the General Assembly: "The High Contracting Parties undertake to prevent and punish the crime of genocide." (United Nations doc. A/C.6/217.) The Netherlands then proposed a new text of Article I combining the *Ad Hoc* Committee draft and the Belgian proposal with some changes: "The High Contracting Parties reaffirm that genocide is a crime under international law, which they undertake to prevent and to punish, in accordance with the following articles." (United Nations docs. A/C.6/220; United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, Summary Records of the 68th meeting, p. 45.) The Danish representative thought that Article I should be worded more effectively and proposed the deletion of the final phrase — "in accordance with the following articles" (*ibid.*, p. 47). The Netherlands representative agreed with that suggestion (*ibid.*, pp. 49-50). After the USSR's proposal to delete Article I was rejected by 36 votes to 8 with 5 abstentions and its proposal to transfer its various points to the Preamble was rejected by 40 votes to 8, and the phrase "whether committed in time of peace or of

war" was inserted by 30 votes to 7 with 6 abstentions, the amended text of Article I was adopted by 37 votes to 3 with 2 abstentions (*ibid.*, pp. 51 and 53).

165. For the Court both changes — the movement of the undertaking from the Preamble to the first operative Article and the removal of the linking clause ("in accordance with the following articles") — confirm that Article I does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide.

166. The Court next considers whether the Parties are also under an obligation, by virtue of the Convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention. The Applicant has however advanced as its main argument that such an obligation is imposed by Article IX, which confers on the Court jurisdiction over disputes "including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III". Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention. Under Article I the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.

167. The Court accordingly concludes that Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. That conclusion must also apply to the other acts enumerated in Article III. Those acts are forbidden along with genocide itself in the list included in Article III. They are referred to equally with genocide in Article IX and without being characterized as "punishable"; and the "purely humanitarian and civilizing purpose" of the Convention may be seen as being promoted by the fact that States are subject to that full set of obligations, supporting their undertaking to prevent genocide. It is true that the concepts used in paragraphs *(b)* to *(e)* of Article III, and particularly that of "complicity", refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals. It would however not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State — even though quite different in nature from criminal responsibility — can be engaged through one of the acts, other than genocide itself, enumerated in Article III.

168. The conclusion that the Contracting Parties are bound in this way by the Convention not to commit genocide and the other acts enumerated in Article III is confirmed by one unusual feature of the wording of Article IX. But for that unusual feature and the addition of the word "fulfilment" to the provision conferring on the Court jurisdiction over disputes as to the "interpretation and application" of the Convention (an addition which does not appear to be significant in this case), Article IX would be a standard dispute settlement provision.

169. The unusual feature of Article IX is the phrase "including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III". The word "including" tends to confirm that disputes relating to the responsibility of Contracting Parties for genocide, and the other acts enumerated in Article III to which it refers, are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention. The responsibility of a party for genocide and the other acts enumerated in Article III arises from its failure to comply with the obligations imposed by the other provisions of the Convention, and in particular, in the present context, with Article III read with Articles I and II. According to the English text of the Convention, the responsibility contemplated is responsibility "for genocide" (in French, "responsabilité . . . en matière de génocide"), not merely responsibility "for failing to prevent or punish genocide". The particular terms of the phrase as a whole confirm that Contracting Parties may be responsible for genocide and the other acts enumerated in Article III of the Convention.

*

170. The Court now considers three arguments, advanced by the Respondent which may be seen as contradicting the proposition that the Convention imposes a duty on the Contracting Parties not to commit genocide and the other acts enumerated in Article III. The first is that, as a matter of general principle, international law does not recognize the criminal responsibility of the State, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility. On the matter of principle the Respondent calls attention to the rejection by the ILC of the concept of international crimes when it prepared the final draft of its Articles on State Responsibility, a decision reflecting the strongly negative reactions of a number of States to any such concept. The Applicant accepts that general international law does not recognize the criminal responsibility of States. It contends, on the specific issue, that the obligation for which the Respondent may be held responsible, in the event of breach, in proceedings under Article IX, is simply an obligation arising under international law, in this case the provisions of the Convention. The Court observes that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature. This argument accordingly cannot be accepted.

171. The second argument of the Respondent is that the nature of the Convention is such as to exclude from its scope State responsibility for genocide and the other enumerated acts. The Convention, it is said, is a standard international criminal law convention focused essentially on the criminal prosecution and punishment of individuals and not on the responsibility of States. The emphasis of the Convention on the obligations and responsibility of individuals excludes any possibility of States being liable and responsible in the event of breach of the obligations reflected in Article III. In particular, it is said, that possibility cannot stand in the face of the references, in Article III to punishment (of individuals), and in Article IV to individuals being punished, and the requirement, in Article V for legislation in particular for effective penalties for persons guilty of genocide, the provision in Article VI for the prosecution of persons charged with genocide, and requirement in Article VII for extradition.

172. The Court is mindful of the fact that the famous sentence in the Nuremberg Judgment that "[c]rimes against international law are committed by men, not by abstract entities . . ." (Judgment of the International Military Tribunal, Trial of the Major War Criminals, 1947, *Official Documents*, Vol. 1, p. 223) might be invoked in support of the proposition that only individuals can breach the obligations set out in Article III. But the Court notes that that Tribunal was answering the argument that "international law is concerned with the actions of sov-

ereign States, and provides no punishment for individuals" (Judgment of the International Military Tribunal, *op. cit.*, p. 222), and that thus States alone were responsible under international law. The Tribunal rejected that argument in the following terms: "[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized" (*ibid.*, p. 223; the phrase "as well as upon States" is missing in the French text of the Judgment).

173. The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The Court notes also that the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001), to be referred to hereinafter as "the ILC Articles on State Responsibility", affirm in Article 58 the other side of the coin: "These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." In its Commentary on this provision, the Commission said:

> "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out." (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.)

The Commission quoted Article 25, paragraph 4, of the Rome Statute, and concluded as follows:

> "Article 58 . . . [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term 'individual responsibility' has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity."

174. The Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs *(a)* to *(e)* of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals. Furthermore, the fact that Articles V, VI and VII focus on individuals cannot itself establish that the Contracting Parties may not be subject to obligations not to commit genocide and the other acts enumerated in Article III.

175. The third and final argument of the Respondent against the proposition that the Contracting Parties are bound by the Convention not to commit genocide is based on the preparatory work of the Convention and particularly of Article IX. The Court has already used part of that work to confirm the operative significance of the undertaking in Article I (see paragraphs 164 and 165 above), an interpretation already determined from the terms of the Convention, its context and purpose.

176. The Respondent, claiming that the Convention and in particular Article IX is ambiguous, submits that the drafting history of the Convention, in the Sixth Committee of the General Assembly, shows that "there was no question of direct responsibility of the State for acts of genocide". It claims that the responsibility of the State was related to the "key provisions" of Articles IV-VI: the Convention is about the criminal responsibility of individuals supported by the civil responsibility of States to prevent and punish. This argument against any wider responsibility for the Contracting Parties is based on the records of the discussion in the Sixth Committee, and is, it is contended, supported by the rejection of United Kingdom amendments to what became Articles IV and VI. Had the first amendment been adopted, Article IV, concerning the punishment of individuals committing genocide or any of the acts enumerated in Article III, would have been extended by the following additional sentence: "[Acts of genocide] committed by or on behalf of States or governments constitute a breach of the present Convention."(A/C.6/236 and Corr. 1.) That amendment was defeated (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 96th Meeting*, p. 355). What became Article VI would have been replaced by a provision conferring jurisdiction on the Court if an act of genocide is or is alleged to be the act of a State or government or its organs. The United Kingdom in response to objections that the proposal was out of order (because it meant going back on a decision already taken) withdrew the amendment in favour of the joint amendment to what became Article IX, submitted by the United Kingdom and Belgium (*ibid., 100th Meeting*, p. 394). In speaking to that joint amendment the United Kingdom delegate acknowledged that the debate had clearly shown the Committee's decision to confine what is now Article VI to the responsibility of individuals (*ibid., 100th Meeting*, p. 430). The United Kingdom/Belgium amendment would have added

the words "including disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV [as the Convention was then drafted]". The United Kingdom delegate explained that what was involved was civil responsibility, not criminal responsibility (United Nations, *Official Records of the General Assembly, op. cit.*, *103rd Meeting*, p. 440). A proposal to delete those words failed and the provision was adopted (*ibid., 104th Meeting*, p. 447), with style changes being made by the Drafting Committee.

177. At a later stage a Belgium/United Kingdom/United States proposal which would have replaced the disputed phrase by including "disputes arising from a charge by a Contracting Party that the crime of genocide or any other of the acts enumerated in article III has been committed within the jurisdiction of another Contracting Party" was ruled by the Chairman of the Sixth Committee as a change of substance and the Committee did not adopt the motion (which required a two-thirds majority) for reconsideration (A/C.6/305). The Chairman gave the following reason for his ruling which was not challenged:

> "it was provided in article IX that those disputes, among others, which concerned the responsibility of a State for genocide or for any of the acts enumerated in article III, should be submitted to the International Court of Justice. According to the joint amendment, on the other hand, the disputes would not be those which concerned the responsibility of the State but those which resulted from an accusation to the effect that the crime had been committed in the territory of one of the contracting parties." (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 131st Meeting*, p. 690.)

By that time in the deliberations of the Sixth Committee it was clear that only individuals could be held criminally responsible under the draft Convention for genocide. The Chairman was plainly of the view that the Article IX, as it had been modified, provided for State responsibility for genocide.

178. In the view of the Court, two points may be drawn from the drafting history just reviewed. The first is that much of it was concerned with proposals supporting the criminal responsibility of States; but those proposals were *not* adopted. The second is that the amendment which was adopted — to Article IX — is about jurisdiction in respect of the responsibility of States *simpliciter*. Consequently, the drafting history may be seen as supporting the conclusion reached by the Court in paragraph 167 above.

179. Accordingly, having considered the various arguments, the Court

affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.

* *

*(5) Question Whether the Court May Make a Finding of Genocide by a State in the Absence of a Prior Conviction of an Individual for Genocide by a Competent Court*

180. The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph *(b)*, and complicity under Article III, paragraph *(e)*; and, as explained below (paragraph 431) for purposes of the obligation to prevent genocide. The Respondent has raised the question whether it is necessary, as a matter of law, for the Court to be able to uphold a claim of the responsibility of a State for an act of genocide, or any other act enumerated in Article III, that there should have been a finding of genocide by a court or tribunal exercising criminal jurisdiction. According to the Respondent, the condition *sine qua non* for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State's responsibility.

181. The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity (paragraphs 209-210 below). Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction under Article IX to find a State responsible if genocide or other acts enumerated in Article III are committed by its organs, or persons or groups whose acts are attributable to it.

182. Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the

police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.

* *

*(6) The Possible Territorial Limits of the Obligations*

183. The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question. The extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the Judgment concerned with that obligation (cf. paragraph 430 below). The significant relevant condition concerning the obligation not to commit genocide and the other acts enumerated in Article III is provided by the rules on attribution (paragraphs 379 ff. below).

184. The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed (cf. paragraph 442 below), or by an international penal tribunal with jurisdiction (paragraphs 443 ff. below).

* *

*(7) The Applicant's Claims in Respect of Alleged Genocide Committed Outside Its Territory against Non-Nationals*

185. In its final submissions the Applicant requests the Court to make rulings about acts of genocide and other unlawful acts allegedly committed against "non-Serbs" outside its own territory (as well as within it) by the Respondent. Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the *jus cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations. For the reasons explained in paragraphs 368 and 369 below, the Court will not however need to address those questions of law.

* *

*(8) The Question of Intent to Commit Genocide*

186. The Court notes that genocide as defined in Article II of the Convention comprises "acts" and an "intent". It is well established that the acts —

> "*(a)* Killing members of the group;
> *(b)* Causing serious bodily or mental harm to members of the group;
> *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> *(d)* Imposing measures intended to prevent births within the group; [and]
> *(e)* Forcibly transferring children of the group to another group" —

themselves include mental elements. "Killing" must be intentional, as must "causing serious bodily or mental harm". Mental elements are made explicit in paragraphs *(c)* and *(d)* of Article II by the words "deliberately" and "intended", quite apart from the implications of the words "inflicting" and "imposing"; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 44, para. 5).

187. In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the "intent to destroy, in whole or in part, . . . [the protected] group, as such". It is not enough to establish, for instance in terms of paragraph *(a)*, that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; in the present Judgment it will usually be referred to as the "specific intent *(dolus specialis)*". It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.

188. The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY" or "the Tribunal") did in the *Kupreškić et al.* case:

> "the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide." (IT-95-16-T, Judgment, 14 January 2000, para. 636.)

189. The specific intent is also to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.

* *

*(9) Intent and "Ethnic Cleansing"*

190. The term "ethnic cleansing" has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case; see, for example, Security Council resolution 787 (1992), para. 2; resolution 827 (1993), Preamble; and the Report with that title attached as Annex IV to the Final Report of the United Nations Commission of Experts (S/1994/674/Add.2) (hereinafter "Report of the Commission of Experts"). General Assembly resolution 47/121 referred in its Preamble to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide", as being carried on in Bosnia and Herzegovina. It will be convenient at this point to consider what legal significance the expression may have. It is in practice used, by reference to a specific region or area, to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area" (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal

during the drafting of the Convention to include in the definition "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" was not accepted (A/C.6/234). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph *(c)*, of the Convention, provided such action is carried out with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'" (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide." (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts.

* *

*(10) Definition of the Protected Group*

191. When examining the facts brought before the Court in support of the accusations of the commission of acts of genocide, it is necessary to have in mind the identity of the group against which genocide may be considered to have been committed. The Court will therefore next consider the application in this case of the requirement of Article II of the Genocide Convention, as an element of genocide, that the proscribed acts be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The Parties disagreed on aspects of the definition of the "group". The Applicant in its final submission refers to "the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population" (paragraph 66 above). It thus follows what is termed the negative approach to the definition of the group in question. The Respondent sees two legal problems with that formulation:

> "First, the group targeted is not sufficiently well defined as such, since, according to the Applicant's allegation, that group consists of the non-Serbs, thus an admixture of all the individuals living in Bosnia and Herzegovina except the Serbs, but more particularly the Muslim population, which accounts for only a part of the non-Serb population. Second, the intent to destroy concerned only a part of the non-Serb population, but the Applicant failed to specify which part of the group was targeted."

In addition to those issues of the negative definition of the group and its geographic limits (or their lack), the Parties also discussed the choice between subjective and objective approaches to the definition. The Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach. The issue is not in any event significant on the facts of this case and the Court takes it no further.

192. While the Applicant has employed the negative approach to the definition of a protected group, it places major, for the most part exclusive, emphasis on the Bosnian Muslims as the group being targeted. The Respondent, for instance, makes the point that the Applicant did not mention the Croats in its oral arguments relating to sexual violence, Srebrenica and Sarajevo, and that other groups including "the Jews, Roma and Yugoslavs" were not mentioned. The Applicant does however maintain the negative approach to the definition of the group in its final submissions and the Court accordingly needs to consider it.

193. The Court recalls first that the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics — national, ethnical, racial or religious — and not the lack of them. The intent must also relate to the group "as such". That means that the crime requires an intent to destroy

a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not. The etymology of the word — killing a group — also indicates a positive definition; and Raphael Lemkin has explained that he created the word from the Greek *genos*, meaning race or tribe, and the termination "-cide", from the Latin *caedere*, to kill (*Axis Rule in Occupied Europe* (1944), p. 79). In 1945 the word was used in the Nuremberg indictment which stated that the defendants "conducted deliberate and systematic genocide, viz., the extermination of racial and national groups . . . in order to destroy particular races and classes of people and national, racial or religious groups . . ." (Indictment, Trial of the Major War Criminals before the International Military Tribunal, *Official Documents*, Vol. 1, pp. 43 and 44). As the Court explains below (paragraph 198), when part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole. Further, each of the acts listed in Article II require that the proscribed action be against members of the "group".

194. The drafting history of the Convention confirms that a positive definition must be used. Genocide as "the denial of the existence of entire human groups" was contrasted with homicide, "the denial of the right to live of individual human beings" by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of "the very existence of certain human groups" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way.

195. The Court observes that the ICTY Appeals Chamber in the *Stakić* case (IT-97-24-A, Judgment, 22 March 2006, paras. 20-28) also came to the conclusion that the group must be defined positively, essentially for the same reasons as the Court has given.

196. Accordingly, the Court concludes that it should deal with the matter on the basis that the targeted group must in law be defined posi-

tively, and thus not negatively as the "non-Serb" population. The Applicant has made only very limited reference to the non-Serb populations of Bosnia and Herzegovina other than the Bosnian Muslims, e.g. the Croats. The Court will therefore examine the facts of the case on the basis that genocide may be found to have been committed if an intent to destroy the Bosnian Muslims, as a group, in whole or in part, can be established.

197. The Parties also addressed a specific question relating to the impact of geographic criteria on the group as identified positively. The question concerns in particular the atrocities committed in and around Srebrenica in July 1995, and the question whether in the circumstances of that situation the definition of genocide in Article II was satisfied so far as the intent of destruction of the "group" "in whole or in part" requirement is concerned. This question arises because of a critical finding in the *Krstić* case. In that case the Trial Chamber was "ultimately satisfied that murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica" (IT-98-33, Judgment, 2 August 2001, para. 546). Those men were systematically targeted whether they were civilians or soldiers *(ibid.)*. The Court addresses the facts of that particular situation later (paragraphs 278-297). For the moment, it considers how as a matter of law the "group" is to be defined, in territorial and other respects.

198. In terms of that question of law, the Court refers to three matters relevant to the determination of "part" of the "group" for the purposes of Article II. In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of *Kayishema*, *Byilishema*, and *Semanza* there referred to; and *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17).

199. Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe" *(ibid.)*. The area of the perpetrator's activity and control are to be considered. As the ICTY Appeals

Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant (*Krstić*, IT-98-33-A, Judgment, 19 April 2004, para. 13). This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide (*Stakić*, IT-97-24-T, Judgment, 31 July 2003, para. 523). The Respondent, while not challenging this criterion, does contend that the limit militates against the existence of the specific intent *(dolus specialis)* at the national or State level as opposed to the local level — a submission which, in the view of the Court, relates to attribution rather than to the "group" requirement.

200. A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the *Krstić* case put the matter in these carefully measured terms:

> "The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute which exactly reproduces Article II of the Convention]." (IT-98-33-A, Judgment, 19 April 2004, para. 12; footnote omitted.)

Establishing the "group" requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court's opinion that the qualitative approach cannot stand alone. The Appeals Chamber in *Krstić* also expresses that view.

201. The above list of criteria is not exhaustive, but, as just indicated, the substantiality criterion is critical. They are essentially those stated by the Appeals Chamber in the *Krstić* case, although the Court does give this first criterion priority. Much will depend on the Court's assessment of those and all other relevant factors in any particular case.

* * *

## V. Questions of Proof: Burden of Proof, the Standard of Proof, Methods of Proof

202. When turning to the facts of the dispute, the Court must note that many allegations of fact made by the Applicant are disputed by the

Respondent. That is so notwithstanding increasing agreement between the Parties on certain matters through the course of the proceedings. The disputes relate to issues about the facts, for instance the number of rapes committed by Serbs against Bosnian Muslims, and the day-to-day relationships between the authorities in Belgrade and the authorities in Pale, and the inferences to be drawn from, or the evaluations to be made of, facts, for instance about the existence or otherwise of the necessary specific intent *(dolus specialis)* and about the attributability of the acts of the organs of Republika Srpska and various paramilitary groups to the Respondent. The allegations also cover a very wide range of activity affecting many communities and individuals over an extensive area and over a long period. They have already been the subject of many accounts, official and non-official, by many individuals and bodies. The Parties drew on many of those accounts in their pleadings and oral argument.

203. Accordingly, before proceeding to an examination of the alleged facts underlying the claim in this case, the Court first considers, in this section of the Judgment, in turn the burden or onus of proof, the standard of proof, and the methods of proof.

204. On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, "it is the litigant seeking to establish a fact who bears the burden of proving it" (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). While the Applicant accepts that approach as a general proposition, it contends that in certain respects the onus should be reversed, especially in respect of the attributability of alleged acts of genocide to the Respondent, given the refusal of the Respondent to produce the full text of certain documents.

205. The particular issue concerns the "redacted" sections of documents of the Supreme Defence Council of the Respondent, i.e. sections in which parts of the text had been blacked out so as to be illegible. The documents had been classified, according to the Co-Agent of the Respondent, by decision of the Council as a military secret, and by a confidential decision of the Council of Ministers of Serbia and Montenegro as a matter of national security interest. The Applicant contends that the Court should draw its own conclusions from the failure of the Respondent to produce complete copies of the documents. It refers to the power of the Court, which it had invoked earlier (paragraph 44 above), to call for documents under Article 49 of the Statute, which provides that "[f]ormal note shall be taken of any refusal". In the second round of oral argument the Applicant's Deputy Agent submitted that

> "Serbia and Montenegro should not be allowed to respond to our quoting the redacted SDC reports if it does not provide at the very same time the Applicant and the Court with copies of entirely

unredacted versions of *all* the SDC shorthand records and of *all* of the minutes of the same. Otherwise, Serbia and Montenegro would have an overriding advantage over Bosnia and Herzegovina with respect to documents, which are apparently, and not in the last place in the Respondent's eyes, of direct relevance to winning or losing the present case. We explicitly, Madam President, request the Court to instruct the Respondent accordingly." (Emphasis in the original.)

206. On this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records. It has made very ample use of it. In the month before the hearings it submitted what must be taken to have been a careful selection of documents from the very many available from the ICTY. The Applicant called General Sir Richard Dannatt, who, drawing on a number of those documents, gave evidence on the relationship between the authorities in the Federal Republic of Yugoslavia and those in the Republika Srpska and on the matter of control and instruction. Although the Court has not agreed to either of the Applicant's requests to be provided with unedited copies of the documents, it has not failed to note the Applicant's suggestion that the Court may be free to draw its own conclusions.

207. On a final matter relating to the burden of proof, the Applicant contends that the Court should draw inferences, notably about specific intent *(dolus specialis)*, from established facts, i.e., from what the Applicant refers to as a "pattern of acts" that "speaks for itself". The Court considers that matter later in the Judgment (paragraphs 370-376 below).

208. The Parties also differ on the second matter, the standard of proof. The Applicant, emphasizing that the matter is not one of criminal law, says that the standard is the balance of evidence or the balance of probabilities, inasmuch as what is alleged is breach of treaty obligations. According to the Respondent, the proceedings "concern the most serious issues of State responsibility and . . . a charge of such exceptional gravity against a State requires a proper degree of certainty. The proofs should be such as to leave no room for reasonable doubt."

209. The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom* v. *Albania), Judgment, I.C.J. Reports 1949*, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.

210. In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.

211. The Court now turns to the third matter — the method of proof. The Parties submitted a vast array of material, from different sources, to the Court. It included reports, resolutions and findings by various United Nations organs, including the Secretary-General, the General Assembly, the Security Council and its Commission of Experts, and the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Special Rapporteur on Human Rights in the former Yugoslavia; documents from other intergovernmental organizations such as the Conference for Security and Cooperation in Europe; documents, evidence and decisions from the ICTY; publications from governments; documents from non-governmental organizations; media reports, articles and books. They also called witnesses, experts and witness-experts (paragraphs 57-58 above).

212. The Court must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached. This case does however have an unusual feature. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY. The Court considers their significance later in this section of the Judgment.

213. The assessment made by the Court of the weight to be given to a particular item of evidence may lead to the Court rejecting the item as unreliable, or finding it probative, as appears from the practice followed for instance in the case concerning *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 9-10, paras. 11-13; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 39-41, paras. 59-73; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 200-201, paras. 57-61. In the most recent case the Court said this:

> "The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activi-*

> *ties in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties." (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 35, para. 61. See also paras. 78-79, 114 and 237-242.)

214. The fact-finding process of the ICTY falls within this formulation, as "evidence obtained by examination of persons directly involved", tested by cross-examination, the credibility of which has not been challenged subsequently. The Court has been referred to extensive documentation arising from the Tribunal's processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing judgments following a plea agreement and decisions of the Appeals Chamber.

215. By the end of the oral proceedings the Parties were in a broad measure of agreement on the significance of the ICTY material. The Applicant throughout has given and gives major weight to that material. At the written stage the Respondent had challenged the reliability of the Tribunal's findings, the adequacy of the legal framework under which it operates, the adequacy of its procedures and its neutrality. At the stage of the oral proceedings, its position had changed in a major way. In its Agent's words, the Respondent now based itself on the jurisprudence of the Tribunal and had "in effect" distanced itself from the opinions about the Tribunal expressed in its Rejoinder. The Agent was however careful to distinguish between different categories of material:

> "[W]e do not regard all the material of the Tribunal for the former Yugoslavia as having the same relevance or probative value. We have primarily based ourselves upon the judgments of the Tribunal's Trial and Appeals Chambers, given that only the judgments can be

regarded as establishing the facts about the crimes in a credible way."

And he went on to point out that the Tribunal has not so far, with the exception of Srebrenica, held that genocide was committed in any of the situations cited by the Applicant. He also called attention to the criticisms already made by Respondent's counsel of the relevant judgment concerning General Krstić who was found guilty of aiding and abetting genocide at Srebrenica.

216. The Court was referred to actions and decisions taken at various stages of the ICTY processes:

(1) The Prosecutor's decision to include or not certain changes in an indictment;
(2) The decision of a judge on reviewing the indictment to confirm it and issue an arrest warrant or not;
(3) If such warrant is not executed, a decision of a Trial Chamber (of three judges) to issue an international arrest warrant, provided the Chamber is satisfied that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged;

(4) The decision of a Trial Chamber on the accused's motion for acquittal at the end of the prosecution case;

(5) The judgment of a Trial Chamber following the full hearings;

(6) The sentencing judgment of a Trial Chamber following a guilty plea.

The Court was also referred to certain decisions of the Appeals Chamber.

217. The Court will consider these stages in turn. The Applicant placed some weight on indictments filed by the Prosecutor. But the claims made by the Prosecutor in the indictments are just that — allegations made by one party. They have still to proceed through the various phases outlined earlier. The Prosecutor may, instead, decide to withdraw charges of genocide or they may be dismissed at trial. Accordingly, as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide.

218. The second and third stages, relating to the confirmation of the indictment, issues of arrest warrants and charges, are the responsibility of the judges (one in the second stage and three in the third) rather than the Prosecutor, and witnesses may also be called in the third, but the accused is generally not involved. Moreover, the grounds for a judge to act are, at the second stage, that a prima facie case has been established, and at the

third, that reasonable grounds exist for belief that the accused has committed crimes charged.

219. The accused does have a role at the fourth stage — motions for acquittal made by the defence at the end of the prosecution's case and after the defence has had the opportunity to cross-examine the prosecution's witnesses, on the basis that "there is no evidence capable of supporting a conviction". This stage is understood to require a decision, not that the Chamber trying the facts *would* be satisfied beyond reasonable doubt by the prosecution's evidence (if accepted), but rather that it *could* be so satisfied (*Jelisić*, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001, para. 37). The significance of that lesser standard for present purposes appears from one case on which the Applicant relied. The Trial Chamber in August 2005 in *Krajišnik* dismissed the defence motion that the accused who was charged with genocide and other crimes had no case to answer (IT-00-39-T, transcript of 19 August 2005, pp. 17112-17132). But following the full hearing the accused was found not guilty of genocide nor of complicity in genocide. While the *actus reus* of genocide was established, the specific intent *(dolus specialis)* was not (Trial Chamber Judgment, 27 September 2006, paras. 867-869). Because the judge or the Chamber does not make definitive findings at any of the four stages described, the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met.

220. The processes of the Tribunal at the fifth stage, leading to a judgment of the Trial Chamber following the full hearing are to be contrasted with those earlier stages. The processes of the Tribunal leading to final findings are rigorous. Accused are presumed innocent until proved guilty beyond reasonable doubt. They are entitled to listed minimum guarantees (taken from the International Covenant on Civil and Political Rights), including the right to counsel, to examine witness against them, to obtain the examination of witness on their behalf, and not to be compelled to testify against themselves or to confess guilt. The Tribunal has powers to require Member States of the United Nations to co-operate with it, among other things, in the taking of testimony and the production of evidence. Accused are provided with extensive pre-trial disclosure including materials gathered by the prosecution and supporting the indictment, relevant witness statements and the pre-trial brief summarizing the evidence against them. The prosecutor is also to disclose exculpatory material to the accused and to make available in electronic form the collections of relevant material which the prosecution holds.

221. In practice, now extending over ten years, the trials, many of important military or political figures for alleged crimes committed over long periods and involving complex allegations, usually last for months, even years, and can involve thousands of documents and numerous witnesses. The Trial Chamber may admit any relevant evidence which has probative value. The Chamber is to give its reasons in writing and separate and dissenting opinions may be appended.

222. Each party has a right of appeal from the judgment of the Trial Chamber to the Appeals Chamber on the grounds of error of law invalidating the decision or error of fact occasioning a miscarriage of justice. The Appeals Chamber of five judges does not rehear the evidence, but it does have power to hear additional evidence if it finds that it was not available at trial, is relevant and credible and could have been a decisive factor in the trial. It too is to give a reasoned opinion in writing to which separate or dissenting opinions may be appended.

223. In view of the above, the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.

224. There remains for consideration the sixth stage, that of sentencing judgments given following a guilty plea. The process involves a statement of agreed facts and a sentencing judgment. Notwithstanding the guilty plea the Trial Chamber must be satisfied that there is sufficient factual basis for the crime and the accused's participation in it. It must also be satisfied that the guilty plea has been made voluntarily, is informed and is not equivocal. Accordingly the agreed statement and the sentencing judgment may when relevant be given a certain weight.

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225. The Court will now comment in a general way on some of the other evidence submitted to it. Some of that evidence has been produced to prove that a particular statement was made so that the Party may make use of its content. In many of these cases the accuracy of the document as a record is not in doubt; rather its significance is. That is often the case for instance with official documents, such as the record of parliamentary bodies and budget and financial statements. Another instance is when the statement was recorded contemporaneously on audio or videotape. Yet another is the evidence recorded by the ICTY.

226. In some cases the account represents the speaker's own knowledge of the fact to be determined or evaluated. In other cases the account may set out the speaker's opinion or understanding of events after they have occurred and in some cases the account will not be based on direct observation but may be hearsay. In fact the Parties rarely disagreed about the authenticity of such material but rather about whether it was being accurately presented (for instance with contention that passages were being taken out of context) and what weight or significance should be given to it.

227. The Court was also referred to a number of reports from official or independent bodies, giving accounts of relevant events. Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).

228. One particular instance is the comprehensive report, "The Fall of Srebrenica", which the United Nations Secretary-General submitted in November 1999 to the General Assembly (United Nations doc. A/54/549). It was prepared at the request of the General Assembly, and covered the events from the establishing by the Security Council of the "safe area" on 16 April 1993 (Security Council resolution 819 (1993)) until the endorsement by the Security Council on 15 December 1995 of the Dayton Agreement. Member States and others concerned had been encouraged to provide relevant information. The Secretary-General was in a very good position to prepare a comprehensive report, some years after the events, as appears in part from this description of the method of preparation:

> "This report has been prepared on the basis of archival research within the United Nations system, as well as on the basis of interviews with individuals who, in one capacity or another, participated in or had knowledge of the events in question. In the interest of gaining a clearer understanding of these events, I have taken the exceptional step of entering into the public record information from the classified files of the United Nations. In addition, I would like to record my thanks to those Member States, organizations and individuals who provided information for this report. A list of persons interviewed in this connection is attached as annex 1. While that list is fairly extensive, time, as well as budgetary and other constraints, precluded interviewing many other individuals who would be in a position to offer important perspectives on the subject at hand. In most cases, the interviews were conducted on a non-attribution basis to encourage as candid a disclosure as possible. I have also honoured the request of those individuals who provided informa-

tion for this report on the condition that they not be identified." (A/54/549, para. 8.)

229. The chapter, "Fall of Srebrenica: 6-11 July 1995", is preceded by this note:

> "The United Nations has hitherto not publicly disclosed the full details of the attack carried out on Srebrenica from 6 to 11 July 1995. The account which follows has now been reconstructed mainly from reports filed at that time by Dutchbat and the United Nations military observers. The accounts provided have also been supplemented with information contained in the Netherlands report on the debriefing of Dutchbat, completed in October 1995, and by information provided by Bosniac, Bosnian Serb and international sources. In order to independently examine the information contained in various secondary sources published over the past four years, as well to corroborate key information contained in the Netherlands debriefing report, interviews were conducted during the preparation of this report with a number of key personnel who were either in Srebrenica at the time, or who were involved in decision-making at higher levels in the United Nations chain of command." (A/54/549, Chap. VII, p. 57.)

The introductory note to the next chapter, "The Aftermath of the fall of Srebrenica: 12-20 July 1995", contains this description of the sources:

> "The following section attempts to describe in a coherent narrative how thousands of men and boys were summarily executed and buried in mass graves within a matter of days while the international community attempted to negotiate access to them. It details how evidence of atrocities taking place gradually came to light, but too late to prevent the tragedy which was unfolding. In 1995, the details of the tragedy were told in piecemeal fashion, as survivors of the mass executions began to provide accounts of the horrors they had witnessed; satellite photos later gave credence to their accounts.
>
> The first official United Nations report which signalled the possibility of mass executions having taken place was the report of the Special Rapporteur of the Commission on Human Rights, dated 22 August 1995 (E/CN.4/1996/9). It was followed by the Secretary-General's reports to the Security Council, pursuant to resolution 1010 (1995), of 30 August (S/1995/755) and 27 November 1995 (S/1995/988). Those reports included information obtained from governmental and non-governmental organizations, as well as information that had appeared in the international and local press. By the end of 1995, however, the International Tribunal for the Former

Yugoslavia had still not been granted access to the area to corroborate the allegations of mass executions with forensic evidence.

The Tribunal first gained access to the crime scenes in January 1996. The details of many of their findings were made public in July 1996, during testimony under rule 60 of the Tribunal's rules of procedure, in the case against Ratio [*sic:* Ratko] Mladić and Radovan Karadžić. Between that time and the present, the Tribunal has been able to conduct further investigations in the areas where the executions were reported to have taken place and where the primary and secondary mass graves were reported to have been located. On the basis of the forensic evidence obtained during those investigations, the Tribunal has now been able to further corroborate much of the testimony of the survivors of the massacres. On 30 October 1998, the Tribunal indicted Radislav Krstić, Commander of the BSA's Drina Corps, for his alleged involvement in those massacres. The text of the indictment provides a succinct summary of the information obtained to date on where and when the mass executions took place.

The aforementioned sources of information, coupled with certain additional confidential information that was obtained during the preparation of this report, form the basis of the account which follows. Sources are purposely not cited in those instances where such disclosure could potentially compromise the Tribunal's ongoing work." (A/54/549, Chap. VIII, p. 77.)

230. The care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. As will appear later in this Judgment, the Court has gained substantial assistance from this report.

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## VI. The Facts Invoked by the Applicant, in Relation to Article II

### *(1) The Background*

231. In this case the Court is seised of a dispute between two sovereign States, each of which is established in part of the territory of the former State known as the Socialist Federal Republic of Yugoslavia, concerning the application and fulfilment of an international convention to which they are parties, the Convention on the Prevention and Punishment of the Crime of Genocide. The task of the Court is to deal with the legal claims and factual allegations advanced by Bosnia and Herzegovina against Serbia and Montenegro; the counter-claim advanced earlier in the proceedings by Serbia and Montenegro against Bosnia and Herzegovina has been withdrawn.

232. Following the death on 4 May 1980 of President Tito, a rotating presidency was implemented in accordance with the 1974 Constitution of the SFRY. After almost ten years of economic crisis and the rise of nationalism within the republics and growing tension between different ethnic and national groups, the SFRY began to break up. On 25 June 1991, Slovenia and Croatia declared independence, followed by Macedonia on 17 September 1991. (Slovenia and Macedonia are not concerned in the present proceedings; Croatia has brought a separate case against Serbia and Montenegro, which is still pending on the General List.) On the eve of the war in Bosnia and Herzegovina which then broke out, according to the last census (31 March 1991), some 44 per cent of the population of the country described themselves as Muslims, some 31 per cent as Serbs and some 17 per cent as Croats (*Krajišnik*, IT-00-39-T and 40-T, Trial Chamber Judgment, 27 September 2006, para. 15).

233. By a "sovereignty" resolution adopted on 14 October 1991, the Parliament of Bosnia and Herzegovina declared the independence of the Republic. The validity of this resolution was contested at the time by the Serbian community of Bosnia and Herzegovina (Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia (the Badinter Commission), p. 3). On 24 October 1991, the Serb Members of the Bosnian Parliament proclaimed a separate Assembly of the Serb Nation/Assembly of the Serb People of Bosnia and Herzegovina. On 9 January 1992, the Republic of the Serb People of Bosnia and Herzegovina (subsequently renamed the Republika Srpska on 12 August 1992) was declared with the proviso that the declaration would come into force upon international recognition of the Republic of Bosnia and Herzegovina. On 28 February 1992, the Constitution of the Republic of the Serb People of Bosnia and Herzegovina was adopted. The Republic of the Serb People of Bosnia and Herzegovina (and subsequently the Republika Srpska) was not and has not been recognized internationally as a State; it has however enjoyed some *de facto* independence.

234. On 29 February and 1 March 1992, a referendum was held on the question of independence in Bosnia and Herzegovina. On 6 March 1992, Bosnia and Herzegovina officially declared its independence. With effect from 7 April 1992, Bosnia and Herzegovina was recognized by the European Community. On 7 April 1992, Bosnia and Herzegovina was recognized by the United States. On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia was adopted consisting of the Republic of Serbia and the Republic of Montenegro. As explained above (paragraph 67), Montenegro declared its independence on 3 June 2006. All three States have been admitted to membership of the United Nations: Bosnia and Herzegovina on 22 May 1992; Serbia and Montenegro, under the name of the Federal Republic of Yugoslavia on 1 November 2000; and the Republic of Montenegro on 28 June 2006.

* *

*(2) The Entities Involved in the Events Complained of*

235. It will be convenient next to define the institutions, organizations or groups that were the actors in the tragic events that were to unfold in Bosnia and Herzegovina. Of the independent sovereign States that had emerged from the break-up of the SFRY, two are concerned in the present proceedings: on the one side, the FRY (later to be called Serbia and Montenegro), which was composed of the two constituent republics of Serbia and Montenegro; on the other, the Republic of Bosnia and Herzegovina. At the time when the latter State declared its independence (15 October 1991), the independence of two other entities had already been declared: in Croatia, the Republika Srpska Krajina, on 26 April 1991, and the Republic of the Serb People of Bosnia and Herzegovina, later to be called the Republika Srpska, on 9 January 1992 (paragraph 233 above). The Republika Srpska never attained international recognition as a sovereign State, but it had *de facto* control of substantial territory, and the loyalty of large numbers of Bosnian Serbs.

236. The Parties both recognize that there were a number of entities at a lower level the activities of which have formed part of the factual issues in the case, though they disagree as to the significance of those activities. Of the military and paramilitary units active in the hostilities, there were in April 1992 five types of armed formations involved in Bosnia: first, the Yugoslav People's Army (JNA), subsequently the Yugoslav Army (VJ); second, volunteer units supported by the JNA and later by the VJ, and the Ministry of the Interior (MUP) of the FRY; third, municipal Bosnian Serb Territorial Defence (TO) detachments; and, fourth, police forces of the Bosnian Serb Ministry of the Interior. The MUP of the Republika Srpska controlled the police and the security services, and operated, according to the Applicant, in close co-operation and co-ordination with the MUP of the FRY. On 15 April 1992, the Bosnian Government established a military force, based on the former Territorial Defence of the Republic, the Army of the Republic of Bosnia and Herzegovina (ARBiH), merging several non-official forces, including a number of paramilitary defence groups, such as the Green Berets, and the Patriotic League, being the military wing of the Muslim Party of Democratic Action. The Court does not overlook the evidence suggesting the existence of Muslim organizations involved in the conflict, such as foreign Mujahideen, although as a result of the withdrawal of the Respondent's counter-claims, the activities of these bodies are not the subject of specific claims before the Court.

237. The Applicant has asserted the existence of close ties between the Government of the Respondent and the authorities of the Republika Srpska, of a political and financial nature, and also as regards administra-

tion and control of the army of the Republika Srpska (VRS). The Court observes that insofar as the political sympathies of the Respondent lay with the Bosnian Serbs, this is not contrary to any legal rule. It is however argued by the Applicant that the Respondent, under the guise of protecting the Serb population of Bosnia and Herzegovina, in fact conceived and shared with them the vision of a "Greater Serbia", in pursuit of which it gave its support to those persons and groups responsible for the activities which allegedly constitute the genocidal acts complained of. The Applicant bases this contention first on the "Strategic Goals" articulated by President Karadžić at the 16th Session of the FRY Assembly on 12 May 1992, and subsequently published in the *Official Gazette* of the Republika Srpska (paragraph 371), and secondly on the consistent conduct of the Serb military and paramilitary forces vis-à-vis the non-Serb Bosnians showing, it is suggested, an overall specific intent *(dolus specialis)*. These activities will be examined below.

238. As regards the relationship between the armies of the FRY and the Republika Srpska, the Yugoslav Peoples' Army (JNA) of the SFRY had, during the greater part of the period of existence of the SFRY, been effectively a federal army, composed of soldiers from all the constituent republics of the Federation, with no distinction between different ethnic and religious groups. It is however contended by the Applicant that even before the break-up of the SFRY arrangements were being made to transform the JNA into an effectively Serb army. The Court notes that on 8 May 1992, all JNA troops who were not of Bosnian origin were withdrawn from Bosnia-Herzegovina. However, JNA troops of Bosnian Serb origin who were serving in Bosnia and Herzegovina were transformed into, or joined, the army of the Republika Srpska (the VRS) which was established on 12 May 1992, or the VRS Territorial Defence. Moreover, Bosnian Serb soldiers serving in JNA units elsewhere were transferred to Bosnia and Herzegovina and subsequently joined the VRS. The remainder of the JNA was transformed into the Yugoslav army (VJ) and became the army of the Federal Republic of Yugoslavia. On 15 May 1992 the Security Council, by resolution 752, demanded that units of the JNA in Bosnia and Herzegovina "be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed". On 19 May 1992, the Yugoslav army was officially withdrawn from Bosnia and Herzegovina. The Applicant contended that from 1993 onwards, around 1,800 VRS officers were "administered" by the 30th Personnel Centre of the VJ in Belgrade; this meant that matters like their payment, promotions, pensions, etc., were handled, not by the Republika Srpska, but by the army of the Respondent. According to the Respondent, the importance of this fact was greatly exaggerated by the Applicant: the VRS had around 14,000 officers and thus only a small number of them were dealt with by the 30th Personnel Centre; this Centre only gave a certain degree of assistance to the VRS. The Applicant maintains that all VRS officers remained members of the

FRY army — only the label changed; according to the Respondent, there is no evidence for this last allegation. The Court takes note however of the comprehensive description of the processes involved set out in paragraphs 113 to 117 of the Judgment of 7 May 1997 of the ICTY Trial Chamber in the *Tadić* case (IT-94-1-T) quoted by the Applicant which mainly corroborate the account given by the latter. Insofar as the Respondent does not deny the fact of these developments, it insists that they were normal reactions to the threat of civil war, and there was no premeditated plan behind them.

239. The Court further notes the submission of the Applicant that the VRS was armed and equipped by the Respondent. The Applicant contends that when the JNA formally withdrew on 19 May 1992, it left behind all its military equipment which was subsequently taken over by the VRS. This claim is supported by the Secretary-General's report of 3 December 1992 in which he concluded that "[t]hough the JNA has completely withdrawn from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the 'Serb Republic' " (A/47/747, para. 11). Moreover, the Applicant submits that Belgrade actively supplied the VRS with arms and equipment throughout the war in Bosnia and Herzegovina. On the basis of evidence produced before the ICTY, the Applicant contended that up to 90 per cent of the material needs of the VRS were supplied by Belgrade. General Dannatt, one of the experts called by the Applicant (paragraph 57 above), testified that, according to a "consumption review" given by General Mladić at the Bosnian Serb Assembly on 16 April 1995, 42.2 per cent of VRS supplies of infantry ammunition were inherited from the former JNA and 47 per cent of VRS requirements were supplied by the VJ. For its part, the Respondent generally denies that it supplied and equipped the VRS but maintains that, even if that were the case, such assistance "is very familiar and is an aspect of numerous treaties of mutual security, both bilateral and regional". The Respondent adds that moreover it is a matter of public knowledge that the armed forces of Bosnia and Herzegovina received external assistance from friendly sources. However, one of the witnesses called by the Respondent, Mr. Vladimir Lukić, who was the Prime Minister of the Republika Srpska from 20 January 1993 to 18 August 1994 testified that the army of the Republika Srpska was supplied from different sources "including but not limited to the Federal Republic of Yugoslavia" but asserted that the Republika Srpska "mainly paid for the military materiel which it obtained" from the States that supplied it.

240. As regards effective links between the two Governments in the financial sphere, the Applicant maintains that the economies of the FRY, the Republika Srpska, and the Republika Srpska Krajina were integrated through the creation of a single economic entity, thus enabling the FRY Government to finance the armies of the two other bodies in addition to its own. The Applicant argued that the National Banks of the

Republika Srpska and of the Republika Srpska Krajina were set up as under the control of, and directly subordinate to, the National Bank of Yugoslavia in Belgrade. The national budget of the FRY was to a large extent financed through primary issues from the National Bank of Yugoslavia, which was said to be entirely under governmental control, i.e. in effect through creating money by providing credit to the FRY budget for the use of the JNA. The same was the case for the budgets of the Republika Srpska and the Republika Srpska Krajina, which according to the Applicant had virtually no independent sources of income; the Respondent asserts that income was forthcoming from various sources, but has not specified the extent of this. The National Bank of Yugoslavia was making available funds (80 per cent of those available from primary issues) for "special purposes", that is to say "to avoid the adverse effects of war on the economy of the Serbian Republic of Bosnia and Herzegovina". The Respondent has denied that the budget deficit of the Republika Srpska was financed by the FRY but has not presented evidence to show how it was financed. Furthermore, the Respondent emphasizes that any financing supplied was simply on the basis of credits, to be repaid, and was therefore quite normal, particularly in view of the economic isolation of the FRY, the Republika Srpska and the Republika Srpska Krajina; it also suggested that any funds received would have been under the sole control of the recipient, the Republika Srpska or the Republika Srpska Krajina.

241. The Court finds it established that the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities.

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*(3) Examination of Factual Evidence: Introduction*

242. The Court will therefore now examine the facts alleged by the Applicant, in order to satisfy itself, first, whether the alleged atrocities occurred; secondly, whether such atrocities, if established, fall within the scope of Article II of the Genocide Convention, that is to say whether the facts establish the existence of an intent, on the part of the perpetrators of those atrocities, to destroy, in whole or in part, a defined group *(dolus specialis)*. The group taken into account for this purpose will, for the reasons explained above (paragraphs 191-196), be that of the Bosnian Muslims; while the Applicant has presented evidence said to relate to the wider group of non-Serb Bosnians, the Bosnian Muslims formed such a substantial part of this wider group that that evidence appears to have equal probative value as regards the facts, in relation to the more restricted

group. The Court will also consider the facts alleged in the light of the question whether there is persuasive and consistent evidence for a pattern of atrocities, as alleged by the Applicant, which would constitute evidence of *dolus specialis* on the part of the Respondent. For this purpose it is not necessary to examine every single incident reported by the Applicant, nor is it necessary to make an exhaustive list of the allegations; the Court finds it sufficient to examine those facts that would illuminate the question of intent, or illustrate the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent *(dolus specialis)*.

243. The Court will examine the evidence following the categories of prohibited acts to be found in Article II of the Genocide Convention. The nature of the events to be described is however such that there is considerable overlap between these categories: thus, for example, the conditions of life in the camps to which members of the protected group were confined have been presented by the Applicant as violations of Article II, paragraph *(c)*, of the Convention (the deliberate infliction of destructive conditions of life), but since numerous inmates of the camps died, allegedly as a result of those conditions, or were killed there, the camps fall to be mentioned also under paragraph *(a)*, killing of members of the protected group.

244. In the evidentiary material submitted to the Court, and that referred to by the ICTY, frequent reference is made to the actions of "Serbs" or "Serb forces", and it is not always clear what relationship, if any, the participants are alleged to have had with the Respondent. In some cases it is contended, for example, that the JNA, as an organ *de jure* of the Respondent, was involved; in other cases it seems clear that the participants were Bosnian Serbs, with no *de jure* link with the Respondent, but persons whose actions are, it is argued, attributable to the Respondent on other grounds. Furthermore, as noted in paragraph 238 above, it appears that JNA troops of Bosnian Serb origin were transformed into, or joined the VRS. At this stage of the present Judgment, the Court is not yet concerned with the question of the attributability to the Respondent of the atrocities described; it will therefore use the terms "Serb" and "Serb forces" purely descriptively, without prejudice to the status they may later, in relation to each incident, be shown to have had. When referring to documents of the ICTY, or to the Applicant's pleadings or oral argument, the Court will use the terminology of the original.

* *

*(4) Article II* (a)*: Killing Members of the Protected Group*

245. Article II *(a)* of the Convention deals with acts of killing members of the protected group. The Court will first examine the evidence of killings of members of the protected group in the principal areas of Bosnia and in the various detention camps, and ascertain whether there is evidence of a specific intent *(dolus specialis)* in one or more of them. The Court will then consider under this heading the evidence of the massacres reported to have occurred in July 1995 at Srebrenica.

*Sarajevo*

246. The Court notes that the Applicant refers repeatedly to killings, by shelling and sniping, perpetrated in Sarajevo. The Fifth Periodic Report of the United Nations Special Rapporteur is presented by the Applicant in support of the allegation that between 1992 and 1993 killings of Muslim civilians were perpetrated in Sarajevo, partly as a result of continuous shelling by Bosnian Serb forces. The Special Rapporteur stated that on 9 and 10 November 1993 mortar attacks killed 12 people (E/CN.4/1994/47, 17 November 1992, p. 4, para. 14). In his periodic Report of 5 July 1995, the Special Rapporteur observed that as from late February 1995 numerous civilians were killed by sniping activities of Bosnian Serb forces and that "one local source reported that a total of 41 civilians were killed . . . in Sarajevo during the month of May 1995" (Report of 5 July 1995, para. 69). The Report also noted that, in late June and early July 1995, there was further indiscriminate shelling and rocket attacks on Sarajevo by Bosnian Serb forces as a result of which many civilian deaths were reported (Report of 5 July 1995, para. 70).

247. The Report of the Commission of Experts gives a detailed account of the battle and siege of Sarajevo. The Commission estimated that over the course of the siege nearly 10,000 persons had been killed or were missing in the city of Sarajevo (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). According to the estimates made in a report presented by the Prosecution before the ICTY in the *Galić* case (IT-98-29-T, Trial Chamber Judgment, 5 December 2003, paras. 578 and 579), the monthly average of civilians killed fell from 105 in September to December 1992, to around 64 in 1993 and to around 28 in the first six months of 1994.

248. The Trial Chamber of the ICTY, in its Judgment of 5 December 2003 in the *Galić* case examined specific incidents in the area of Sarajevo, for instance the shelling of the Markale market on 5 February 1994 which resulted in the killing of 60 persons. The majority of the Trial

Chamber found that "civilians in ARBiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory during the Indictment Period, and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured" (*Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 591), the Trial Chamber further concluded that "[i]n sum, the Majority of the Trial Chamber finds that each of the crimes alleged in the Indictment — crime of terror, attacks on civilians, murder and inhumane acts — were committed by SRK forces during the Indictment Period" (*ibid.*, para. 600).

249. In this connection, the Respondent makes the general point that in a civil war it is not always possible to differentiate between military personnel and civilians. It does not deny that crimes were committed during the siege of Sarajevo, crimes that "could certainly be characterized as war crimes and certain even as crimes against humanity", but it does not accept that there was a strategy of targeting civilians.

*Drina River Valley*

(a) *Zvornik*

250. The Applicant made a number of allegations with regard to killings that occurred in the area of Drina River Valley. The Applicant, relying on the Report of the Commission of Experts, claims that at least 2,500 Muslims died in Zvornik from April to May 1992. The Court notes that the findings of the Report of the Commission of Experts are based on individual witness statements and one declassified United States State Department document No. 94-11 (Vol. V, Ann. X, para. 387; Vol. IV, Ann. VIII, p. 342 and para. 2884; Vol. I, Ann. III.A, para. 578). Further, a video reporting on massacres in Zvornik was shown during the oral proceedings (excerpts from "The Death of Yugoslavia", BBC documentary). With regard to specific incidents, the Applicant alleges that Serb soldiers shot 36 Muslims and mistreated 27 Muslim children in the local hospital of Zvornik in the second half of May 1992.

251. The Respondent contests those allegations and contends that all three sources used by the Applicant are based solely on the account of one witness. It considers that the three reports cited by the Applicant cannot be used as evidence before the Court. The Respondent produced the statement of a witness made before an investigating judge in Zvornik which claimed that the alleged massacre in the local hospital of Zvornik had never taken place. The Court notes that the Office of the Prosecutor of the ICTY had never indicted any of the accused for the alleged massacres in the hospital.

(b) *Camps*

(i) *Sušica camp*

252. The Applicant further presents claims with regard to killings perpetrated in detention camps in the area of Drina River Valley. The Report of the Commission of Experts includes the statement of an ex-guard at the Sušica camp who personally witnessed 3,000 Muslims being killed (Vol. IV, Ann. VIII, p. 334) and the execution of the last 200 surviving detainees (Vol. I, Ann. IV, pp. 31-32). In proceedings before the ICTY, the Commander of that camp, Dragan Nikolić, pleaded guilty to murdering nine non-Serb detainees and, according to the Sentencing Judgment of 18 December 2003, "the Accused persecuted Muslim and other non-Serb detainees by subjecting them to murders, rapes and torture as charged specifically in the Indictment" (*Nikolić*, IT-94-2-S, para. 67).

(ii) *Foča Kazneno-Popravní Dom camp*

253. The Report of the Commission of Experts further mentions numerous killings at the camp of Foča Kazneno-Popravní Dom (Foča KP Dom). The Experts estimated that the number of prisoners at the camp fell from 570 to 130 over two months (Vol. IV, Ann. VIII, p. 129). The United States State Department reported one eye-witness statement of regular executions in July 1992 and mass graves at the camp.

254. The Trial Chamber of the ICTY made the following findings on several killings at this camp in its Judgment in the *Krnojelac* case:

> "The Trial Chamber is satisfied beyond reasonable doubt that all but three of the persons listed in Schedule C to the Indictment were killed at the KP Dom. The Trial Chamber is satisfied that these persons fell within the pattern of events that occurred at the KP Dom during the months of June and July 1992, and that the only reasonable explanation for the disappearance of these persons since that time is that they died as a result of acts or omissions, with the relevant state of mind [sc. that required to establish murder], at the KP Dom." (IT-97-25-T, Judgment, 15 March 2002, para. 330.)

(iii) *Batković camp*

255. As regards the detention camp of Batković, the Applicant claims that many prisoners died at this camp as a result of mistreatment by the Serb guards. The Report of the Commission of Experts reports one witness statement according to which there was a mass grave located next to the Batković prison camp. At least 15 bodies were buried next to a cow stable, and the prisoners neither knew the identity of those buried at the stable nor the circumstances of their deaths (Report of the Commission

of Experts, Vol. V, Ann. X, p. 9). The Report furthermore stresses that

> "[b]ecause of the level of mistreatment, many prisoners died. One man stated that during his stay, mid-July to mid-August, 13 prisoners were beaten to death. Another prisoner died because he had gangrene which went untreated. Five more may have died from hunger. Allegedly, 20 prisoners died prior to September." (Vol. IV, Ann. VIII, p. 63.)

Killings at the Batković camp are also mentioned in the Dispatch of the United States State Department of 19 April 1993. According to a witness, several men died as a result of bad conditions and beatings at the camp (United States Dispatch, 19 April 1993, Vol. 4, No. 30, p. 538).

256. On the other hand, the Respondent stressed that, when the United Nations Special Rapporteur visited the Batković prison camp, he found that: "The prisoners did not complain of ill-treatment and, in general appeared to be in good health." (Report of 17 November 1992, para. 29) However, the Applicant contends that "it is without any doubt that Mazowiecki was shown a 'model' camp".

*Prijedor*

(a) *Kozarac and Hambarine*

257. With regard to the area of the municipality of Prijedor, the Applicant has placed particular emphasis on the shelling and attacks on Kozarac, 20 km east of Prijedor, and on Hambarine in May 1992. The Applicant contends that after the shelling, Serb forces shot people in their homes and that those who surrendered were taken to a soccer stadium in Kozarac where some men were randomly shot. The Report of the Commission of Experts (Vol. I, Ann. III, pp. 154-155) states that:

> "The attack on Kozarac lasted three days and caused many villagers to flee to the forest while the soldiers were shooting at 'every moving thing'. Survivors calculated that at least 2,000 villagers were killed in that period. The villagers' defence fell on 26 May . . .
>
> Serbs then reportedly announced that the villagers had 10 minutes to reach the town's soccer stadium. However, many people were shot in their homes before given a chance to leave. One witness reported that several thousand people tried to surrender by carrying white flags, but three Serb tanks opened fire on them, killing many."

The Respondent submits that the number of killings is exaggerated and that "there was severe fighting in Kozarac, which took place on 25 and 26 May, and naturally, it should be concluded that a certain number of the victims were Muslim combatants".

258. As regards Hambarine, the Report of the Commission of Experts (Vol. I, p. 39) states that:

> "Following an incident in which less than a handful of Serb[ian] soldiers were shot dead under unclear circumstances, the village of Hambarine was given an ultimatum to hand over a policeman who lived where the shooting had occurred. As it was not met, Hambarine was subjected to several hours of artillery bombardment on 23 May 1992.
>
> The shells were fired from the aerodrome Urije just outside Prijedor town. When the bombardment stopped, the village was stormed by infantry, including paramilitary units, which sought out the inhabitants in every home. Hambarine had a population of 2,499 in 1991."

The Report of the Special Rapporteur of 17 November 1992, states that:

> "Between 23 and 25 May, the Muslim village of Hambarine, 5 km south of Prijedor, received an ultimatum: all weapons must be surrendered by 11 a.m. Then, alleging that a shot was fired at a Serbian patrol, heavy artillery began to shell the village and tanks appeared, firing at homes. The villagers fled to Prijedor. Witnesses reported many deaths, probably as many as 1,000." (Periodic Report of 17 November 1992, p. 8, para. 17 *(c)*.)

The Respondent says, citing the indictment in the *Stakić* case, that "merely 11 names of the victims are known" and that it is therefore impossible that the total number of victims in Hambarine was "as many as 1,000".

259. The Report of the Commission of Experts found that on 26, 27 or 28 May, the Muslim village of Kozarac, came under attack of heavy Serb artillery. It furthermore notes that:

> "The population, estimated at 15,000, suffered a great many summary executions, possibly as many as 5,000 persons according to some witnesses." (Report of the Commission of Experts, Vol. IV, pt. 4.)

260. The Applicant also claimed that killings of members of the protected group were perpetrated in Prijedor itself. The Report of the Commission of Experts, as well as the United Nations Special Rapporteur collected individual witness statements on several incidents of killing in the town of Prijedor (Report of the Commission of Experts, Vol. I, Ann. V, pp. 54 *et seq.*). In particular, the Special Rapporteur received

testimony "from a number of reliable sources" that 200 people were killed in Prijedor on 29 May 1992 (Report of 17 November 1992, para. 17).

261. In the *Stakić* case, the ICTY Trial Chamber found that "many people were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Prijedor municipality and several massacres of Muslims took place", and that "a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 ha[d] been proved beyond reasonable doubt" (IT-97-24-T, Judgment, 31 July 2003, paras. 544 and 546). Further, in the *Brđanin* case, the Trial Chamber was satisfied that "at least 80 Bosnian Muslim civilians were killed when Bosnian Serb soldiers and police entered the villages of the Kozarac area" (IT-99-36, Judgment, 1 September 2004, para. 403).

(b) *Camps*

(i) *Omarska camp*

262. With respect to the detention camps in the area of Prijedor, the Applicant has stressed that the camp of Omarska was "arguably the cruellest camp in Bosnia and Herzegovina". The Report of the Commission of Experts gives an account of seven witness statements reporting between 1,000 to 3,000 killings (Vol. IV, Ann. VIII, p. 222). The Report noted that

> "[s]ome prisoners estimate that on an average there may have been 10 to 15 bodies displayed on the grass each morning, when the first prisoners went to receive their daily food rations. But there were also other dead bodies observed in other places at other times. Some prisoners died from their wounds or other causes in the rooms where they were detained. Constantly being exposed to the death and suffering of fellow prisoners made it impossible for anyone over any period of time to forget in what setting he or she was. Given the length of time Logor Omarska was used, the numbers of prisoners detained in the open, and the allegations that dead bodies were exhibited there almost every morning."

The Report of the Commission of Experts concludes that "all information available . . . seems to indicate that [Omarska] was more than anything else a death camp" (Vol. I, Ann. V, p. 80). The United Nations Secretary-General also received submissions from Canada, Austria and the United States, containing witness statements about the killings at Omarska.

263. In the Opinion and Judgment of the Trial Chamber in the *Tadić* case, the ICTY made the following findings on Omarska: "Perhaps the most notorious of the camps, where the most horrific conditions existed,

was the Omarska camp." (IT-94-1-T, Judgment, 7 May 1997, para. 155.) "The Trial Chamber heard from 30 witnesses who survived the brutality to which they were systematically subjected at Omarska. By all accounts, the conditions at the camp were horrendous; killings and torture were frequent." (*Ibid.*, para. 157.) The Trial Chamber in the *Stakić* Judgment found that "over a hundred people were killed in late July 1992 in the Omarska camp" and that

> "[a]round late July 1992, 44 people were taken out of Omarska and put in a bus. They were told that they would be exchanged in the direction of Bosanska Krupa; they were never seen again. During the exhumation in Jama Lisac, 56 bodies were found: most of them had died from gunshot injuries." (IT-97-24-T, Judgment, 31 July 2003, paras. 208 and 210).

At least 120 people detained at Omarska were killed after having been taken away by bus.

> "The corpses of some of those taken away on the buses were later found in Hrastova Glavica and identified. A large number of bodies, 126, were found in this area, which is about 30 kilometres away from Prijedor. In 121 of the cases, the forensic experts determined that the cause of death was gunshot wounds." (*Ibid.*, para. 212.)

264. In the *Brđanin* case, the Trial Chamber, in its Judgment of 1 September 2004 held that between 28 May and 6 August, a massive number of people were killed at Omarska camp. The Trial Chamber went on to say specifically that "[a]s of late May 1992, a camp was set up at Omarska, where evidence shows that several hundred Bosnian Muslim and Bosnian Croat civilians from the Prijedor area were detained, and where killings occurred on a massive scale" (IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 441). "The Trial Chamber is unable to precisely identify all detainees that were killed at Omarska camp. It is satisfied beyond reasonable doubt however that, at a minimum, 94 persons were killed, including those who disappeared." (*Ibid.*, para. 448.)

(ii) *Keraterm camp*

265. A second detention camp in the area of Prijedor was the Keraterm camp where, according to the Applicant, killings of members of the protected group were also perpetrated. Several corroborating accounts of a mass execution on the morning of 25 July 1992 in Room 3 at Keraterm camp were presented to the Court. This included the United States Dispatch of the State Department and a letter from the Permanent Repre-

sentative of Austria to the United Nations dated 5 March 1993, addressed to the Secretary-General. The Report of the Commission of Experts cites three separate witness statements to the effect that ten prisoners were killed per day at Keraterm over three months (Vol. IV, para. 1932; see also Vol. I, Ann. V, para. 445).

266. The Trial Chamber of the ICTY, in the *Sikirica et al.* case, concerning the Commander of Keraterm camp, found that 160 to 200 men were killed or wounded in the so-called Room 3 massacre (IT-95-8-S, Sentencing Judgment, 13 November 2001, para. 103). According to the Judgment, Sikirica himself admitted that there was considerable evidence "concerning the murder and killing of other named individuals at Keraterm during the period of his duties". There was also evidence that "others were killed because of their rank and position in society and their membership of a particular ethnic group or nationality" (*ibid.*, para. 122). In the *Stakić* case, the Trial Chamber found that "from 30 April 1992 to 30 September 1992 . . . killings occurred frequently in the Omarska, Keraterm and Trnopolje camps" (IT-97-24-T, Judgment, 31 July 2003, para. 544).

(iii) *Trnopolje camp*

267. The Applicant further contends that there is persuasive evidence of killing at Trnopolje camp, with individual eye-witnesses corroborating each other. The Report of the Commission of Experts found that "[i]n Trnopolje, the regime was far better than in Omarska and Keraterm. Nonetheless, harassment and malnutrition was a problem for all the inmates. Rapes, beatings and other kinds of torture, and even killings, were not rare." (Report of the Commission of Experts, Vol. IV, Ann. V, p. 10.)

> "The first period was allegedly the worst in Trnopolje, with the highest numbers of inmates killed, raped, and otherwise mistreated and tortured . . .
>
> The people killed in the camp were usually removed soon after by some camp inmates who were ordered by the Serbs to take them away and bury them . . .
>
> Albeit *Logor* Trnopolje was not a death camp like *Logor* Omarska or *Logor* Keraterm, the label 'concentration camp' is none the less justified for *Logor* Trnopolje due to the regime prevailing in the camp." (*Ibid.*, Vol. I, Ann. V, pp. 88-90.)

268. With regard to the number of killings at Trnopolje, the ICTY considered the period between 25 May and 30 September 1992, the relevant period in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 226-227). The Trial Chamber came to the conclusion that "killings occurred frequently in the Omarska, Keraterm and Trno-

polje camps and other detention centres" (IT-97-24-T, para. 544). In the Judgment in the *Brđanin* case, the Trial Chamber found that in the period from 28 May to October 1992,

> "numerous killings occurred in Trnopolje camp. A number of detainees died as a result of the beatings received by the guards. Others were killed by camp guards with rifles. The Trial Chamber also [found] that at least 20 inmates were taken outside the camp and killed there." (IT-99-36-T, Judgment, 1 September 2004, para. 450.)

269. In response to the allegations of killings at the detention camps in the area of Prijedor, the Respondent questions the number of victims, but not the fact that killings occurred. It contends that killings in Prijedor "were committed sporadically and against individuals who were not a significant part of the group". It further observed that the ICTY had not characterized the acts committed in the Prijedor region as genocide.

*Banja Luka*

*Manjača camp*

270. The Applicant further contends that killings were also frequent at Manjača camp in Banja Luka. The Court notes that multiple witness accounts of killings are contained in the Report of the Commission of Experts (Vol. IV, paras. 370-376) and a mass grave of 540 bodies, "presumably" from prisoners at Manjača, is mentioned in a report on missing persons submitted by Manfred Nowak, the United Nations Expert on Missing Persons:

> "In September 1995, mass graves were discovered near Krasulje in northwest Bosnia and Herzegovina. The Government has exhumed 540 bodies of persons who were presumably detained at Manjaca concentration camp in 1992. In January 1996, a mass grave containing 27 bodies of Bosnian Muslims was discovered near Sanski Most; the victims were reportedly killed in July 1992 during their transfer from Sanski Most to Manjaca concentration camp (near Banja Luka)." (E/CN.4/1996/36 of 4 March 1996, para. 52.)

*Brčko*

*Luka camp*

271. The Applicant claims that killings of members of the protected group were also perpetrated at Luka camp and Brčko. The Report of the Commission of Experts confirms these allegations. One witness reported that "[s]hootings often occurred at 4.00 a.m. The witness estimates that during his first week at Luka more than 2,000 men were killed and

thrown into the Sava River." (Report of the Commission of Experts Vol. IV, Ann. VIII, p. 93.) The Report further affirms that "[a]pparently, murder and torture were a daily occurrence" (*ibid.*, p. 96), and that it was reported that

> "[t]he bodies of the dead or dying internees were often taken to the camp dump or moved behind the prisoner hangars. Other internees were required to move the bodies. Sometimes the prisoners who carried the dead were killed while carrying such bodies to the dump. The dead were also taken and dumped outside the Serbian Police Station located on Majevička Brigada Road in Brčko." (*Ibid.*)

These findings are corroborated by evidence of a mass grave being found near the site (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 101, and United States State Department Dispatch).

272. In the *Jelisić* case, eight of the 13 murders to which the accused pleaded guilty were perpetrated at Luka camp and five were perpetrated at the Brčko police station (IT-95-10-T, Trial Chamber Judgment, 14 December 1999, paras. 37-38). The Trial Chamber further held that "[a]lthough the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelisić for the period in the indictment, it notes that, in this instance, the material element of the crime of genocide has been satisfied" (*ibid.*, para. 65).

273. In the *Milošević* Decision on Motion for Judgment of Acquittal, the Trial Chamber found that many Muslims were detained in Luka camp in May and June 1992 and that many killings were observed by witnesses (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras. 159, 160-168), it held that "[t]he conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings" (*ibid.*, para. 159). "At Luka Camp . . . The witness personally moved about 12 to 15 bodies and saw approximately 100 bodies stacked up like firewood at Luka Camp; each day a refrigerated meat truck from the local Bimeks Company in Brčko would come to take away the dead bodies." (*Ibid.*, para. 161.)

274. The Court notes that the *Brđanin* Trial Chamber Judgment of 1 September 2004 made a general finding as to killings of civilians in camps and municipalities at Banja Luka, Prijedor, Sanski Most, Ključ, Kotor Varoš and Bosanski Novi. It held that:

> "In sum, the Trial Chamber is satisfied beyond reasonable doubt that, considering all the incidents described in this section of the judgment, at least 1,669 Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces, all of whom were non-combatants." (IT-99-36-T, Judgment, 1 September 2004, para. 465.)

There are contemporaneous Security Council and General Assembly resolutions condemning the killing of civilians in connection with ethnic cleansing, or expressing alarm at reports of mass killings (Security Council resolution 819 (1993), Preamble, paras. 6 and 7; General Assembly resolution 48/153 (1993), paras. 5 and 6; General Assembly resolution 49/196 (1994), para. 6).

275. The Court further notes that several resolutions condemn specific incidents. These resolutions, *inter alia*, condemn "the Bosnian Serb forces for their continued offensive against the safe area of Goražde, which has resulted in the death of numerous civilians" (Security Council resolution 913 (1994), Preamble, para. 5); condemn ethnic cleansing "perpetrated in Banja Luka, Bijeljina and other areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces" (Security Council resolution 941 (1994), para. 2); express concern at "grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder" (Security Council resolution 1019 (1995), Preamble, para. 2); and condemn "the indiscriminate shelling of civilians in the safe areas of Sarajevo, Tuzla, Bihać and Goražde and the use of cluster bombs on civilian targets by Bosnian Serb and Croatian Serb forces" (General Assembly resolution 50/193 (1995) para. 5).

*

276. On the basis of the facts set out above, the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings. The Court notes in fact that, while the Respondent contested the veracity of certain allegations, and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina. The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II *(a)* of the Convention, are fulfilled. At this stage of its reasoning, the Court is not called upon to list the specific killings, nor even to make a conclusive finding on the total number of victims.

277. The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent *(dolus specialis)* on the part of the perpetrators to destroy, in whole or in part, the group as such. The Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observes that none of those convicted were found to have acted with specific intent *(dolus specialis)*. The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention. As to the Applicant's contention that the specific intent *(dolus specialis)* can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide (violations of Article II, paragraphs *(b)* to *(e)*) (see paragraph 370 below).

* *

*(5) The Massacre at Srebrenica*

278. The atrocities committed in and around Srebrenica are nowhere better summarized than in the first paragraph of the Judgment of the Trial Chamber in the *Krstić* case:

> "The events surrounding the Bosnian Serb take-over of the United Nations ('UN') 'safe area' of Srebrenica in Bosnia and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be 'free from armed attack or any other hostile act', units of the Bosnian Serb Army ('VRS') launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again." (IT-98-33-T, Judgment, 2 August 2001, para. 1; footnotes omitted.)

While the Respondent raises a question about the number of deaths, it does not essentially question that account. What it does question is whether specific intent *(dolus specialis)* existed and whether the acts complained of can be attributed to it. It also calls attention to the attacks carried out by the Bosnian army from within Srebrenica and the fact that the enclave was never demilitarized. In the Respondent's view the military action taken by the Bosnian Serbs was in revenge and part of a war for territory.

279. The Applicant contends that the planning for the final attack on Srebrenica must have been prepared quite some time before July 1995. It refers to a report of 4 July 1994 by the commandant of the Bratunac Brigade. He outlined the "final goal" of the VRS: "an entirely Serbian Podrinje. The enclaves of Srebrenica, Žepa and Goražde must be militarily defeated." The report continued:

> "We must continue to arm, train, discipline, and prepare the RS Army for the execution of this crucial task — the expulsion of Muslims from the Srebrenica enclave. There will be no retreat when it comes to the Srebrenica enclave, we must advance. The enemy's life has to be made unbearable and their temporary stay in the enclave impossible so that they leave *en masse* as soon as possible, realising that they cannot survive there."

The Chamber in the *Blagojević* case mentioned testimony showing that some "members of the Bratunac Brigade . . . did not consider this report to be an order. Testimony of other witnesses and documentary evidence show that the strategy was in fact implemented." (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 104; footnotes omitted.) The Applicant sees the "final goal" described here as "an entirely Serbian Podrinje", in conformity with the objective of a Serbian region 50 km to the west of the Drina river identified in an April or a May 1991 meeting of the political and State leadership of Yugoslavia. The Court observes that the object stated in the report, like the 1992 Strategic Objectives, does not envisage the destruction of the Muslims in Srebrenica, but rather their departure. The Chamber did not give the report any particular significance.

280. The Applicant, like the Chamber, refers to a meeting on 7 March 1995 between the Commander of the United Nations Protection Force (UNPROFOR) and General Mladić, at which the latter expressed dissatisfaction with the safe area régime and indicated that he might take military action against the eastern enclaves. He gave assurances however for the safety of the Bosnian Muslim population of those enclaves. On the following day, 8 March 1995, President Karadžić issued the Directive for Further Operations 7, also quoted by the Chamber and the Applicant: "'Planned and well-thought-out combat operations' were

to create 'an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves'." The *Blagojević* Chamber continues as follows:

> "The separation of the Srebrenica and Žepa enclaves became the task of the Drina Corps. As a result of this directive, General Ratko Mladić on 31 March 1995 issued Directive for Further Operations, Operative No. 7/1, which further directive specified the Drina Corps' tasks." (IT-02-60-T, pp. 38-39, para. 106.)

281. Counsel for the Applicant asked in respect of the first of those directives "[w]hat could be a more clear-cut definition of the genocidal intent to destroy on the part of the authorities in Pale?". As with the July 1994 report, the Court observes that the expulsion of the inhabitants would achieve the purpose of the operation. That observation is supported by the ruling of the Appeals Chamber in the *Krstić* case that the directives were "insufficiently clear" to establish specific intent *(dolus specialis)* on the part of the members of the Main Staff who issued them. "Indeed, the Trial Chamber did not even find that those who issued Directives 7 and 7.1 had genocidal intent, concluding instead that the genocidal plan crystallized at a later stage." (IT-98-33-A, Judgment, 19 April 2004, para. 90.)

282. A Netherlands Battalion (Dutchbat) was deployed in the Srebrenica safe area. Within that area in January 1995 it had about 600 personnel. By February and through the spring the VRS was refusing to allow the return of Dutch soldiers who had gone on leave, causing their numbers to drop by at least 150, and were restricting the movement of international convoys of aid and supplies to Srebrenica and to other enclaves. It was estimated that without new supplies about half of the population of Srebrenica would be without food after mid-June.

283. On 2 July the Commander of the Drina Corps issued an order for active combat operations; its stated objective on the Srebrenica enclave was to reduce "the enclave to its urban area". The attack began on 6 July with rockets exploding near the Dutchbat headquarters in Potočari; 7 and 8 July were relatively quiet because of poor weather, but the shelling intensified around 9 July. Srebrenica remained under fire until 11 July when it fell, with the Dutchbat observation posts having been taken by the VRS. Contrary to the expectations of the VRS, the Bosnia and Herzegovina army showed very little resistance (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 125). The United Nations Secretary-General's report quotes an assessment made by United Nations military observers on the afternoon of 9 July which concluded as follows:

> "'the BSA offensive will continue until they achieve their aims. These aims may even be widening since the United Nations response has been almost non-existent and the BSA are now in a position to overrun the enclave if they wish.' Documents later obtained from Serb sources appear to suggest that this assessment was correct. Those documents indicate that the Serb attack on Srebrenica initially had limited objectives. Only after having advanced with unexpected ease did the Serbs decide to overrun the entire enclave. Serb civilian and military officials from the Srebrenica area have stated the same thing, adding, in the course of discussions with a United Nations official, that they decided to advance all the way to Srebrenica town when they assessed that UNPROFOR was not willing or able to stop them." (A/54/549, para. 264.)

Consistently with that conclusion, the Chamber in the *Blagojević* case says this:

> "As the operation progressed its military object changed from 'reducing the enclave to the urban area' [the objective stated in a Drina Corps order of 2 July] to the taking-over of Srebrenica town and the enclave as a whole. The Trial Chamber has heard no direct evidence as to the exact moment the military objective changed. The evidence does show that President Karadžić was 'informed of successful combat operations around Srebrenica . . . which enable them to occupy the very town of Srebrenica' on 9 July. According to Miroslav Deronjić, the President of the Executive Board of the Bratunac Municipality, President Karadžić told him on 9 July that there were two options in relation to the operation, one of which was the complete take-over of Srebrenica. Later on 9 July, President Karadžić 'agreed with continuation of operations for the takeover of Srebrenica'. By the morning of 11 July the change of objective of the 'Krivaja 95' operation had reached the units in the field; and by the middle of the afternoon, the order to enter Srebrenica had reached the Bratunac Brigade's IKM in Pribićevac and Colonel Blagojević. Miroslav Deronjić visited the Bratunac Brigade IKM in Pribićevac on 11 July. He briefly spoke with Colonel Blagojević about the Srebrenica operation. According to Miroslav Deronjić, the VRS had just received the order to enter Srebrenica town." (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 130.)

284. The Chamber then begins an account of the dreadful aftermath of the fall of Srebrenica. A Dutchbat Company on 11 July started directing the refugees to the UNPROFOR headquarters in Potočari which was

considered to be the only safe place for them. Not all the refugees went towards Potočari; many of the Bosnian Muslim men took to the woods. Refugees were soon shelled and shot at by the VRS despite attempts to find a safe route to Potočari where, to quote the ICTY, chaos reigned:

> "The crowd outside the UNPROFOR compound grew by the thousands during the course of 11 July. By the end of the day, an estimated 20,000 to 30,000 Bosnian Muslims were in the surrounding area and some 4,000 to 5,000 refugees were in the UNPROFOR compound.
>
> *(b)* Conditions in Potočari
>
> The standards of hygiene within Potočari had completely deteriorated. Many of the refugees seeking shelter in the UNPROFOR headquarters were injured. Medical assistance was given to the extent possible; however, there was a dramatic shortage of medical supplies. As a result of the VRS having prevented aid convoys from getting through during the previous months, there was hardly any fresh food in the DutchBat headquarters. There was some running water available outside the compound. From 11 to 13 July 1995 the temperature was very high, reaching 35 degrees centigrade and this small water supply was insufficient for the 20,000 to 30,000 refugees who were outside the UNPROFOR compound." (IT-02-60-T, paras. 146-147.)

The Tribunal elaborates on those matters and some efforts made by Bosnian Serb and Serbian authorities, i.e., the local Municipal Assembly, the Bratunac Brigade and the Drina Corps, as well as UNHCR, to assist the Bosnian Muslim refugees (*ibid.*, para. 148).

285. On 10 July at 10.45 p.m., according to the Secretary-General's 1999 Report, the delegate in Belgrade of the Secretary-General's Special Representative telephoned the Representative to say that he had seen President Milošević who had responded that not much should be expected of him because "the Bosnian Serbs did not listen to him" (A/54/549, para. 292). At 3 p.m. the next day, the President rang the Special Representative and, according to the same report, "stated that the Dutchbat soldiers in Serb-held areas had retained their weapons and equipment, and were free to move about. This was not true." (*Ibid.*, para. 307.) About 20 minutes earlier two NATO aircraft had dropped two bombs on what were thought to be Serb vehicles advancing towards the town from the south. The Secretary-General's report gives the VRS reaction:

> "Immediately following this first deployment of NATO close air support, the BSA radioed a message to Dutchbat. They threatened

> to shell the town and the compound where thousands of inhabitants had begun to gather, and to kill the Dutchbat soldiers being held hostage, if NATO continued with its use of air power. The Special Representative of the Secretary-General recalled having received a telephone call from the Netherlands Minister of Defence at this time, requesting that the close air support action be discontinued, because Serb soldiers on the scene were too close to Netherlands troops, and their safety would be jeopardized. The Special Representative considered that he had no choice but to comply with this request." (A/54/549, para. 306.)

286. The Trial Chamber in the *Blagojević* case recorded that on 11 July at 8 p.m. there was a meeting between a Dutch colonel and General Mladić and others. The former said that he had come to negotiate the withdrawal of the refugees and to ask for food and medicine for them. He sought assurances that the Bosnian Muslim population and Dutchbat would be allowed to withdraw from the area. General Mladić said that the civilian population was not the target of his actions and the goal of the meeting was to work out an arrangement. He then said "'you can all leave, all stay, or all die here' . . . 'we can work out an agreement for all this to stop and for the issues of the civilian population, your soldiers and the Muslim military to be resolved in a peaceful way'" (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, paras. 150-152). Later that night at a meeting beginning at 11 p.m., attended by a representative of the Bosnian Muslim community, General Mladić said:

> "'Number one, you need to lay down your weapons and I guarantee that all those who lay down their weapon will live. I give you my word, as a man and a General, that I will use my influence to help the innocent Muslim population which is not the target of the combat operations carried out by the VRS . . . In order to make a decision as a man and a Commander, I need to have a clear position of the representatives of your people on whether you want to survive . . . stay or vanish. I am prepared to receive here tomorrow at 10 a.m. hrs. a delegation of officials from the Muslim side with whom I can discuss the salvation of your people from . . . the former enclave of Srebrenica . . . Nesib [a Muslim representative], the future of your people is in your hands, not only in this territory . . . Bring the people who can secure the surrender of weapons and save your people from destruction.'
>
> The Trial Chamber finds, based on General Mladić's comments, that he was unaware that the Bosnian Muslim men had left the Srebrenica enclave in the column.
>
> General Mladić also stated that he would provide the vehicles to transport the Bosnian Muslims out of Potočari. The Bosnian

Muslim and Bosnian Serb sides were not on equal terms and Nesib Mandžić felt his presence was only required to put up a front for the international public. Nesib Mandžić felt intimidated by General Mladić. There was no indication that anything would happen the next day." (IT-02-60-T, paras. 156-158.)

287. A third meeting was held the next morning, 12 July. The Tribunal in the *Blagojević* case gives this account:

"After the Bosnian Muslim representatives had introduced themselves, General Mladić stated:

'I want to help you, but I want absolute co-operation from the civilian population because your army has been defeated. There is no need for your people to get killed, your husband, your brothers or your neighbours . . . As I told this gentleman last night, you can either survive or disappear. For your survival, I demand that all your armed men, even those who committed crimes, and many did, against our people, surrender their weapons to the VRS . . . You can choose to stay or you can choose to leave. If you wish to leave, you can go anywhere you like. When the weapons have been surrendered every individual will go where they say they want to go. The only thing is to provide the needed gasoline. You can pay for it if you have the means. If you can't pay for it, UNPROFOR should bring four or five tanker trucks to fill up trucks . . .'

Čamila Omanović [one of the Muslim representatives] interpreted this to mean that if the Bosnian Muslim population left they would be saved, but that if they stayed they would die. General Mladić did not give a clear answer in relation to whether a safe transport of the civilian population out of the enclave would be carried out. General Mladić stated that the male Bosnian Muslim population from the age of 16 to 65 would be screened for the presence of war criminals. He indicated that after this screening, the men would be returned to the enclave. This was the first time that the separation of men from the rest of the population was mentioned. The Bosnian Muslim representatives had the impression that 'everything had been prepared in advance, that there was a team of people working together in an organized manner' and that 'Mladić was the chief organizer.'

The third Hotel Fontana meeting ended with an agreement that the VRS would transport the Bosnian Muslim civilian population out of the enclave to ARBiH-held territory, with the assistance of UNPROFOR to ensure that the transportation was carried out in a humane manner." (*Ibid.*, paras. 160-161.)

The Court notes that the accounts of the statements made at the meetings come from transcripts of contemporary video recordings.

288. The VRS and MUP of the Republika Srpska from 12 July separated men aged 16 to approximately 60 or 70 from their families. The Bosnian Muslim men were directed to various locations but most were sent to a particular house ("The White House") near the UNPROFOR headquarters in Potočari, where they were interrogated. During the afternoon of 12 July a large number of buses and other vehicles arrived in Potočari including some from Serbia. Only women, children and the elderly were allowed to board the buses bound for territory held by the Bosnia and Herzegovina military. Dutchbat vehicles escorted convoys to begin with, but the VRS stopped that and soon after stole 16-18 Dutchbat jeeps, as well as around 100 small arms, making further escorts impossible. Many of the Bosnian Muslim men from Srebrenica and its surroundings including those who had attempted to flee through the woods were detained and killed.

289. Mention should also be made of the activities of certain paramilitary units, the "Red Berets" and the "Scorpions", who are alleged by the Applicant to have participated in the events in and around Srebrenica. The Court was presented with certain documents by the Applicant, which were said to show that the "Scorpions" were indeed sent to the Trnovo area near Srebrenica and remained there through the relevant time period. The Respondent cast some doubt on the authenticity of these documents (which were copies of intercepts, but not originals) without ever formally denying their authenticity. There was no denial of the fact of the relocation of the "Scorpions" to Trnovo. The Applicant during the oral proceedings presented video material showing the execution by paramilitaries of six Bosnian Muslims, in Trnovo, in July 1995.

290. The Trial Chambers in the *Krstić* and *Blagojević* cases both found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of Srebrenica in July 1995 (*Krstić*, IT-98-33-T, Judgment, 2 August 2001, paras. 426-427 and *Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 643). Accordingly they found that the *actus reus* of killings in Article II *(a)* of the Convention was satisfied. Both also found that actions of Bosnian Serb forces also satisfied the *actus reus* of causing serious bodily or mental harm, as defined in Article II *(b)* of the Convention — both to those who where about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them (*Krstić*, *ibid.*, para. 543, and *Blagojević*, *ibid.*, paras. 644-654).

291. The Court is fully persuaded that both killings within the terms of Article II *(a)* of the Convention, and acts causing serious bodily or men-

tal harm within the terms of Article II *(b)* thereof occurred during the Srebrenica massacre. Three further aspects of the ICTY decisions relating to Srebrenica require closer examination — the specific intent *(dolus specialis)*, the date by which the intent was formed, and the definition of the "group" in terms of Article II. A fourth issue which was not directly before the ICTY but which this Court must address is the involvement, if any, of the Respondent in the actions.

292. The issue of intent has been illuminated by the *Krstić* Trial Chamber. In its findings, it was convinced of the existence of intent by the evidence placed before it. Under the heading "A Plan to Execute the Bosnian Muslim Men of Srebrenica", the Chamber "finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave" (IT-98-33-T, Judgment, 2 August 2001, para. 87). All the executions, the Chamber decided, "systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers" (*ibid.*, para. 546). While "[t]he VRS may have initially considered only targeting military men for execution, . . . [the] evidence shows, however, that a decision was taken, at some point, to capture and kill all the Bosnian Muslim men indiscriminately. No effort was made to distinguish the soldiers from the civilians." (*Ibid.*, para. 547.) Under the heading "Intent to Destroy", the Chamber reviewed the Parties' submissions and the documents, concluding that it would "adhere to the characterization of genocide which encompass[es] only acts committed with the *goal* of destroying all or part of a group" (*ibid.*, para. 571; original emphasis). The acts of genocide need not be premeditated and the intent may become the goal later in an operation (*ibid.*, para. 572).

> "Evidence presented in this case has shown that the killings were planned: the number and nature of the forces involved, the standardized coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied, indicate that a decision was made to kill all the Bosnian Muslim military aged men.
>
> The Trial Chamber is unable to determine the precise date on which the decision to kill all the military aged men was taken. Hence, it cannot find that the killings committed in Potočari on 12 and 13 July 1995 formed part of the plan to kill all the military aged men. Nevertheless, the Trial Chamber is confident that the mass executions and other killings committed from 13 July onwards were part of this plan." (*Ibid.*, paras. 572-573; see also paras. 591-598.)

293. The Court has already quoted (paragraph 281) the passage from the Judgment of the Appeals Chamber in the *Krstić* case rejecting the Prosecutor's attempted reliance on the Directives given earlier in July, and it would recall the evidence about the VRS's change of plan in the course of the operation in relation to the complete takeover of the enclave. The Appeals Chamber also rejected the appeal by General Krstić against the finding that genocide occurred in Srebrenica. It held that the Trial Chamber was entitled to conclude that the destruction of such a sizeable number of men, one fifth of the overall Srebrenica community, "'would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica'" (IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 28-33); and the Trial Chamber, as the best assessor of the evidence presented at trial, was entitled to conclude that the evidence of the transfer of the women and children supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The Appeals Chamber concluded this part of its Judgment as follows:

> "The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements — the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part — guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.

In concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber

did not depart from the legal requirements for genocide. The Defence appeal on this issue is dismissed." (*Ibid.*, paras. 37-38.)

294. On one view, taken by the Applicant, the *Blagojević* Trial Chamber decided that the specific intent *(dolus specialis)* was formed earlier than 12 or 13 July, the time chosen by the *Krstić* Chamber. The Court has already called attention to that Chamber's statement that at some point (it could not determine "the exact moment") the military objective in Srebrenica changed, from "reducing the enclave to the urban area" (stated in a Drina Corps order of 2 July 1995 referred to at times as the "Krivaja 95 operation") to taking over Srebrenica town and the enclave as a whole. Later in the Judgment, under the heading "Findings: was genocide committed?", the Chamber refers to the 2 July document:

> "The Trial Chamber is convinced that the criminal acts committed by the Bosnian Serb forces were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica, as reflected in the 'Krivaja 95 operation', the ultimate objective of which was to eliminate the enclave and, therefore, the Bosnian Muslim community living there." (*Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 674.)

The Chamber immediately goes on to refer only to the events — the massacres and the forcible transfer of the women and children — after the fall of Srebrenica, that is sometime after the change of military objective on 9 or 10 July. The conclusion on intent is similarly focused:

> "The Trial Chamber has no doubt that all these acts constituted a single operation executed with the intent to destroy the Bosnian Muslim population of Srebrenica. The Trial Chamber finds that the Bosnian Serb forces not only knew that the combination of the killings of the men with the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group." (*Ibid.*, para. 677.) (See similarly all but the first item in the list in paragraph 786.)

295. The Court's conclusion, fortified by the Judgments of the Trial Chambers in the *Krstić* and *Blagojević* cases, is that the necessary intent was not established until after the change in the military objective and after the takeover of Srebrenica, on about 12 or 13 July. This may be significant for the application of the obligations of the Respondent under

the Convention (paragraph 423 below). The Court has no reason to depart from the Tribunal's determination that the necessary specific intent *(dolus specialis)* was established and that it was not established until that time.

296. The Court now turns to the requirement of Article II that there must be the intent to destroy a protected "group" in whole or in part. It recalls its earlier statement of the law and in particular the three elements there discussed: substantiality (the primary requirement), relevant geographic factors and the associated opportunity available to the perpetrators, and emblematic or qualitative factors (paragraphs 197-201). Next, the Court recalls the assessment it made earlier in the Judgment of the persuasiveness of the ICTY's findings of facts and its evaluation of them (paragraph 223). Against that background it turns to the findings in the *Krstić* case (IT-98-33-T, Trial Chamber Judgment, 2 August 2001, paras. 551-599 and IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 6-22), in which the Appeals Chamber endorsed the findings of the Trial Chamber in the following terms.

> "In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size." (IT-98-33-A, Judgment, 19 April 2004, para. 15; footnotes omitted.)

The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.

297. The Court concludes that the acts committed at Srebrenica falling within Article II *(a)* and *(b)* of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.

* *

*(6) Article II* (b)*: Causing Serious Bodily or Mental Harm to Members of the Protected Group*

298. The Applicant contends that besides the massive killings, systematic serious harm was caused to the non-Serb population of Bosnia and Herzegovina. The Applicant includes the practice of terrorizing the non-Serb population, the infliction of pain and the administration of torture as well as the practice of systematic humiliation into this category of acts of genocide. Further, the Applicant puts a particular emphasis on the issue of systematic rapes of Muslim women, perpetrated as part of genocide against the Muslims in Bosnia during the conflict.

299. The Respondent does not dispute that, as a matter of legal qualification, the crime of rape may constitute an act of genocide, causing serious bodily or mental harm. It disputes, however, that the rapes in the territory of Bosnia and Herzegovina were part of a genocide perpetrated therein. The Respondent, relying on the Report of the Commission of Experts, maintains that the rapes and acts of sexual violence committed during the conflict, were not part of genocide, but were committed on all sides of the conflict, without any specific intent *(dolus specialis)*.

300. The Court notes that there is no dispute between the Parties that rapes and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group. It notes also that the ICTR, in its Judgment of 2 September 1998 in the *Akayesu* case, addressed the issue of acts of rape and sexual violence as acts of genocide in the following terms:

> "Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm." (ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 731.)

The ICTY, in its Judgment of 31 July 2003 in the *Stakić* case, recognized that:

> "'Causing serious bodily and mental harm' in subparagraph *(b)* [of Article 4 (2) of the Statute of the ICTY] is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable." (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 516.)

301. The Court notes furthermore that Security Council and General Assembly resolutions contemporary with the facts are explicit in referring

to sexual violence. These resolutions were in turn based on reports before the General Assembly and the Security Council, such as the Reports of the Secretary-General, the Commission of Experts, the Special Rapporteur for Human Rights, Tadeusz Mazowiecki, and various United Nations agencies in the field. The General Assembly stressed the "extraordinary suffering of the victims of rape and sexual violence" (General Assembly resolution 48/143 (1993), Preamble; General Assembly resolution 50/192 (1995), para. 8). In resolution 48/143 (1993), the General Assembly declared it was:

> "*Appalled* at the recurring and substantiated reports of widespread rape and abuse of women and children in the areas of armed conflict in the former Yugoslavia, in particular its systematic use against the Muslim women and children in Bosnia and Herzegovina by Serbian forces" (Preamble, para. 4).

302. Several Security Council resolutions expressed alarm at the "massive, organised and systematic detention and rape of women", in particular Muslim women in Bosnia and Herzegovina (Security Council resolutions 798 (1992), Preamble, para. 2; resolution 820 (1993), para. 6; 827 (1993), Preamble, para. 3). In terms of other kinds of serious harm, Security Council resolution 1034 (1995) condemned

> "in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, Żepa, Banja Luka and Sanski Most as described in the report of the Secretary-General of 27 November 1995 and showing a consistent pattern of summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances" (para. 2).

The Security Council further referred to a "persistent and systematic campaign of terror" in Banja Luka, Bijeljina and other areas under the control of Bosnian Serb forces (Security Council resolution 941 (1994), Preamble, para. 4). It also expressed concern at reports of mass murder, unlawful detention and forced labour, rape and deportation of civilians in Banja Luka and Sanski Most (Security Council resolution 1019 (1995), Preamble, para. 2).

303. The General Assembly also condemned specific violations including torture, beatings, rape, disappearances, destruction of houses, and other acts or threats of violence aimed at forcing individuals to leave their homes (General Assembly resolution 47/147 (1992), para. 4; see also General Assembly resolution 49/10 (1994), Preamble, para. 14, and General Assembly resolution 50/193 (1995), para. 2).

304. The Court will now examine the specific allegations of the Applicant under this heading, in relation to the various areas and camps identified as having been the scene of acts causing "bodily or mental harm" within the meaning of the Convention. As regards the events of Srebrenica, the Court has already found it to be established that such acts were committed (paragraph 291 above).

*Drina River Valley*

(a) *Zvornik*

305. As regards the area of the Drina River Valley, the Applicant has stressed the perpetration of acts and abuses causing serious bodily or mental harm in the events at Zvornik. In particular, the Court has been presented with a report on events at Zvornik which is based on eye-witness accounts and extensive research (Hannes Tretter *et al*., "'Ethnic cleansing' Operations in the Northeast Bosnian-City of Zvornik from April through June 1992", Ludwig Boltzmann Institute of Human Rights (1994), p. 48). The report of the Ludwig Boltzmann Institute gives account of a policy of terrorization, forced relocation, torture, rape during the takeover of Zvornik in April-June 1992. The Report of the Commission of Experts received 35 reports of rape in the area of Zvornik in May 1992 (Vol. V, Ann. IX, p. 54).

(b) *Foča*

306. Further acts causing serious bodily and mental harm were perpetrated in the municipality of Foča. The Applicant, relying on the Judgment in the *Kunarac et al.* case (IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001, paras. 574 and 592), claims, in particular, that many women were raped repeatedly by Bosnian Serb soldiers or policemen in the city of Foča.

(c) *Camps*

(i) *Batković camp*

307. The Applicant further claims that in Batković camp, prisoners were frequently beaten and mistreated. The Report of the Commission of Experts gives an account of a witness statement according to which "prisoners were forced to perform sexual acts with each other, and sometimes with guards". The Report continues: "Reports of the frequency of beatings vary from daily beatings to beatings 10 times each day." (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 62, para. 469.) Individual witness accounts reported by the Commission of Experts (Report of the Commission of Experts, Vol. IV, Ann. VIII, pp. 62-63, and Ann. X, p. 9) provide second-hand testimony that beatings occurred and prisoners lived in terrible conditions. As already noted

above (paragraph 256), however, the periodic Report of Special Rapporteur Mazowiecki of 17 November 1992 stated that "[t]he prisoners . . . appeared to be in good health" (p. 13); but according to the Applicant, Mazowiecki was shown a "model" camp and therefore his impression was inaccurate. The United States Department of State Dispatch of 19 April 1993 (Vol. 4, No. 16), alleges that in Batković camp, prisoners were frequently beaten and mistreated. In particular, the Dispatch records two witness statements according to which "[o]n several occasions, they and other prisoners were forced to remove their clothes and perform sex acts on each other and on some guards".

(ii) *Sušica camp*

308. According to the Applicant, rapes and physical assaults were also perpetrated at Sušica camp; it pointed out that in the proceedings before the ICTY, in the "Rule 61 Review of the Indictment" and the Sentencing Judgment, in the *Nikolić* case, the accused admitted that many Muslim women were raped and subjected to degrading physical and verbal abuse in the camp and at locations outside of it (*Nikolić*, IT-94-2-T, Sentencing Judgment, 18 December 2003, paras. 87-90), and that several men were tortured in that same camp.

(iii) *Foča Kazneno-Popravní Dom camp*

309. With regard to the Foča Kazneno-Popravní Dom camp, the Applicant asserts that beatings, rapes of women and torture were perpetrated. The Applicant bases these allegations mainly on the Report of the Commission of Experts and the United States State Department Dispatch. The Commission of Experts based its findings on information provided by a Helsinki Watch Report. A witness claimed that some prisoners were beaten in Foča KP Dom (Report of the Commission of Experts, Vol. IV, pp. 128-132); similar accounts are contained in the United States State Department Dispatch. One witness stated that

> "Those running the center instilled fear in the Muslim prisoners by selecting certain prisoners for beatings. From his window in Room 13, the witness saw prisoners regularly being taken to a building where beatings were conducted. This building was close enough for him to hear the screams of those who were being beaten." (Dispatch of the United States Department of State, 19 April 1993, No. 16, p. 262.)

310. The ICTY Trial Chamber in its *Kunarac* Judgment of 22 February 2001, described the statements of several witnesses as to the poor and brutal living conditions in Foča KP Dom. These seem to confirm that the Muslim men and women from Foča, Gacko and Kalinovik municipalities were arrested, rounded up, separated from each other, and imprisoned or detained at several detention centres like the Foča KP

Dom where some of them were killed, raped or severely beaten (*Kunarac et al*, IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001).

*Prijedor*

(a) *Municipality*

311. Most of the allegations of abuses said by the Applicant to have occurred in Prijedor have been examined in the section of the present Judgment concerning the camps situated in Prijedor. However, the Report of the Commission of Experts refers to a family of nine found dead in Stara Rijeka in Prijedor, who had obviously been tortured (Vol. V, Ann. X, p. 41). The Trial Chamber of the ICTY, in its Judgment in the *Tadić* case made the following factual finding as to an attack on two villages in the Kozarac area, Jaskići and Sivci:

> "On 14 June 1992 both villages were attacked. In the morning the approaching sound of shots was heard by the inhabitants of Sivci and soon after Serb tanks and Serb soldiers entered the village . . . There they were made to run along that road, hands clasped behind their heads, to a collecting point in the yard of one of the houses. On the way there they were repeatedly made to stop, lie down on the road and be beaten and kicked by soldiers as they lay there, before being made to get up again and run some distance further, where the whole performance would be repeated . . . In all some 350 men, mainly Muslims but including a few Croats, were treated in this way in Sivci.
>
> On arrival at the collecting point, beaten and in many cases covered with blood, some men were called out and questioned about others, and were threatened and beaten again. Soon buses arrived, five in all, and the men were made to run to them, hands again behind the head, and to crowd on to them. They were then taken to the Keraterm camp.
>
> The experience of the inhabitants of the smaller village of Jaskići, which contained only 11 houses, on 14 June 1992 was somewhat similar but accompanied by the killing of villagers. Like Sivci, Jaskići had received refugees after the attack on Kozarac but by 14 June 1992 many of those refugees had left for other villages. In the afternoon of 14 June 1992 gunfire was heard and Serb soldiers arrived in Jaskići and ordered men out of their homes and onto the village street, their hands clasped behind their heads; there they were made to lie down and were severely beaten." (IT-94-1-T, Judgment, 7 May 1997, paras. 346-348.)

(b) *Camps*

(i) *Omarska camp*

312. As noted above in connection with the killings (paragraph 262), the Applicant has been able to present abundant and persuasive evidence of physical abuses causing serious bodily harm in Omarska camp. The Report of the Commission of Experts contains witness accounts regarding the "white house" used for physical abuses, rapes, torture and, occasionally, killings, and the "red house" used for killings (Vol. IV, Ann. VIII, pp. 207-222). Those accounts of the sadistic methods of killing are corroborated by United States submissions to the Secretary-General. The most persuasive and reliable source of evidence may be taken to be the factual part of the Opinion and Judgment of the ICTY in the *Tadić* case (IT-94-1-T, Trial Chamber Judgment, 7 May 1997). Relying on the statements of 30 witnesses, the *Tadić* Trial Judgment made findings as to interrogations, beatings, rapes, as well as the torture and humiliation of Muslim prisoners in Omarska camp (in particular: *ibid.*, paras. 155-158, 163-167). The Trial Chamber was satisfied beyond reasonable doubt of the fact that several victims were mistreated and beaten by Tadić and suffered permanent harm, and that he had compelled one prisoner to sexually mutilate another (*ibid.*, paras. 194-206). Findings of mistreatment, torture, rape and sexual violence at Omarska camp were also made by the ICTY in other cases; in particular, the Trial Judgment of 2 November 2001 in the *Kvočka et al.* case (IT-98-30/1-T, Trial Chamber Judgment, paras. 21-50, and 98-108) — upheld on appeal, the Trial Judgment of 1 September 2004 in the *Brđanin* case (IT-99-36-T, Trial Chamber Judgment, paras. 515-517) and the Trial Judgment of 31 July 2003 in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, paras. 229-336).

(ii) *Keraterm camp*

313. The Applicant also pointed to evidence of beatings and rapes at Keraterm camp. Several witness accounts are reported in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 225, 231, 233, 238) and corroborated by witness accounts reported by the Permanent Mission of Austria to the United Nations and Helsinki Watch. The attention of the Court has been drawn to several judgments of the ICTY which also document the severe physical abuses, rapes and sexual violence that occurred at this camp. The Trial Judgment of 1 September 2004 in the *Brđanin* case found that:

> "At Keraterm camp, detainees were beaten on arrival . . . Beatings were carried out with wooden clubs, baseball bats, electric cables and police batons . . .

> In some cases the beatings were so severe as to result in serious injury and death. Beatings and humiliation were often administered in front of other detainees. Female detainees were raped in Keraterm camp." (IT-99-36-T, Trial Chamber Judgment, paras. 851-852.)

The Trial Chamber in its Judgment of 31 July 2003 in the *Stakić* case found that

> "the detainees at the Keraterm camp were subjected to terrible abuse. The evidence demonstrates that many of the detainees at the Keraterm camp were beaten on a daily basis. Up until the middle of July, most of the beatings happened at night. After the detainees from Brdo arrived, around 20 July 1992, there were 'no rules', with beatings committed both day and night. Guards and others who entered the camp, including some in military uniforms carried out the beatings. There were no beatings in the rooms since the guards did not enter the rooms — people were generally called out day and night for beatings." (IT-97-24-T, Trial Chamber Judgment, para. 237.)

The Chamber also found that there was convincing evidence of further beatings and rape perpetrated in Keraterm camp (*ibid.*, paras. 238-241).

In the Trial Judgment in the *Kvočka et al.* case, the Chamber held that, in addition to the "dreadful" general conditions of life, detainees at Keraterm camp were "mercilessly beaten" and "women were raped" (IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, para. 114).

(iii) *Trnopolje camp*

314. The Court has furthermore been presented with evidence that beatings and rapes occurred at Trnopolje camp. The rape of 30-40 prisoners on 6 June 1992 is reported by both the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 251-253) and a publication of the United States State Department. In the *Tadić* case the Trial Chamber of the ICTY concluded that at Trnopolje camp beatings occurred and that "[b]ecause this camp housed the largest number of women and girls, there were more rapes at this camp than at any other" (IT-94-1-T, Judgment, 7 May 1997, paras. 172-177 (para. 175)). These findings concerning beatings and rapes are corroborated by other Judgments of the ICTY, such as the Trial Judgment in the *Stakić* case where it found that,

> "although the scale of the abuse at the Trnopolje camp was less than that in the Omarska camp, mistreatment was commonplace. The

> Serb soldiers used baseball bats, iron bars, rifle butts and their hands and feet or whatever they had at their disposal to beat the detainees. Individuals were who taken out for questioning would often return bruised or injured" (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 242);

and that, having heard the witness statement of a victim, it was satisfied beyond reasonable doubt "that rapes did occur in the Trnopolje camp" (*ibid.*, para. 244). Similar conclusions were drawn in the Judgment of the Trial Chamber in the *Brđanin* case (IT-99-36-T, 1 September 2004, paras. 513-514 and 854-857).

*Banja Luka*

*Manjača camp*

315. With regard to the Manjača camp in Banja Luka, the Applicant alleges that beatings, torture and rapes were occurring at this camp. The Applicant relies mainly on the witnesses cited in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 50-54). This evidence is corroborated by the testimony of a former prisoner at the Joint Hearing before the Select Committee on Intelligence in the United States Senate on 9 August 1995, and a witness account reported in the Memorial of the Applicant (United States State Department Dispatch, 2 November 1992, p. 806). The Trial Chamber, in its Decision on Motion for Judgment of Acquittal of 16 June 2004, in the *Milošević* case reproduced the statement of a witness who testified that,

> "at the Manjaca camp, they were beaten with clubs, cables, bats, or other similar items by the military police. The men were placed in small, bare stables, which were overcrowded and contained no toilet facilities. While at the camp, the detainees received inadequate food and water. Their heads were shaved, and they were severely beaten during interrogations." (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 178.)

316. The Applicant refers to the Report of the Commission of Experts, which contains reports that the Manjača camp held a limited number of women and that during their stay they were "raped repeatedly". Muslim male prisoners were also forced to rape female prisoners (Report of the Commission of Experts, Vol. IV, Annex VIII, pp. 53-54). The Respondent points out that the *Brđanin* Trial Judgment found no evidence had been presented that detainees were subjected to "acts of sexual degradation" in Manjača.

*Brčko*

*Luka camp*

317. The Applicant alleges that torture, rape and beatings occurred at Luka camp (Brčko). The Report of the Commission of Experts contains multiple witness accounts, including the evidence of a local guard forced into committing rape (Vol. IV, Ann. VIII, pp. 93-97). The account of the rapes is corroborated by multiple sources (United States State Department Dispatch, 19 April 1993). The Court notes in particular the findings of the ICTY Trial Chamber in the *Češić* case, with regard to acts perpetrated in the Luka camp. In his plea agreement the accused admitted several grave incidents, such as beatings and compelling two Muslim brothers to perform sexual acts with each other (IT-95-10/1-S, Sentencing Judgment, 11 March 2004, paras. 8-17). These findings are corroborated by witness statements and the guilty plea in the *Jelisić* case.

318. The Respondent does not deny that the camps in Bosnia and Herzegovina were "in breach of humanitarian law and, in most cases, in breach of the law of war", but argues that the conditions in all the camps were not of the kind described by the Applicant. It stated that all that had been demonstrated was "the existence of serious crimes, committed in a particularly complex situation, in a civil and fratricidal war", but not the requisite specific intent *(dolus specialis)*.

*

319. Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The requirements of the material element, as defined by Article II *(b)* of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent *(dolus specialis)* to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.

* *

*(7) Article II* (c)*: Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part*

320. Article II *(c)* of the Genocide Convention concerns the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part. Under this heading, the Applicant first points to an alleged policy by the Bosnian Serb forces to encircle civilians of the protected group in villages, towns or entire regions and to subsequently shell those areas and cut off all supplies in order to starve the population. Secondly, the Applicant claims that Bosnian Serb forces attempted to deport and expel the protected group from the areas which those forces occupied. Finally, the Applicant alleges that Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property.

321. The Respondent argues that the events referred to by the Applicant took place in a context of war which affected the entire population, whatever its origin. In its view, "it is obvious that in any armed conflict the conditions of life of the civilian population deteriorate". The Respondent considers that, taking into account the civil war in Bosnia and Herzegovina which generated inhuman conditions of life for the entire population in the territory of that State, "it is impossible to speak of the deliberate infliction on the Muslim group alone or the non-Serb group alone of conditions of life calculated to bring about its destruction".

322. The Court will examine in turn the evidence concerning the three sets of claims made by the Applicant: encirclement, shelling and starvation; deportation and expulsion; destruction of historical, religious and cultural property. It will also go on to consider the evidence presented regarding the conditions of life in the detention camps already extensively referred to above (paragraphs 252-256, 262-273, 307-310 and 312-318).

*Alleged encirclement, shelling and starvation*

323. The principal incident referred to by the Applicant in this regard is the siege of Sarajevo by Bosnian Serb forces. Armed conflict broke out in Sarajevo at the beginning of April 1992 following the recognition by the European Community of Bosnia and Herzegovina as an independent State. The Commission of Experts estimated that, between the beginning of April 1992 and 28 February 1994, in addition to those killed or missing in the city (paragraph 247 above), 56,000 persons had been wounded (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). It was further estimated that, "over the course of the siege, the city [was] hit by an average of approximately 329 shell impacts per day, with a high of 3,777 shell impacts on 22 July 1993" *(ibid.)*. In his report of 28 August 1992, the Special Rapporteur observed that:

> "The city is shelled on a regular basis . . . Snipers shoot innocent civilians . . .
>
> The civilian population lives in a constant state of anxiety, leaving their homes or shelters only when necessary . . . The public systems for distribution of electrical power and water no longer function. Food and other basic necessities are scarce, and depend on the airlift organized by UNHCR and protected by UNPROFOR." (Report of 28 August 1992, paras. 17-18.)

324. The Court notes that, in resolutions adopted on 16 April and 6 May 1993, the Security Council declared Sarajevo, together with Tuzla, Žepa, Goražde, Bihać and Srebrenica, to be "safe areas" which should be free from any armed attack or any other hostile act and fully accessible to UNPROFOR and international humanitarian agencies (resolutions 819 of 16 April 1993 and 824 of 6 May 1993). However, these resolutions were not adhered to by the parties to the conflict. In his report of 26 August 1993, the Special Rapporteur noted that

> "Since May 1993 supplies of electricity, water and gas to Sarajevo have all but stopped . . . a significant proportion of the damage caused to the supply lines has been deliberate, according to United Nations Protection Force engineers who have attempted to repair them. Repair crews have been shot at by both Bosnian Serb and government forces . . ." (Report of 26 August 1993, para. 6.)

He further found that UNHCR food and fuel convoys had been "obstructed or attacked by Bosnian Serb and Bosnian Croat forces and sometimes also by governmental forces" (Report of 26 August 1993, para. 15). The Commission of Experts also found that the "blockade of humanitarian aid ha[d] been used as an important tool in the siege" (Report of the Commission of Experts, Ann. VI, p. 17). According to the Special Rapporteur, the targeting of the civilian population by shelling and sniping continued and even intensified throughout 1994 and 1995 (Report of 4 November 1994, paras. 27-28; Report of 16 January 1995, para. 13; Report of 5 July 1995, paras. 67-70). The Special Rapporteur noted that

> "[a]ll sides are guilty of the use of military force against civilian populations and relief operations in Sarajevo. However, one cannot lose sight of the fact that the main responsibility lies with the [Bosnian Serb] forces, since it is they who have adopted the tactic of laying siege to the city." (Report of 17 November 1992, para. 42.)

325. The Court notes that in the *Galić* case, the Trial Chamber of the ICTY found that the Serb forces (the SRK) conducted a campaign of sniping and shelling against the civilian population of Sarajevo (*Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 583). It was

> "convinced by the evidence in the Trial Record that civilians in ARBiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory . . ., and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured" (*ibid.*, para. 591).

These findings were subsequently confirmed by the Appeals Chamber (*Galić*, IT-98-29-A, Judgment, 30 November 2006, paras. 107-109). The ICTY also found that the shelling which hit the Markale market on 5 February 1994, resulting in 60 persons killed and over 140 injured, came from behind Bosnian Serb lines, and was deliberately aimed at civilians (*ibid.*, paras. 333 and 335 and *Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 496).

326. The Respondent argues that the safe areas proclaimed by the Security Council had not been completely disarmed by the Bosnian army. For instance, according to testimony given in the *Galić* case by the Deputy Commander of the Bosnian army corps covering the Sarajevo area, the Bosnian army had deployed 45,000 troops within Sarajevo. The Respondent also pointed to further testimony in that case to the effect that certain troops in the Bosnian army were wearing civilian clothes and that the Bosnian army was using civilian buildings for its bases and positioning its tanks and artillery in public places. Moreover, the Respondent observes that, in his book, *Fighting for Peace*, General Rose was of the view that military equipment was installed in the vicinity of civilians, for instance, in the grounds of the hospital in Sarajevo and that "[t]he Bosnians had evidently chosen this location with the intention of attracting Serb fire, in the hope that the resulting carnage would further tilt international support in their favour" (Michael Rose, *Fighting for Peace*, 1998, p. 254).

327. The Applicant also points to evidence of sieges of other towns in Bosnia and Herzegovina. For instance, with regard to Goražde, the Special Rapporteur found that the enclave was being shelled and had been denied convoys of humanitarian aid for two months. Although food was being air-dropped, it was insufficient (Report of 5 May 1992, para. 42). In a later report, the Special Rapporteur noted that, as of spring 1994, the town had been subject to a military offensive by Bosnian Serb forces, during which civilian objects including the hospital had been targeted and the water supply had been cut off (Report of 10 June 1994, paras. 7-12). Humanitarian convoys were harassed including by the detention of UNPROFOR personnel and the theft of equipment (Report of

19 May 1994, paras. 17 *et seq.*). Similar patterns occurred in Bihać, Tuzla, Cerska and Maglaj (Bihać: Special Rapporteur's Report of 28 August 1992, para. 20; Report of the Secretary-General pursuant to resolution 959 (1994), para. 17; Special Rapporteur's Report of 16 January 1995, para. 12; Tuzla: Report of the Secretary-General pursuant to resolutions 844 (1993), 836 (1993) and 776 (1992), paras. 2-4; Special Rapporteur's Report of 5 July 1995; Cerska: Special Rapporteur's Report of 5 May 1993, paras. 8-17; Maglaj: Special Rapporteur's Report of 17 November 1993, para. 93).

328. The Court finds that virtually all the incidents recounted by the Applicant have been established by the available evidence. It takes account of the assertion that the Bosnian army may have provoked attacks on civilian areas by Bosnian Serb forces, but does not consider that this, even if true, can provide any justification for attacks on civilian areas. On the basis of a careful examination of the evidence presented by the Parties, the Court concludes that civilian members of the protected group were deliberately targeted by Serb forces in Sarajevo and other cities. However, reserving the question whether such acts are in principle capable of falling within the scope of Article II, paragraph *(c)*, of the Convention, the Court does not find sufficient evidence that the alleged acts were committed with the specific intent to destroy the protected group in whole or in part. For instance, in the *Galić* case, the ICTY found that

> "the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition . . . the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear" (*Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 593).

These findings were not overruled by the judgment of the Appeals Chamber of 30 November 2006 (*Galić*, IT-98-29-A, Judgment: see e.g., paras. 107-109, 335 and 386-390). The Special Rapporteur of the United Nations Commission on Human Rights was of the view that "[t]he siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croatians to flee" (Report of 28 August 1992, para. 17). The Court thus finds that it has not been conclusively established that the acts were committed with the specific intent *(dolus specialis)* to destroy the protected group in whole or in part.

*Deportation and expulsion*

329. The Applicant claims that deportations and expulsions occurred systematically all over Bosnia and Herzegovina. With regard to Banja Luka, the Special Rapporteur noted that since late November 1993, there had been a "sharp rise in repossessions of apartments, whereby Muslim and Croat tenants [were] summarily evicted" and that "a form of housing agency ha[d] been established . . . which chooses accommodation for incoming Serb displaced persons, evicts Muslim or Croat residents and reputedly receives payment for its services in the form of possessions left behind by those who have been evicted" (Report of 21 February 1994, para. 8). In a report dated 21 April 1995 dedicated to the situation in Banja Luka, the Special Rapporteur observed that since the beginning of the war, there had been a 90 per cent reduction in the local Muslim population (Report of 21 April 1995, para. 4). He noted that a forced labour obligation imposed by the *de facto* authorities in Banja Luka, as well as "the virulence of the ongoing campaign of violence" had resulted in "practically all non-Serbs fervently wishing to leave the Banja Luka area" (Report of 21 April 1995, para. 24). Those leaving Banja Luka were required to pay fees and to relinquish in writing their claim to their homes, without reimbursement (Report of 21 April 1995, para. 26). The displacements were "often very well organized, involving the bussing of people to the Croatian border, and involve[d] large numbers of people" (Report of 4 November 1994, para. 23). According to the Special Rapporteur, "[o]n one day alone in mid-June 1994, some 460 Muslims and Croats were displaced" *(ibid.)*.

330. As regards Bijeljina, the Special Rapporteur observed that, between mid-June and 17 September 1994, some 4,700 non-Serbs were displaced from the Bijeljina and Janja regions. He noted that many of the displaced, "whether forced or choosing to depart, were subject to harassment and theft by the Bosnian Serb forces orchestrating the displacement" (Report of 4 November 1994, para. 21). These reports were confirmed by those of non-governmental organizations based on witness statements taken on the ground (Amnesty International, "Bosnia and Herzegovina: Living for the Day — Forced expulsions from Bijeljina and Janja", December 1994, p. 2).

331. As for Zvornik, the Commission of Experts, relying on a study carried out by the Ludwig Boltzmann Institute of Human Rights based on an evaluation of 500 interviews of individuals who had fled the area, found that a systematic campaign of forced deportation had occurred (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 55 *et seq*). The study observed that Bosnian Muslims obtained an official stamp on their identity card indicating a change of domicile in exchange for transferring their property to an "agency for the exchange of houses" which was subsequently a prerequisite for being able to leave the town (Lud-

wig Boltzmann Institute of Human Rights, "'Ethnic Cleansing Operations' in the northeast Bosnian city of Zvornik from April through June 1992", pp. 28-29). According to the study, forced deportations of Bosnian Muslims began in May/June 1992 by bus to Mali Zvornik and from there to the Bosnian town of Tuzla or to Subotica on the Serbian-Hungarian border (*ibid.*, pp. 28 and 35-36). The Special Rapporteur's report of 10 February 1993 supports this account, stating that deportees from Zvornik had been "ordered, some at gunpoint, to board buses and trucks and later trains", provided with Yugoslav passports and subsequently taken to the Hungarian border to be admitted as refugees (Report of 10 February 1993, para. 99).

332. According to the Trial Chamber of the ICTY in its review of the indictment in the cases against *Karadžić and Mladić*, "[t]housands of civilians were unlawfully expelled or deported to other places inside and outside the Republic of Bosnia and Herzegovina" and "[t]he result of these expulsions was the partial or total elimination of Muslims and Bosnian Croats in some of [the] Bosnian Serb-held regions of Bosnia and Herzegovina". The Chamber further stated that "[i]n the municipalities of Prijedor, Foča, Vlasenica, Brčko and Bosanski Šamac, to name but a few, the once non-Serbian majority was systematically exterminated or expelled by force or intimidation" (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 16).

333. The Respondent argues that displacements of populations may be necessary according to the obligations set down in Articles 17 and 49, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, for instance if the security of the population or imperative military reasons so demand. It adds that the displacement of populations has always been a way of settling certain conflicts between opposing parties and points to a number of examples of forced population displacements in history following an armed conflict. The Respondent also argues that the mere expulsion of a group cannot be characterized as genocide, but that, according to the ICTY Judgment in the *Stakić* case, "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group" and "[t]he expulsion of a group or part of a group does not in itself suffice for genocide" (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519).

334. The Court considers that there is persuasive and conclusive evidence that deportations and expulsions of members of the protected group occurred in Bosnia and Herzegovina. With regard to the Respondent's argument that in time of war such deportations or expulsions may be justified under the Geneva Convention, or may be a normal way of settling a conflict, the Court would observe that no such justification

could be accepted in the face of proof of specific intent *(dolus specialis)*. However, even assuming that deportations and expulsions may be categorized as falling within Article II, paragraph *(c)*, of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part (see paragraph 190 above).

*Destruction of historical, religious and cultural property*

335. The Applicant claims that throughout the conflict in Bosnia and Herzegovina, Serb forces engaged in the deliberate destruction of historical, religious and cultural property of the protected group in "an attempt to wipe out the traces of their very existence".

336. In the *Tadić* case, the ICTY found that "[n]on-Serb cultural and religious symbols throughout the region were targeted for destruction" in the Banja Luka area (*Tadić*, IT-94-1-T, Trial Chamber Judgment, 7 May 1997, para. 149). Further, in reviewing the indictments of Karadžić and Mladić, the Trial Chamber stated that:

> "Throughout the territory of Bosnia and Herzegovina under their control, Bosnian Serb forces . . . destroyed, quasi-systematically, the Muslim and Catholic cultural heritage, in particular, sacred sites. According to estimates provided at the hearing by an expert witness, Dr. Kaiser, a total of 1.123 mosques, 504 Catholic churches and five synagogues were destroyed or damaged, for the most part, in the absence of military activity or after the cessation thereof.
>
> This was the case in the destruction of the entire Islamic and Catholic heritage in the Banja Luka area, which had a Serbian majority and the nearest area of combat to which was several dozen kilometres away. All of the mosques and Catholic churches were destroyed. Some mosques were destroyed with explosives and the ruins were then levelled and the rubble thrown in the public dumps in order to eliminate any vestige of Muslim presence.
>
> Aside from churches and mosques, other religious and cultural symbols like cemeteries and monasteries were targets of the attacks." (*Karadžić and Mladić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 15.)

In the *Brđanin* case, the Trial Chamber was "satisfied beyond reasonable doubt that there was wilful damage done to both Muslim and Roman Catholic religious buildings and institutions in the relevant municipalities by Bosnian Serb forces" (*Brđanin*, IT-99-36-T, Judgment, 1 September 2004, paras. 640 and 658). On the basis of the findings regarding a number of incidents in various regions of Bosnia and Herzegovina, the

Trial Chamber concluded that a "campaign of devastation of institutions dedicated to religion took place throughout the conflict" but "intensified in the summer of 1992" and that this concentrated period of significant damage was "indicative that the devastation was targeted, controlled and deliberate" (*Brđanin*, IT-99-36-T, paras. 642-657). For instance, the Trial Chamber found that the Bosanska Krupa town mosque was mined by Bosnian Serb forces in April 1992, that two mosques in Bosanski Petrovac were destroyed by Bosnian Serb forces in July 1992 and that the mosques in Staro Šipovo, Bešnjevo and Pljeva were destroyed on 7 August 1992 (*ibid.*, paras. 644, 647 and 656).

337. The Commission of Experts also found that religious monuments especially mosques and churches had been destroyed by Bosnian Serb forces (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 5, 9, 21 ff.). In its report on the Prijedor region, the Commission found that at least five mosques and associated buildings in Prijedor town had been destroyed and noted that it was claimed that all 16 mosques in the Kozarac area had been destroyed and that not a single mosque, or other Muslim religious building, remained intact in the Prijedor region (Report of the Commission of Experts, Vol. I, Ann. V, p. 106). The report noted that those buildings were "allegedly not desecrated, damaged and destroyed for any military purpose nor as a side-effect of the military operations as such" but rather that the destruction "was due to later separate operations of dynamiting" *(ibid.)*.

338. The Special Rapporteur found that, during the conflict, "many mosques, churches and other religious sites, including cemeteries and monasteries, have been destroyed or profaned" (Report of 17 November 1992, para. 26). He singled out the "systematic destruction and profanation of mosques and Catholic churches in areas currently or previously under [Bosnian Serb] control" (Report of 17 November 1992, para. 26).

339. Bosnia and Herzegovina called as an expert Mr. András Riedlmayer, who had carried out a field survey on the destruction of cultural heritage in 19 municipalities in Bosnia and Herzegovina for the Prosecutor of the ICTY in the *Milošević* case and had subsequently studied seven further municipalities in two other cases before the ICTY ("Destruction of Cultural Heritage in Bosnia and Herzegovina, 1992-1996: A Post-war Survey of Selected Municipalities", *Milošević*, IT-02-54-T, Exhibit Number P486). In his report prepared for the *Milošević* case, Mr. Riedlmayer documented 392 sites, 60 per cent of which were inspected first hand while for the other 40 per cent his assessment was based on photographs and information obtained from other sources judged to be reliable and where there was corroborating documentation (Riedlmayer Report, p. 5).

340. The report compiled by Mr. Riedlmayer found that of the 277 mosques surveyed, none were undamaged and 136 were almost or entirely destroyed (Riedlmayer Report, pp. 9-10). The report found that:

> "The damage to these monuments was clearly the result of attacks directed against them, rather than incidental to the fighting. Evidence of this includes signs of blast damage indicating explosives placed inside the mosques or inside the stairwells of minarets; many mosques [were] burnt out. In a number of towns, including Bijeljina, Janja (Bijeljina municipality), Foča, Banja Luka, Sanski Most, Zvornik and others, the destruction of mosques took place while the area was under the control of Serb forces, at times when there was no military action in the immediate vicinity." (*Ibid.*, p. 11.)

The report also found that, following the destruction of mosques:

> "the ruins [of the mosques] were razed and the sites levelled with heavy equipment, and all building materials were removed from the site . . . Particularly well-documented instances of this practice include the destruction and razing of 5 mosques in the town of Bijeljina; of 2 mosques in the town of Janja (in Bijeljina municipality); of 12 mosques and 4 turbes in Banja Luka; and of 3 mosques in the city of Brčko." (*Ibid.*, p. 12.)

Finally, the Report noted that the sites of razed mosques had been "turned into rubbish tips, bus stations, parking lots, automobile repair shops, or flea markets" (*ibid.*, p. 14), for example, a block of flats and shops had been erected on the site of the Zamlaz Mosque in Zvornik and a new Serbian Orthodox church was built on the site of the destroyed Divic Mosque (*ibid.*, p. 14).

341. Mr. Riedlmayer's report together with his testimony before the Court and other corroborative sources detail the destruction of the cultural and religious heritage of the protected group in numerous locations in Bosnia and Herzegovina. For instance, according to the evidence before the Court, 12 of the 14 mosques in Mostar were destroyed or damaged and there are indications from the targeting of the minaret that the destruction or damage was deliberate (Council of Europe, *Information Report: The Destruction by War of the Cultural Heritage in Croatia and Bosnia-Herzegovina*, Parliamentary Assembly doc. 6756, 2 February 1993, paras. 129 and 155). In Foča, the town's 14 historic mosques were allegedly destroyed by Serb forces. In Banja Luka, all 16 mosques were destroyed by Serb forces including the city's two largest mosques,

the Ferhadija Mosque (built in 1578) and the Arnaudija Mosque (built in 1587) (United States Department of State, Bureau of Public Affairs, *Dispatch*, 26 July 1993, Vol. 4, No. 30, pp. 547-548; "War Crimes in Bosnia-Herzegovina: UN Cease-Fire Won't Help Banja Luka", Human Rights Watch/Helsinki Watch, June 1994, Vol. 6, No. 8, pp. 15-16; The Humanitarian Law Centre, Spotlight Report, No. 14, August 1994, pp. 143-144).

342. The Court notes that archives and libraries were also subjected to attacks during the war in Bosnia and Herzegovina. On 17 May 1992, the Institute for Oriental Studies in Sarajevo was bombarded with incendiary munitions and burnt, resulting in the loss of 200,000 documents including a collection of over 5,000 Islamic manuscripts (Riedlmayer Report, p. 18; Council of Europe, Parliamentary Assembly; Second Information Report on War Damage to the Cultural Heritage in Croatia and Bosnia-Herzegovina, doc. 6869, 17 June 1993, p. 11, Ann. 38). On 25 August 1992, Bosnia's National Library was bombarded and an estimated 1.5 million volumes were destroyed (Riedlmayer Report, p. 19). The Court observes that, although the Respondent considers that there is no certainty as to who shelled these institutions, there is evidence that both the Institute for Oriental Studies in Sarajevo and the National Library were bombarded from Serb positions.

343. The Court notes that, in cross-examination of Mr. Riedlmayer, counsel for the Respondent pointed out that the municipalities included in Mr. Riedlmayer's report only amounted to 25 per cent of the territory of Bosnia and Herzegovina. Counsel for the Respondent also called into question the methodology used by Mr. Riedlmayer in compiling his report. However, having closely examined Mr. Riedlmayer's report and having listened to his testimony, the Court considers that Mr. Riedlmayer's findings do constitute persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia and Herzegovina albeit in a limited geographical area.

344. In light of the foregoing, the Court considers that there is conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question. The Court takes note of the submission of the Applicant that the destruction of such heritage was "an essential part of the policy of ethnic purification" and was "an attempt to wipe out the traces of [the] very existence" of the Bosnian Muslims. However, in the Court's view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group,

and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts. Moreover, the ILC subsequently confirmed this approach, stating that:

> "As clearly shown by the preparatory work for the Convention . . ., the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group." (Report of the International Law Commission on the work of its Forty-eighth Session, *Yearbook of the International Law Commission 1996*, Vol. II, Part Two, pp. 45-46, para. 12.)

Furthermore, the ICTY took a similar view in the *Krstić* case, finding that even in customary law, "despite recent developments", the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 580). The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention. At the same time, it also endorses the observation made in the *Krstić* case that "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group" *(ibid.)*.

*Camps*

345. The Court notes that the Applicant has presented substantial evidence as to the conditions of life in the detention camps and much of this evidence has already been discussed in the sections regarding Articles II *(a)* and *(b)*. The Court will briefly examine the evidence presented by the Applicant which relates specifically to the conditions of life in the principal camps.

(a) *Drina River Valley*

(i) *Sušica camp*

346. In the Sentencing Judgment in the case of Dragan Nikolić, the Commander of Sušica camp, the ICTY found that he subjected detainees to inhumane living conditions by depriving them of adequate food, water, medical care, sleeping and toilet facilities (*Nikolić*, IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 69).

(ii) *Foča Kazneno-Popravní Dom camp*

347. In the *Krnojelac* case, the ICTY Trial Chamber made the following findings regarding the conditions at the camp:

> "the non-Serb detainees were forced to endure brutal and inadequate living conditions while being detained at the KP Dom, as a result of which numerous individuals have suffered lasting physical and psychological problems. Non-Serbs were locked in their rooms or in solitary confinement at all times except for meals and work duty, and kept in overcrowded rooms even though the prison had not reached its capacity. Because of the overcrowding, not everyone had a bed or even a mattress, and there were insufficient blankets. Hygienic conditions were poor. Access to baths or showers, with no hot water, was irregular at best. There were insufficient hygienic products and toiletries. The rooms in which the non-Serbs were held did not have sufficient heating during the harsh winter of 1992. Heaters were deliberately not placed in the rooms, windowpanes were left broken and clothes made from blankets to combat the cold were confiscated. Non-Serb detainees were fed starvation rations leading to severe weight loss and other health problems. They were not allowed to receive visits after April 1992 and therefore could not supplement their meagre food rations and hygienic supplies". (*Krnojelac*, IT-97-25-T, Judgment, 15 March 2002, para. 440.)

(b) *Prijedor*

(i) *Omarska camp*

348. In the Trial Judgment in the *Kvočka et al.* case, the ICTY Trial Chamber provided the following description of the poor conditions in the Omarska camp based on the accounts of detainees:

> "Detainees were kept in inhuman conditions and an atmosphere of extreme mental and physical violence pervaded the camp. Intimidation, extortion, beatings, and torture were customary practices. The arrival of new detainees, interrogations, mealtimes, and use of the toilet facilities provided recurrent opportunities for abuse. Outsiders entered the camp and were permitted to attack the detainees at random and at will . . .
>
> . . . . . .
>
> The Trial Chamber finds that the detainees received poor quality food that was often rotten or inedible, caused by the high temperatures and sporadic electricity during the summer of 1992. The food

was sorely inadequate in quantity. Former detainees testified of the acute hunger they suffered in the camp: most lost 25 to 35 kilograms in body weight during their time at Omarska; some lost considerably more." (*Kvočka et al.*, IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, paras. 45 and 55.)

(ii) *Keraterm camp*

349. The *Stakić* Trial Judgment contained the following description of conditions in the Keraterm camp based on multiple witness accounts:

"The detainees slept on wooden pallets used for the transport of goods or on bare concrete in a big storage room. The conditions were cramped and people often had to sleep on top of each other. In June 1992, Room 1, which according to witness statements was slightly larger than Courtroom 2 of this Tribunal (98.6 $m^2$), held 320 people and the number continued to grow. The detainees were given one meal a day, made up of two small slices of bread and some sort of stew. The rations were insufficient for the detainees. Although families tried to deliver food and clothing every day they rarely succeeded. The detainees could see their families walking to the camp and leaving empty-handed, so in all likelihood someone at the gates of the camp took the food and prevented it from being distributed to the detainees." (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 163.)

(iii) *Trnopolje camp*

350. With respect to the Trnopolje camp, the *Stakić* Trial Judgment described the conditions as follows, noting that they were slightly better than at Omarska and Keraterm:

"The detainees were provided with food at least once a day and, for some time, the families of detainees were allowed to bring food. However the quantity of food available was insufficient and people often went hungry. Moreover, the water supply was insufficient and the toilet facilities inadequate. The majority of the detainees slept in the open air. Some devised makeshift . . . shelters of blankets and plastic bags. While clearly inadequate, the conditions in the Trnopolje camp were not as appalling as those that prevailed in Omarska and Keraterm." (*Ibid.*, para. 190.)

(c) *Banja Luka*

*Manjača camp*

351. According to ICTY Trial Chamber in the *Plavšić* Sentencing Judgment:

> "the sanitary conditions in Manjača were 'disastrous . . . inhuman and really brutal': the concept of sanitation did not exist. The temperature inside was low, the inmates slept on the concrete floor and they relieved themselves in the compound or in a bucket placed by the door at night. There was not enough water, and any water that became available was contaminated. In the first three months of Adil Draganović's detention, Manjača was a 'camp of hunger' and when there was food available, it was of a very poor quality. The inmates were given two small meals per day, which usually consisted of half a cup of warm tea, which was more like warm water, and a small piece of thin, 'transparent' bread. Between two and a half thousand men there were only 90 loaves of bread, with each loaf divided into 20 or 40 pieces. Most inmates lost between 20 and 30 kilograms of body weight while they were detained at Manjača. The witness believes that had the ICRC and UNHCR not arrived, the inmates would have died of starvation." (*Plavšić*, IT-00-39-S and 40/1-S, Sentencing Judgment, 27 February 2003, para. 48.)

(d) *Bosanski Šamac*

352. In its Judgment in the *Simić* case, the Trial Chamber made the following findings:

> "the detainees who were imprisoned in the detention centres in Bosanski Šamac were confined under inhumane conditions. The prisoners were subjected to humiliation and degradation. The forced singing of 'Chetnik' songs and the verbal abuse of being called 'ustasha' or 'balija' were forms of such abuse and humiliation of the detainees. They did not have sufficient space, food or water. They suffered from unhygienic conditions, and they did not have appropriate access to medical care. These appalling detention conditions, the cruel and inhumane treatment through beatings and the acts of torture caused severe physical suffering, thus attacking the very fundamentals of human dignity . . . This was done because of the non-Serb ethnicity of the detainees." (*Simić*, IT-95-9-T, Judgment, 17 October 2003, para. 773.)

353. The Respondent does not deny that the camps in Bosnia and Herzegovina were in breach of humanitarian law and, in most cases, in breach of the law of war. However, it notes that, although a number of

detention camps run by the Serbs in Bosnia and Herzegovina were the subject of investigation and trials at the ICTY, no conviction for genocide was handed down on account of any criminal acts committed in those camps. With specific reference to the Manjača camp, the Respondent points out that the Special Envoy of the United Nations Secretary-General visited the camp in 1992 and found that it was being run correctly and that a Muslim humanitarian organization also visited the camp and found that "material conditions were poor, especially concerning hygiene [b]ut there were no signs of maltreatment or execution of prisoners".

354. On the basis of the elements presented to it, the Court considers that there is convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps. However, the evidence presented has not enabled the Court to find that those acts were accompanied by specific intent *(dolus specialis)* to destroy the protected group, in whole or in part. In this regard, the Court observes that, in none of the ICTY cases concerning camps cited above, has the Tribunal found that the accused acted with such specific intent *(dolus specialis)*.

* *

### *(8) Article II* (d)*: Imposing Measures to Prevent Births within the Protected Group*

355. The Applicant invoked several arguments to show that measures were imposed to prevent births, contrary to the provision of Article II, paragraph *(d)*, of the Genocide Convention. First, the Applicant claimed that the

> "forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces . . . in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months".

The Court notes that no evidence was provided in support of this statement.

356. Secondly, the Applicant submitted that rape and sexual violence against women led to physical trauma which interfered with victims' reproductive functions and in some cases resulted in infertility. However, the only evidence adduced by the Applicant was the indictment in the *Gagović* case before the ICTY in which the Prosecutor stated that one witness could no longer give birth to children as a result of the sexual abuse she suffered (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 7.10). In the Court's view, an indictment by the Prosecutor

does not constitute persuasive evidence (see paragraph 217 above). Moreover, it notes that the *Gagović* case did not proceed to trial due to the death of the accused.

357. Thirdly, the Applicant referred to sexual violence against men which prevented them from procreating subsequently. In support of this assertion, the Applicant noted that, in the *Tadić* case, the Trial Chamber found that, in Omarska camp, the prison guards forced one Bosnian Muslim man to bite off the testicles of another Bosnian Muslim man (*Tadić*, IT-94-1-T, Judgment, 7 May 1997, para. 198). The Applicant also cited a report in the newspaper, *Le Monde*, on a study by the World Health Organization and the European Union on sexual assaults on men during the conflict in Bosnia and Herzegovina, which alleged that sexual violence against men was practically always accompanied by threats to the effect that the victim would no longer produce Muslim children. The article in *Le Monde* also referred to a statement by the President of a non-governmental organization called the Medical Centre for Human Rights to the effect that approximately 5,000 non-Serb men were the victims of sexual violence. However, the Court notes that the article in *Le Monde* is only a secondary source. Moreover, the results of the World Health Organization and European Union study were only preliminary, and there is no indication as to how the Medical Centre for Human Rights arrived at the figure of 5,000 male victims of sexual violence.

358. Fourthly, the Applicant argued that rape and sexual violence against men and women led to psychological trauma which prevented victims from forming relationships and founding a family. In this regard, the Applicant noted that in the *Akayesu* case, the ICTR considered that "rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate" (*Akayesu*, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 508). However, the Court notes that the Applicant presented no evidence that this was the case for women in Bosnia and Herzegovina.

359. Fifthly, the Applicant considered that Bosnian Muslim women who suffered sexual violence might be rejected by their husbands or not be able to find a husband. Again, the Court notes that no evidence was presented in support of this statement.

360. The Respondent considers that the Applicant "alleges no fact, puts forward no serious argument, and submits no evidence" for its allegations that rapes were committed in order to prevent births within a group and notes that the Applicant's contention that there was a decline in births within the protected group is not supported by any evidence concerning the birth rate in Bosnia and Herzegovina either before or after the war.

361. Having carefully examined the arguments of the Parties, the Court finds that the evidence placed before it by the Applicant does not enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II *(d)* of the Convention.

* *

*(9) Article II* (e)*: Forcibly Transferring Children of the Protected Group to Another Group*

362. The Applicant claims that rape was used "as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males" or, in other words, as "procreative rape". The Applicant argues that children born as a result of these "forced pregnancies" would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.

363. As evidence for this claim, the Applicant referred to a number of sources including the following. In the indictment in the *Gagović et al.* case, the Prosecutor alleged that one of the witnesses was raped by two Bosnian Serb soldiers and that "[b]oth perpetrators told her that she would now give birth to Serb babies" (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 9.3). However, as in paragraph 356 above, the Court notes that an indictment cannot constitute persuasive evidence for the purposes of the case now before it and that the *Gagović* case did not proceed to trial. The Applicant further referred to the Report of the Commission of Experts which stated that one woman had been detained and raped daily by three or four soldiers and that "[s]he was told that she would give birth to a chetnik boy" (Report of the Commission of Experts, Vol. I, p. 59, para. 248).

364. The Applicant also cited the Review of the Indictment in the *Karadžić and Mladić* cases in which the Trial Chamber stated that "[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late to undergo an abortion" and that "[i]t would seem that the aim of many rapes was enforced impregnation" (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 64). However, the Court notes that this finding of the Trial Chamber was based only on the testimony of one *amicus curiae* and on the above-mentioned incident reported by the Commission of Experts (*ibid.*, para. 64, footnote 154).

365. Finally, the Applicant noted that in the *Kunarac* case, the ICTY Trial Chamber found that, after raping one of the witnesses, the accused had told her that "she would now carry a Serb baby and would not know who the father would be" (*Kunarac et al.* cases, Nos. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 583).

366. The Respondent points out that Muslim women who had been raped gave birth to their babies in Muslim territory and consequently the babies would have been brought up not by Serbs but, on the contrary, by Muslims. Therefore, in its view, it cannot be claimed that the children were transferred from one group to the other.

367. The Court, on the basis of the foregoing elements, finds that the evidence placed before it by the Applicant does not establish that there was any form of policy of forced pregnancy, nor that there was any aim to transfer children of the protected group to another group within the meaning of Article II *(e)* of the Convention.

* *

*(10) Alleged Genocide outside Bosnia and Herzegovina*

368. In the submissions in its Reply, the Applicant has claimed that the Respondent has violated its obligations under the Genocide Convention "by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, *but not limited to* the, territory of Bosnia and Herzegovina, including in particular the Muslim population . . ." (emphasis added). The Applicant devoted a section in its Reply to the contention that acts of genocide, for which the Respondent was allegedly responsible, also took place on the territory of the FRY; these acts were similar to those perpetrated on Bosnian territory, and the constituent elements of "ethnic cleansing as a policy" were also found in the territory of the FRY. This question of genocide committed within the FRY was not actively pursued by the Applicant in the course of the oral argument before the Court; however, the submission quoted above was maintained in the final submissions presented at the hearings, and the Court must therefore address it. It was claimed by the Applicant that the genocidal policy was aimed not only at citizens of Bosnia and Herzegovina, but also at Albanians, Sandžak Muslims, Croats, Hungarians and other minorities; however, the Applicant has not established to the satisfaction of the Court any facts in support of that allegation. The Court has already found (paragraph 196 above) that, for purposes of establishing genocide, the targeted group must be defined positively, and not as a "non-Serb" group.

369. The Applicant has not in its arguments dealt separately with the question of the nature of the specific intent *(dolus specialis)* alleged to accompany the acts in the FRY complained of. It does not appear to be

contending that actions attributable to the Respondent, and committed on the territory of the FRY, were accompanied by a specific intent *(dolus specialis)*, peculiar to or limited to that territory, in the sense that the objective was to eliminate the presence of non-Serbs in the FRY itself. The Court finds in any event that the evidence offered does not in any way support such a contention. What the Applicant has sought to do is to convince the Court of a pattern of acts said to evidence specific intent *(dolus specialis)* inspiring the actions of Serb forces in Bosnia and Herzegovina, involving the destruction of the Bosnian Muslims in that territory; and that same pattern lay, it is contended, behind the treatment of Bosnian Muslims in the camps established in the FRY, so that that treatment supports the pattern thesis. The Applicant has emphasized that the same treatment was meted out to those Bosnian Muslims as was inflicted on their compatriots in Bosnia and Herzegovina. The Court will thus now turn to the question whether the specific intent *(dolus specialis)* can be deduced, as contended by the Applicant, from the pattern of actions against the Bosnian Muslims taken as a whole.

* *

*(11) The Question of Pattern of Acts Said to Evidence an Intent to Commit Genocide*

370. In the light of its review of the factual evidence before it of the atrocities committed in Bosnia and Herzegovina in 1991-1995, the Court has concluded that, save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident. The Applicant however relies on the alleged existence of an overall plan to commit genocide, indicated by the pattern of genocidal or potentially acts of genocide committed throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group. In the case, for example, of the conduct of Serbs in the various camps (described in paragraphs 252-256, 262-273, 307-310 and 312-318 above), it suggests that "[t]he genocidal intent of the Serbs becomes particularly clear in the description of camp practices, due to their striking similarity all over the territory of Bosnia and Herzegovina". Drawing attention to the similarities between actions attributed to the Serbs in Croatia, and the later events at, for example, Kosovo, the Applicant observed that

> "it is not surprising that the picture of the takeovers and the following human and cultural destruction looks indeed similar from 1991

through 1999. These acts were perpetrated as the expression of one single project, which basically and effectively included the destruction in whole or in part of the non-Serb group, wherever this ethnically and religiously defined group could be conceived as obstructing the all-Serbs-in-one-State group concept."

371. The Court notes that this argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of to the intent of higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. In the absence of an official statement of aims reflecting such an intent, the Applicant contends that the specific intent *(dolus specialis)* of those directing the course of events is clear from the consistency of practices, particularly in the camps, showing that the pattern was of acts committed "within an organized institutional framework". However, something approaching an official statement of an overall plan is, the Applicant contends, to be found in the Decision on Strategic Goals issued on 12 May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska, published in the *Official Gazette* of the Republika Srpska, and the Court will first consider what significance that Decision may have in this context. The English translation of the Strategic Goals presented by the Parties during the hearings, taken from the Report of Expert Witness Donia in the *Milošević* case before the ICTY, Exhibit No. 537, reads as follows:

"DECISION ON THE STRATEGIC GOALS OF THE SERBIAN PEOPLE IN BOSNIA AND HERZEGOVINA

The Strategic Goals, i.e., the priorities, of the Serbian people in Bosnia and Herzegovina are:

1. Separation as a state from the other two ethnic communities.

2. A corridor between Semberija and Krajina.
3. The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states.

4. The establishment of a border on the Una and Neretva rivers.
5. The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part.
6. An outlet to the sea for the Republika Srpska."

While the Court notes that this document did not emanate from the Government of the Respondent, evidence before the Court of intercepted exchanges between President Milošević of Serbia and President Karadžić of the Republika Srpska is sufficient to show that the objectives defined represented their joint view.

372. The Parties have drawn the Court's attention to statements in the Assembly by President Karadžić which appear to give conflicting interpretations of the first and major goal of these objectives, the first on the day they were adopted, the second two years later. On that first occasion, the Applicant contended, he said: "It would be much better to solve this situation by political means. It would be best if a truce could be established right away and the borders set up, even if we lose something." Two years later he said (according to the translation of his speech supplied by the Applicant):

> "We certainly know that we must give up something — that is beyond doubt in so far as we want to achieve our first strategic goal: to drive our enemies by the force of war from their homes, that is the Croats and Muslims, so that we will no longer be together [with them] in a State."

The Respondent disputes the accuracy of the translation, claiming that the stated goal was not "to drive our enemies by the force of war from their homes" but "to free the homes from the enemy". The 1992 objectives do not include the elimination of the Bosnian Muslim population. The 1994 statement even on the basis of the Applicant's translation, however shocking a statement, does not necessarily involve the intent to destroy in whole or in part the Muslim population in the enclaves. The Applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership — to create a larger Serb State, by a war of conquest if necessary — did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion. The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired, actions which the Respondent accepted (in the latter case at least) as being unlawful since they would be at variance with the inviolability of borders and the territorial integrity of a State which had just been recognized internationally. It is significant that in cases in which the Prosecutor has put the Strategic Goals in issue, the ICTY has not characterized them as genocidal (see *Brđanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 303, and *Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 546-561 (in particular para. 548)). The Court does not see the 1992 Strategic Goals as establishing the specific intent.

373. Turning now to the Applicant's contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demon-

strated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.

374. Furthermore, and again significantly, the proposition is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor, including decisions not to charge genocide offences in possibly relevant indictments, and to enter into plea agreements, as in the *Plavšić* and *Sikirica et al.* cases (IT-00-40 and IT-95-8), by which the genocide-related charges were withdrawn. Those actions of the Prosecution and the Tribunal can be conveniently enumerated here. Prosecutions for genocide and related crimes before the ICTY can be grouped in the following way:

*(a)* convictions in respect of charges involving genocide relating to Srebrenica in July 1995: *Krstić* (IT-98-33) (conviction of genocide at trial was reduced to aiding and abetting genocide on appeal) and *Blagojević* (IT-02-60) (conviction of complicity in genocide "through aiding and abetting" at trial is currently on appeal);

*(b)* plea agreements in which such charges were withdrawn, with the accused pleading guilty to crimes against humanity: *Obrenović* (IT-02-60/2) and *Momir Nikolić* (IT-02-60/1);

*(c)* acquittals on genocide-related charges in respect of events occurring elsewhere: *Krajišnik* (paragraph 219 above) (on appeal), *Jelisić* (IT-95-10) (completed), *Stakić* (IT-97-24) (completed), *Brđanin* (IT-99-36) (on appeal) and *Sikirica* (IT-95-8) (completed);

*(d)* cases in which genocide-related charges in respect of events occurring elsewhere were withdrawn: *Plavšić* (IT-00-39 and 40/1) (plea agreement), *Župljanin* (IT-99-36) (genocide-related charges withdrawn) and *Mejakić* (IT-95-4) (genocide-related charges withdrawn);

*(e)* case in which the indictment charged genocide and related crimes in Srebrenica and elsewhere in which the accused died during the proceedings: *Milošević* (IT-02-54);

*(f)* cases in which indictments charge genocide or related crimes in respect of events occurring elsewhere, in which accused have died before or during proceedings: *Kovačević and Drljača* (IT-97-24) and *Talić* (IT-99-36/1);

*(g)* pending cases in which the indictments charge genocide and related crimes in Srebrenica and elsewhere: *Karadžić and Mladić* (IT-95-5/18); and

*(h)* pending cases in which the indictments charge genocide and related crimes in Srebrenica: *Popović, Beara, Drago Nikolić, Borovčanin, Pandurević and Trbić* (IT-05-88/1) and *Tolimir* (IT-05-88/2).

375. In the cases of a number of accused, relating to events in July 1995 in Srebrenica, charges of genocide or its related acts have not been brought: *Erdemović* (IT-96-22) (completed), *Jokić* (IT-02-60) (on appeal), *Miletić and Gvero* (IT-05-88, part of the *Popović et al.* proceeding referred to in paragraph 374 *(h)* above), *Perišić* (IT-04-81) (pending) and *Stanišić and Simatović* (IT-03-69) (pending).

376. The Court has already concluded above that — save in the case of Srebrenica — the Applicant has not established that any of the widespread and serious atrocities, complained of as constituting violations of Article II, paragraphs *(a)* to *(e)*, of the Genocide Convention, were accompanied by the necessary specific intent *(dolus specialis)* on the part of the perpetrators. It also finds that the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent. Having however concluded (paragraph 297 above), in the specific case of the massacres at Srebrenica in July 1995, that acts of genocide were committed in operations led by members of the VRS, the Court now turns to the question whether those acts are attributable to the Respondent.

* * *

## VII. The Question of Responsibility for Events at Srebrenica under Article III, Paragraph *(a)*, of the Genocide Convention

### *(1) The Alleged Admission*

377. The Court first notes that the Applicant contends that the Respondent has in fact recognized that genocide was committed at Srebrenica, and has accepted legal responsibility for it. The Applicant called attention to the following official declaration made by the Council of Ministers of the Respondent on 15 June 2005, following the showing on a Belgrade television channel on 2 June 2005 of a video-recording of the murder by a paramilitary unit of six Bosnian Muslim prisoners near Srebrenica (paragraph 289 above). The statement reads as follows:

> "Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia

nor Montenegro, but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance.

Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica.

Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime."

The Applicant requests the Court to declare that this declaration "be regarded as a form of admission and as having decisive probative force regarding the attributability to the Yugoslav State of the Srebrenica massacre".

378. It is for the Court to determine whether the Respondent is responsible for any acts of genocide which may be established. For purposes of a finding of this kind the Court may take into account any statements made by either party that appear to bear upon the matters in issue, and have been brought to its attention (cf. *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 263 ff., paras. 32 ff., and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 465ff., paras. 27ff.; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 573-574, paras. 38-39), and may accord to them such legal effect as may be appropriate. However, in the present case, it appears to the Court that the declaration of 15 June 2005 was of a political nature; it was clearly not intended as an admission, which would have had a legal effect in complete contradiction to the submissions made by the Respondent before this Court, both at the time of the declaration and subsequently. The Court therefore does not find the statement of 15 June 2005 of assistance to it in determining the issues before it in the case.

* *

*(2) The Test of Responsibility*

379. In view of the foregoing conclusions, the Court now must ascertain whether the international responsibility of the Respondent can have been incurred, on whatever basis, in connection with the massacres committed in the Srebrenica area during the period in question. For the reasons set out above, those massacres constituted the crime of genocide within the meaning of the Convention. For this purpose, the Court may be required to consider the following three issues in turn. First, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court

will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility: that is to say, the acts referred to in Article III, paragraphs *(b)* to *(e)*, one of these being complicity in genocide. Finally, it will be for the Court to rule on the issue as to whether the Respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.

380. These three issues must be addressed in the order set out above, because they are so interrelated that the answer on one point may affect the relevance or significance of the others. Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs *(b)* to *(e)*, of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. *(a)*), conspiracy to commit genocide (Art. III, para. *(b)*), and direct and public incitement to commit genocide (Art. III, para. *(c)*), there would be little point, where the requirements for attribution are fulfilled under *(a)*, in making a judicial finding that they are also satisfied under *(b)* and *(c)*, since responsibility under *(a)* absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of "genocide" (Art. III, para. *(a)*), "attempt to commit genocide" (Art. III, para. *(d)*), and "complicity in genocide" (Art. III, para. *(e)*), in relation to the same actions, must be rejected as untenable both logically and legally.

381. On the other hand, there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph *(a)*, of the Convention, can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent's responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs *(b)* to *(e)*. In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility, the content of which will be considered below.

382. Furthermore, the question whether the Respondent has complied with its obligations to prevent and punish genocide arises in different terms, depending on the replies to the two preceding questions. It is only if the Court answers the first two questions in the negative that it will have to consider whether the Respondent fulfilled its obligation of pre-

vention, in relation to the whole accumulation of facts constituting genocide. If a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), or for one of the other acts referred to in Article III of the Convention (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated. On the other hand, it is self-evident, as the Parties recognize, that if a State is not responsible for any of the acts referred to in Article III, paragraphs *(a)* to *(e)*, of the Convention, this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III.

383. Finally, it should be made clear that, while, as noted above, a State's responsibility deriving from any of those acts renders moot the question whether it satisfied its obligation of prevention in respect of the same conduct, it does not necessarily render superfluous the question whether the State complied with its obligation to punish the perpetrators of the acts in question. It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.

384. Having thus explained the interrelationship among the three issues set out above (paragraph 379), the Court will now proceed to consider the first of them. This is the question whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph *(a)*, of the Convention, are attributable, in whole or in part, to the Respondent. This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.

* *

*(3) The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of the Conduct of Its Organs*

385. The first of these two questions relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility as follows:

"*Article 4*

*Conduct of organs of a State*

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

386. When applied to the present case, this rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. It must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica (see also paragraphs 278 to 297 above). Further, neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law.

387. The Applicant has however claimed that all officers in the VRS, including General Mladić, remained under FRY military administration, and that their salaries were paid from Belgrade right up to 2002, and

accordingly contends that these officers "were *de jure* organs of [the FRY], intended by their superiors to serve in Bosnia and Herzegovina with the VRS". On this basis it has been alleged by the Applicant that those officers, in addition to being officers of the VRS, remained officers of the VJ, and were thus *de jure* organs of the Respondent (paragraph 238 above). The Respondent however asserts that only some of the VRS officers were being "administered" by the 30th Personnel Centre in Belgrade, so that matters like their payment, promotion, pension, etc., were being handled from the FRY (paragraph 238 above); and that it has not been clearly established whether General Mladić was one of them. The Applicant has shown that the promotion of Mladić to the rank of Colonel General on 24 June 1994 was handled in Belgrade, but the Respondent emphasizes that this was merely a verification for administrative purposes of a promotion decided by the authorities of the Republika Srpska.

388. The Court notes first that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of the army of the Respondent — a *de jure* organ of the Respondent. Nor has it been conclusively established that General Mladić was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY for the purposes of the application of the rules of State responsibility. There is no doubt that the FRY was providing substantial support, *inter alia*, financial support, to the Republika Srpska (cf. paragraph 241 above), and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinated to the political leadership of the Republika Srpska. In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. The expression "State organ", as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC Commentary to Art. 4, para. (1)). The functions of the VRS officers, including General Mladić, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska. The particular situation of General Mladić, or of any other VRS officer present at Srebrenica who may have been being "administered" from Belgrade, is not therefore such as to lead the Court to modify the conclusion reached in the previous paragraph.

389. The issue also arises as to whether the Respondent might bear responsibility for the acts of the "Scorpions" in the Srebrenica area. In this connection, the Court will consider whether it has been proved that the Scorpions were a *de jure* organ of the Respondent. It is in dispute between the Parties as to when the "Scorpions" became incorporated into the forces of the Respondent. The Applicant has claimed that incorporation occurred by a decree of 1991 (which has not been produced as an Annex). The Respondent states that "these regulations [were] relevant exclusively for the war in Croatia in 1991" and that there is no evidence that they remained in force in 1992 in Bosnia and Herzegovina. The Court observes that, while the single State of Yugoslavia was disintegrating at that time, it is the status of the "Scorpions" in mid-1995 that is of relevance to the present case. In two of the intercepted documents presented by the Applicant (the authenticity of which was queried — see paragraph 289 above), there is reference to the "Scorpions" as "MUP of Serbia" and "a unit of Ministry of Interiors of Serbia". The Respondent identified the senders of these communications, Ljubiša Borovčanin and Savo Cvjetinović, as being "officials of the police forces of Republika Srpska". The Court observes that neither of these communications was addressed to Belgrade. Judging on the basis of these materials, the Court is unable to find that the "Scorpions" were, in mid-1995, *de jure* organs of the Respondent. Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.

390. The argument of the Applicant however goes beyond mere contemplation of the status, under the Respondent's internal law, of the persons who committed the acts of genocide; it argues that Republika Srpska and the VRS, as well as the paramilitary militias known as the "Scorpions", the "Red Berets", the "Tigers" and the "White Eagles" must be deemed, notwithstanding their apparent status, to have been "*de facto* organs" of the FRY, in particular at the time in question, so that all of their acts, and specifically the massacres at Srebrenica, must be considered attributable to the FRY, just as if they had been organs of that State under its internal law; reality must prevail over appearances. The Respondent rejects this contention, and maintains that these were not *de facto* organs of the FRY.

391. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons — or groups of persons — who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in

its Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*Merits, Judgment, I.C.J. Reports 1986*, pp. 62-64). In paragraph 109 of that Judgment the Court stated that it had to

> "determine . . . whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government" (p. 62).

Then, examining the facts in the light of the information in its possession, the Court observed that "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf" (para. 109), and went on to conclude that "the evidence available to the Court . . . is insufficient to demonstrate [the *contras*'] complete dependence on United States aid", so that the Court was "unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States" (pp. 62-63, para. 110).

392. The passages quoted show that, according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

393. However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as "complete dependence". It remains to be determined in the present case whether, at the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it; it is only if this condition is met that they can be equated with organs of the Respondent for the purposes of its international responsibility.

394. The Court can only answer this question in the negative. At the relevant time, July 1995, neither the Republika Srpska nor the VRS could

be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years (see paragraph 238 above), and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have "conduct[ed] its crucial or most significant military and paramilitary activities" (*I.C.J. Reports 1986*, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

395. The Court now turns to the question whether the "Scorpions" were in fact acting in complete dependence on the Respondent. The Court has not been presented with materials to indicate this. The Court also notes that, in giving his evidence, General Dannatt, when asked under whose control or whose authority the paramilitary groups coming from Serbia were operating, replied, "they would have been under the command of Mladić and part of the chain of the command of the VRS". The Parties referred the Court to the *Stanišić and Simatović* case (IT-03-69, pending); notwithstanding that the defendants are not charged with genocide in that case, it could have its relevance for illuminating the status of the "Scorpions" as Serbian MUP or otherwise. However, the Court cannot draw further conclusions as this case remains at the indictment stage. In this respect, the Court recalls that it can only form its opinion on the basis of the information which has been brought to its notice at the time when it gives its decision, and which emerges from the pleadings and documents in the case file, and the arguments of the Parties made during the oral exchanges.

The Court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility.

* *

*(4) The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of Direction or Control*

396. As noted above (paragraph 384), the Court must now determine whether the massacres at Srebrenica were committed by persons who,

though not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control, as the Applicant argues in the alternative; the Respondent denies that such was the case.

397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs *de facto*, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FRY organs — incontestably having that status under the FRY's internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows:

"*Article 8*

*Conduct directed or controlled by a State*

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of

> persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

399. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the *contras* were to be equated with organs of the United States because they were "completely dependent" on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State" (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

> "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." (*Ibid.*, p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its "effective control". It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the "effective control" of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (see paragraph 399 above). The rules

for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94-1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the "overall control" exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid.*, para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under

the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.

*

408. The Respondent has emphasized that in the final judgments of the Chambers of the ICTY relating to genocide in Srebrenica, none of its leaders have been found to have been implicated. The Applicant does not challenge that reading, but makes the point that that issue has not been before the ICTY for decision. The Court observes that the ICTY has indeed not up to the present been directly concerned in final judgments with the question whether those leaders might bear responsibility in that respect. The Court notes the fact that the report of the United Nations Secretary-General does not establish any direct involvement by President Milošević with the massacre. The Court has already recorded the contacts between Milošević and the United Nations on 10 and 11 July (paragraph 285). On 14 July, as recorded in the Secretary-General's Report,

> "the European Union negotiator, Mr. Bildt, travelled to Belgrade to meet with President Milošević. The meeting took place at Dobanovci, the hunting lodge outside Belgrade, where Mr. Bildt had met President Milošević and General Mladić one week earlier. According to Mr. Bildt's public account of that second meeting, he pressed the President to arrange immediate access for UNHCR to assist the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war. He also insisted that the Netherlands soldiers be allowed to leave at will. Mr. Bildt added that the international community would not tolerate an attack on Goražde, and that a 'green light' would have to be secured for free and unimpeded access to the enclaves. He also demanded that the road between Kiseljak and Sarajevo ('Route Swan') be opened to all non-military transport. President Milošević apparently acceded to the various demands, but also claimed that he did not have control over the matter. Milošević had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement.
>
> A few hours into the meeting, General Mladić arrived at Dobanovci. Mr. Bildt noted that General Mladić readily agreed to most of the demands on Srebrenica, but remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular. Eventually, with President Milošević's intervention, it appeared that an agreement in principle had been reached. It was decided that

> another meeting would be held the next day in order to confirm the arrangements. Mr. Bildt had already arranged with Mr. Stoltenberg and Mr. Akashi [the Special Representative of the Secretary-General] that they would join him in Belgrade. He also requested that the UNPROFOR Commander also come to Belgrade in order to finalize some of the military details with Mladić." (A/54/549, paras. 372-373.)

409. By 19 July, on the basis of the Belgrade meeting, Mr. Akashi was hopeful that both President Milošević and General Mladić might show some flexibility. The UNPROFOR Commander met with Mladić on 19 July and throughout the meeting kept in touch with Mr. Bildt who was holding parallel negotiations with President Milošević in Belgrade. Mladić gave his version of the events of the preceding days (his troops had "'finished [it] in a correct way'"; some "'unfortunate small incidents' had occurred"). The UNPROFOR Commander and Mladić then signed an agreement which provided for

> "ICRC access to all 'reception centres' where the men and boys of Srebrenica were being held, by the next day;
>
> UNHCR and humanitarian aid convoys to be given access to Srebrenica;
>
> The evacuation of wounded from Potočari, as well as the hospital in Bratunac;
>
> The return of Dutchbat weapons and equipment taken by the BSA;
>
> The transfer of Dutchbat out of the enclave commencing on the afternoon of 21 July, following the evacuation of the remaining women, children and elderly who wished to leave.
>
> Subsequent to the signing of this agreement, the Special Representative wrote to President Milošević, reminding him of the agreement, that had not yet been honoured, to allow ICRC access to Srebrenica. The Special Representative later also telephoned President Milošević to reiterate the same point." (*Ibid.*, para. 392.)

410. The Court was referred to other evidence supporting or denying the Respondent's effective control over, participation in, involvement in, or influence over the events in and around Srebrenica in July 1995. The Respondent quotes two substantial reports prepared seven years after the events, both of which are in the public domain, and readily accessible. The first, *Srebrenica — a "Safe" Area*, published in 2002 by the Netherlands Institute for War Documentation was prepared over a lengthy period by an expert team. The Respondent has drawn attention to the fact that this report contains no suggestion that the FRY leadership was involved in planning the attack or inciting the killing of non-Serbs; nor

any hard evidence of assistance by the Yugoslav army to the armed forces of the Republika Srpska before the attack; nor any suggestion that the Belgrade Government had advance knowledge of the attack. The Respondent also quotes this passage from point 10 of the Epilogue to the Report relating to the "mass slaughter" and "the executions" following the fall of Srebrenica: "There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is highly improbable." The Respondent further observes that the Applicant's only response to this submission is to point out that "the report, by its own admission, is not exhaustive", and that this Court has been referred to evidence not used by the authors.

411. The Court observes, in respect of the Respondent's submissions, that the authors of the Report do conclude that Belgrade was aware of the intended attack on Srebrenica. They record that the Dutch Military Intelligence Service and another Western intelligence service concluded that the July 1995 operations were co-ordinated with Belgrade (Part III, Chap. 7, Sect. 7). More significantly for present purposes, however, the authors state that "there is no evidence to suggest participation in the preparations for executions on the part of Yugoslav military personnel or the security agency (RDB). In fact there is some evidence to support the opposite view . . ." (Part IV, Chap. 2, Sect. 20). That supports the passage from point 10 of the Epilogue quoted by the Respondent, which was preceded by the following sentence: "Everything points to a central decision by the General Staff of the VRS."

412. The second report is *Balkan Battlegrounds*, prepared by the United States Central Intelligence Agency, also published in 2002. The first volume under the heading "The Possibility of Yugoslav involvement" arrives at the following conclusion:

> "No basis has been established to implicate Belgrade's military or security forces in the post-Srebrenica atrocities. While there are indications that the VJ or RDB [the Serbian State Security Department] may have contributed elements to the Srebrenica battle, there is no similar evidence that Belgrade-directed forces were involved in any of the subsequent massacres. Eyewitness accounts by survivors may be imperfect recollections of events, and details may have been overlooked. Narrations and other available evidence suggest that only Bosnian Serb troops were employed in the atrocities and executions that followed the military conquest of Srebrenica." (*Balkan Battlegrounds*, p. 353.)

The response of the Applicant was to quote an earlier passage which refers to reports which "suggest" that VJ troops and possibly elements of the Serbian State Security Department may have been engaged in the battle in Srebrenica — as indeed the second sentence of the passage quoted by the Respondent indicates. It is a cautious passage, and significantly gives no indication of any involvement by the Respondent in the post-conflict atrocities which are the subject of genocide-related convictions. Counsel for the Respondent also quoted from the evidence of the Deputy Commander of Dutchbat, given in the *Milošević* trial, in which the accused put to the officer the point quoted earlier from the Epilogue to the Netherlands report. The officer responded:

> "At least for me, I did not have any evidence that it was launched in co-operation with Belgrade. And again, I read all kinds of reports and opinions and papers where all kinds of scenarios were analysed, and so forth. Again, I do not have any proof that the action, being the attack on the enclave, was launched in co-operation with Belgrade."

The other evidence on which the Applicant relied relates to the influence, rather than the control, that President Milošević had or did not have over the authorities in Pale. It mainly consists of the evidence given at the *Milošević* trial by Lord Owen and General Wesley Clark and also Lord Owen's publications. It does not establish a factual basis for finding the Respondent responsible on a basis of direction or control.

* *

*(5) Conclusion as to Responsibility for Events at Srebrenica under Article III, Paragraph* (a)*, of the Genocide Convention*

413. In the light of the information available to it, the Court finds, as indicated above, that it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent (see paragraph 395 above). It finds also that it has not been established that those massacres were committed on the instructions or under the direction of organs of the respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which, as indicated in paragraph 297 above, constituted the crime of genocide, were perpetrated.

The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent *(dolus specialis)* characterizing the crime of genocide, which would have had to be present in order for the Respondent to be held responsible on this basis. All indications are to the contrary: that the

decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

As for the killings committed by the "Scorpions" paramilitary militias, notably at Trnovo (paragraph 289 above), even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY (see, in particular, the Trial Chamber's decision of 12 April 2006 in the *Stanišić and Simatović* case, IT-03-69), it has not been proved that they took place either on the instructions or under the control of organs of the FRY.

414. Finally, the Court observes that none of the situations, other than those referred to in Articles 4 and 8 of the ILC's Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent's disposal by another State (Art. 6), nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art. 9); finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).

415. The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis.

* * *

## VIII. The Question of Responsibility, in Respect of Srebrenica, for Acts Enumerated in Article III, Paragraphs *(b)* to *(e)*, of the Genocide Convention

416. The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent's possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. These are: conspiracy to

commit genocide (Art. III, para. *(b)*), direct and public incitement to commit genocide (Art. III, para. *(c)*), attempt to commit genocide (Art. III, para. *(d)*) — though no claim is made under this head in the Applicant's final submissions in the present case — and complicity in genocide (Art. III, para. *(e)*). For the reasons already stated (paragraph 380 above), the Court must make a finding on this matter inasmuch as it has replied in the negative to the previous question, that of the Respondent's responsibility in the commission of the genocide itself.

417. It is clear from an examination of the facts of the case that subparagraphs *(b)* and *(c)* of Article III are irrelevant in the present case. It has not been proved that organs of the FRY, or persons acting on the instructions or under the effective control of that State, committed acts that could be characterized as "[c]onspiracy to commit genocide"(Art. III, para. *(b)*), or as "[d]irect and public incitement to commit genocide" (Art. III, para. *(c)*), if one considers, as is appropriate, only the events in Srebrenica. As regards paragraph *(b)*, what was said above regarding the attribution to the Respondent of acts of genocide, namely that the massacres were perpetrated by persons and groups of persons (the VRS in particular) who did not have the character of organs of the Respondent, and did not act on the instructions or under the effective control of the Respondent, is sufficient to exclude the latter's responsibility in this regard. As regards subparagraph *(c)*, none of the information brought to the attention of the Court is sufficient to establish that organs of the Respondent, or persons acting on its instructions or under its effective control, directly and publicly incited the commission of the genocide in Srebrenica; nor is it proven, for that matter, that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina. In this respect, the Court must only accept precise and incontrovertible evidence, of which there is clearly none.

418. A more delicate question is whether it can be accepted that acts which could be characterized as "complicity in genocide", within the meaning of Article III, paragraph *(e)*, can be attributed to organs of the Respondent or to persons acting under its instructions or under its effective control.

This question calls for some preliminary comment.

419. First, the question of "complicity" is to be distinguished from the question, already considered and answered in the negative, whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY. It is true that in certain national systems of criminal law, giving instructions or orders to persons to commit a criminal act is considered as the mark of complicity in the commission of that act. However, in the particular context of the application of the law of international responsibility in the domain of genocide, if it were established that a genocidal act had been committed on the instructions or under the direction of a

State, the necessary conclusion would be that the genocide was attributable to the State, which would be directly responsible for it, pursuant to the rule referred to above (paragraph 398), and no question of complicity would arise. But, as already stated, that is not the situation in the present case.

However there is no doubt that "complicity", in the sense of Article III, paragraph *(e)*, of the Convention, includes the provision of means to enable or facilitate the commission of the crime; it is thus on this aspect that the Court must focus. In this respect, it is noteworthy that, although "complicity", as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the "aid or assistance" furnished by one State for the commission of a wrongful act by another State.

420. In this connection, reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule, which reads as follows:

> "*Article 16*
>
> *Aid or assistance in the commission of an internationally wrongful act*
>
> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> *(a)* That State does so with knowledge of the circumstances of the internationally wrongful act; and
> *(b)* The act would be internationally wrongful if committed by that State."

Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between "complicity in genocide", within the meaning of Article III, paragraph *(e)*, of the Convention, and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 — setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for "complicity in genocide" within the meaning of Article III, paragraph *(e)*, which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished "aid or assistance" in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.

421. Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent *(dolus specialis)* which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent *(dolus specialis)* of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent *(dolus specialis)* of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.

422. The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.

423. A point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken; the Court has found (paragraph 295 above) that that decision was taken shortly before it was actually carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established

that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.

424. The Court concludes from the above that the international responsibility of the Respondent is not engaged for acts of complicity in genocide mentioned in Article III, paragraph *(e)*, of the Convention. In the light of this finding, and of the findings above relating to the other paragraphs of Article III, the international responsibility of the Respondent is not engaged under Article III as a whole.

* * *

## IX. The Question of Responsibility for Breach of the Obligations to Prevent and Punish Genocide

425. The Court now turns to the third and last of the questions set out in paragraph 379 above: has the respondent State complied with its obligations to prevent and punish genocide under Article I of the Convention?

Despite the clear links between the duty to prevent genocide and the duty to punish its perpetrators, these are, in the view of the Court, two distinct yet connected obligations, each of which must be considered in turn.

426. It is true that, simply by its wording, Article I of the Convention brings out the close link between prevention and punishment: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." It is also true that one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent. Lastly, it is true that, although in the subsequent Articles, the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a principle in Article I, only in Article VIII:

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

427. However, it is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the

obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court. The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.

This is the reason why the Court will first consider the manner in which the Respondent has performed its obligation to prevent before examining the situation as regards the obligation to punish.

*(1) The Obligation to Prevent Genocide*

428. As regards the obligation to prevent genocide, the Court thinks it necessary to begin with the following introductory remarks and clarifications, amplifying the observations already made above.

429. First, the Genocide Convention is not the only international instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit. Many other instruments include a similar obligation, in various forms: see, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Art. 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973 (Art. 4); the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (Art. 11); the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 (Art. 15). The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented.

The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law. The Court will therefore confine itself to determining the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a

determination is necessary to the decision to be given on the dispute before it. This will, of course, not absolve it of the need to refer, if need be, to the rules of law whose scope extends beyond the specific field covered by the Convention.

430. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.

431. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach

of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility:

> ". . . . . .
> 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent *(dolus specialis)*, it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.

In consequence, in the present case the Court will have to consider the Respondent's conduct, in the light of its duty to prevent, solely in connection with the massacres at Srebrenica, because these are the only acts in respect of which the Court has concluded in this case that genocide was committed.

432. Fourth and finally, the Court believes it especially important to lay stress on the differences between the requirements to be met before a State can be held to have violated the obligation to prevent genocide — within the meaning of Article I of the Convention — and those to be satisfied in order for a State to be held responsible for "complicity in genocide" — within the meaning of Article III, paragraph *(e)* — as previously discussed. There are two main differences; they are so significant as to make it impossible to treat the two types of violation in the same way.

In the first place, as noted above, complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent

results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.

In the second place, as also noted above, there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts. By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed. As will be seen below, this latter difference could prove decisive in the present case in determining the responsibility incurred by the Respondent.

433. In light of the foregoing, the Court will now consider the facts of the case. For the reasons stated above (paragraph 431), it will confine itself to the FRY's conduct vis-à-vis the Srebrenica massacres.

434. The Court would first note that, during the period under consideration, the FRY was in a position of influence over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.

435. Secondly, the Court cannot but note that, on the relevant date, the FRY was bound by very specific obligations by virtue of the two Orders indicating provisional measures delivered by the Court in 1993. In particular, in its Order of 8 April 1993, the Court stated, *inter alia*, that although not able, at that early stage in the proceedings, to make "definitive findings of fact or of imputability" (*I.C.J. Reports 1993*, p. 22, para. 44) the FRY was required to ensure:

> "that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide . . ." (*I.C.J. Reports 1993*, p. 24, para. 52 A (2)).

The Court's use, in the above passage, of the term "influence" is particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the Respondent maintained close links and on which it could exert a certain influence. Although in principle the two issues are separate, and the second will be examined below, it is not possible, when considering the way the Respondent discharged its obligation of prevention under the Convention, to fail to take account of the obligation incumbent upon it, albeit on a different basis, to implement the provisional measures indicated by the Court.

436. Thirdly, the Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave. Among the documents containing information clearly suggesting that such an awareness existed, mention should be made of the above-mentioned report (see paragraphs 283 and 285 above) of the United Nations Secretary-General prepared pursuant to General Assembly resolution 53/35 on the "fall of Srebrenica" (United Nations doc. A/54/549), which recounts the visit to Belgrade on 14 July 1995 of the European Union negotiator Mr. Bildt to meet Mr. Milošević. Mr. Bildt, in substance, informed Mr. Milošević of his serious concern and

> "pressed the President to arrange immediate access for the UNHCR to assist the people of Srebrenica, and for the ICRC to start to register those who were being treated by the BSA [Bosnian Serb Army] as prisoners of war".

437. The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the *Milošević* case. General Clark referred to a conversation that he had had with Milošević during the negotiation of the Dayton Agreement. He stated that

> "I went to Milošević and I asked him. I said, 'If you have so much influence over these [Bosnian] Serbs, how could you have allowed

> General Mladić to have killed all those people at Srebrenica?' And he looked to me — at me. His expression was very grave. He paused before he answered, and he said, 'Well, General Clark, I warned him not to do this, but he didn't listen to me.' And it was in the context of all the publicity at the time about the Srebrenica massacre." (*Milošević*, IT-02-54-T, Transcript, 16 December 2003, pp. 30494-30495).

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be "a military operation combined with a massacre" (*ibid.*, p. 30497). The ICTY record shows that Milošević denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark's testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal (*Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 280).

438. In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

Such is the case here. In view of the foregoing, the Court concludes that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.

* *

*(2) The Obligation to Punish Genocide*

439. The Court now turns to the question of the Respondent's compliance with its obligation to punish the crime of genocide stemming from Article I and the other relevant provisions of the Convention.

440. In its fifth final submission, Bosnia and Herzegovina requests the Court to adjudge and declare:

> "5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal."

441. This submission implicitly refers to Article VI of the Convention, according to which:

> "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

442. The Court would first recall that the genocide in Srebrenica, the commission of which it has established above, was not carried out in the Respondent's territory. It concludes from this that the Respondent cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices, or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide. Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia's other international obligations, *inter alia* its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia's domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise

territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

443. It is thus to the obligation for States parties to co-operate with the "international penal tribunal" mentioned in the above provision that the Court must now turn its attention. For it is certain that once such a court has been established, Article VI obliges the Contracting Parties "which shall have accepted its jurisdiction" to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory — even if the crime of which they are accused was committed outside it — and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.

444. In order to determine whether the Respondent has fulfilled its obligations in this respect, the Court must first answer two preliminary questions: does the ICTY constitute an "international penal tribunal" within the meaning of Article VI? And must the Respondent be regarded as having "accepted the jurisdiction" of the tribunal within the meaning of that provision?

445. As regards the first question, the Court considers that the reply must definitely be in the affirmative. The notion of an "international penal tribunal" within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to "those Contracting Parties which shall have accepted [the] jurisdiction" of the international penal tribunal. Yet, it would be contrary to the object of the provision to interpret the notion of "international penal tribunal" restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter. The Court has found nothing to suggest that such a possibility was considered by the authors of the Convention, but no intention of seeking to exclude it can be imputed to them.

446. The question whether the Respondent must be regarded as having "accepted the jurisdiction" of the ICTY within the meaning of Article VI must consequently be formulated as follows: is the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of the Security Council resolution which established it, or of

some other rule of international law? If so, it would have to be concluded that, for the Respondent, co-operation with the ICTY constitutes both an obligation stemming from the resolution concerned and from the United Nations Charter, or from another norm of international law obliging the Respondent to co-operate, and an obligation arising from its status as a party to the Genocide Convention, this last clearly being the only one of direct relevance in the present case.

447. For the purposes of the present case, the Court only has to determine whether the FRY was under an obligation to co-operate with the ICTY, and if so, on what basis, from when the Srebrenica genocide was committed in July 1995. To that end, suffice it to note that the FRY was under an obligation to co-operate with the ICTY from 14 December 1995 at the latest, the date of the signing and entry into force of the Dayton Agreement between Bosnia and Herzegovina, Croatia and the FRY. Annex 1A of that treaty, made binding on the parties by virtue of its Article II, provides that they must fully co-operate, notably with the ICTY. Thus, from 14 December 1995 at the latest, and at least on the basis of the Dayton Agreement, the FRY must be regarded as having "accepted [the] jurisdiction" of the ICTY within the meaning of Article VI of the Convention. This fact is sufficient for the Court in its consideration of the present case, since its task is to rule upon the Respondent's compliance with the obligation resulting from Article VI of the Convention in relation to the Srebrenica genocide, from when it was perpetrated to the present day, and since the Applicant has not invoked any failure to respect the obligation to co-operate alleged to have occurred specifically between July and December 1995. Similarly, the Court is not required to decide whether, between 1995 and 2000, the FRY's obligation to co-operate had any legal basis besides the Dayton Agreement. Needless to say, the admission of the FRY to the United Nations in 2000 provided a further basis for its obligation to co-operate: but while the legal basis concerned was thereby confirmed, that did not change the scope of the obligation. There is therefore no need, for the purposes of assessing how the Respondent has complied with its obligation under Article VI of the Convention, to distinguish between the period before and the period after its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.

448. Turning now to the facts of the case, the question the Court must answer is whether the Respondent has fully co-operated with the ICTY, in particular by arresting and handing over to the Tribunal any persons accused of genocide as a result of the Srebrenica genocide and finding themselves on its territory. In this connection, the Court would first observe that, during the oral proceedings, the Respondent asserted that the duty to co-operate had been complied with following the régime change in Belgrade in the year 2000, thus implicitly admitting that such had not been the case during the preceding period. The conduct of the

organs of the FRY before the régime change however engages the Respondent's international responsibility just as much as it does that of its State authorities from that date. Further, the Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladić, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him. In particular, counsel for the Applicant referred during the hearings to recent statements made by the Respondent's Minister for Foreign Affairs, reproduced in the national press in April 2006, and according to which the intelligence services of that State knew where Mladić was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive. The authenticity and accuracy of those statements has not been disputed by the Respondent at any time.

449. It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as a party to the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the Convention. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the "international penal tribunal", the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have "accepted [the] jurisdiction" of that "international penal tribunal"; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty. On this point, the Applicant's submissions relating to the violation by the Respondent of Articles I and VI of the Convention must therefore be upheld.

450. It follows from the foregoing considerations that the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged.

* * *

## X. The Question of Responsibility for Breach of the Court's Orders Indicating Provisional Measures

451. In its seventh submission Bosnia and Herzegovina requests the Court to adjudge and declare:

> "7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

452. The Court observes that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109). Although the Court only had occasion to make such a finding in a judgment subsequent to the Orders that it made in the present dispute, this does not affect the binding nature of those Orders, since in the Judgment referred to the Court did no more than give the provisions of the Statute the meaning and scope that they had possessed from the outset. It notes that provisional measures are aimed at preserving the rights of each of the parties pending the final decision of the Court. The Court's Orders of 8 April and 13 September 1993 indicating provisional measures created legal obligations which both Parties were required to satisfy.

453. The Court indicated the following provisional measures in the *dispositif*, paragraph 52, of its Order of 8 April 1993:

> "A. (1). . . . . .
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;
>
> (2). . . . . .
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;
>
> . . . . . .

B. . . . . .

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution."

454. The Court reaffirmed these measures in the *dispositif* of its Order of 13 September 1993.

455. From the Applicant's written and oral pleadings as a whole, it is clear that the Applicant is not accusing the Respondent of failing to respect measure B above, and that its submissions relate solely to the measures indicated in paragraph A, subparagraphs (1) and (2). It is therefore only to that extent that the Court will consider whether the Respondent has fully complied with its obligation to respect the measures ordered by the Court.

456. The answer to this question may be found in the reasoning in the present Judgment relating to the Applicant's other submissions to the Court. From these it is clear that in respect of the massacres at Srebrenica in July 1995 the Respondent failed to fulfil its obligation indicated in paragraph 52 A (1) of the Order of 8 April 1993 and reaffirmed in the Order of 13 September 1993 to "take all measures within its power to prevent commission of the crime of genocide". Nor did it comply with the measure indicated in paragraph 52 A (2) of the Order of 8 April 1993, reaffirmed in the Order of 13 September 1993, insofar as that measure required it to "ensure that any . . . organizations and persons which may be subject to its . . . influence . . . do not commit any acts of genocide".

457. However, the remainder of the Applicant's seventh submission claiming that the Respondent failed to comply with the provisional measures indicated must be rejected for the reasons set out above in respect of the Applicant's other submissions (paragraphs 415 and 424).

458. As for the request that the Court hold the Respondent to be under an obligation to the Applicant to provide symbolic compensation, in an amount to be determined by the Court, for the breach thus found, the Court observes that the question of compensation for the injury caused to the Applicant by the Respondent's breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations under the Genocide Convention. It will therefore be dealt with below, in connection with consideration of points *(b)* and *(c)* of the Respondent's sixth submission, which concern the financial compensation which the Applicant claims to be owed by the Respondent.

* * *

## XI. The Question of Reparation

459. Having thus found that the Respondent has failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, the Court turns to the question of reparation. The Applicant, in its final submissions, has asked the Court to decide that the Respondent

> "must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for . . . violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused" (submission 6 *(b)*).

The Applicant also asks the Court to decide that the Respondent

> "shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal" (submission 6 *(a)*),

and that the Respondent "shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court" (submission 6 *(d)*). These submissions, and in particular that relating to compensation, were however predicated on the basis that the Court would have upheld, not merely that part of the Applicant's claim as relates to the obligation of prevention and punishment, but also the claim that the Respondent has violated its substantive obligation not to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement, and the claim that the Respondent has aided and abetted genocide. The Court has now to consider what is the appropriate form of reparation for the other forms of violation of the Convention which have been alleged against the Respondent and which the Court has found to have been established, that is to say breaches of the obligations to prevent and punish.

460. The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that "reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47: see

also Article 31 of the ILC's Articles on State Responsibility). In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it" (*I.C.J. Reports 1997*, p. 81, para. 152.; cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 198, paras. 152-153; see also Article 36 of the ILC's Articles on State Responsibility). It is therefore appropriate to consider what were the consequences of the failure of the Respondent to comply with its obligations under the Genocide Convention to prevent and punish the crime of genocide, committed in Bosnia and Herzegovina, and what damage can be said to have been caused thereby.

461. The Court has found that the authorities of the Respondent could not have been unaware of the grave risk of genocide once the VRS forces had decided to take possession of the Srebrenica enclave, and that in view of its influence over the events, the Respondent must be held to have had the means of action by which it could seek to prevent genocide, and to have manifestly refrained from employing them (paragraph 438). To that extent therefore it failed to comply with its obligation of prevention under the Convention. The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. To make this finding, the Court did not have to decide whether the acts of genocide committed at Srebrenica would have occurred anyway even if the Respondent had done as it should have and employed the means available to it. This is because, as explained above, the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome. It therefore does not follow from the Court's reasoning above in finding a violation by the Respondent of its obligation of prevention that the atrocious suffering caused by the genocide committed at Srebrenica would not have occurred had the violation not taken place.

462. The Court cannot however leave it at that. Since it now has to rule on the claim for reparation, it must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the

principle of customary international law stated above. In this context, the question just mentioned, whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant, for the definition of the extent of the obligation of reparation borne by the Respondent as a result of its wrongful conduct. The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.

463. It is however clear that the Applicant is entitled to reparation in the form of satisfaction, and this may take the most appropriate form, as the Applicant itself suggested, of a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide. As in the *Corfu Channel (United Kingdom* v. *Albania)* case, the Court considers that a declaration of this kind is "in itself appropriate satisfaction" (*Merits, Judgment, I.C.J. Reports 1949*, pp. 35, 36), and it will, as in that case, include such a declaration in the operative clause of the present Judgment. The Applicant acknowledges that this failure is no longer continuing, and accordingly has withdrawn the request made in the Reply that the Court declare that the Respondent "has violated *and is violating* the Convention" (emphasis added).

464. The Court now turns to the question of the appropriate reparation for the breach by the Respondent of its obligation under the Convention to punish acts of genocide; in this respect, the Applicant asserts the existence of a continuing breach, and therefore maintains *(inter alia)* its request for a declaration in that sense. As noted above (paragraph 440), the Applicant includes under this heading the failure "to transfer individuals accused of genocide or any other act prohibited by the Conven-

tion to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal"; and the Court has found that in that respect the Respondent is indeed in breach of Article VI of the Convention (paragraph 449 above). A declaration to that effect is therefore one appropriate form of satisfaction, in the same way as in relation to the breach of the obligation to prevent genocide. However, the Applicant asks the Court in this respect to decide more specifically that

> "Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal."

465. It will be clear from the Court's findings above on the question of the obligation to punish under the Convention that it is satisfied that the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under Articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić (paragraph 448). The Court will therefore make a declaration in these terms in the operative clause of the present Judgment, which will in its view constitute appropriate satisfaction.

466. In its final submissions, the Applicant also requests the Court to decide "that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court". As presented, this submission relates to all the wrongful acts, i.e. breaches of the Genocide Convention, attributed by the Applicant to the Respondent, thus including alleged breaches of the Respondent's obligation not itself to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement. Insofar as the Court has not upheld these claims, the submission falls. There remains however the question whether it is appropriate to direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide. The Court notes the reasons advanced by counsel for the Applicant at the hearings in support of the submission, which relate for the most part to "recent events [which] cannot fail to cause concern as to whether movements in Serbia and Montenegro calling for genocide have disappeared". It considers that these indications do not constitute sufficient grounds for requiring guarantees of non-repetition. The Applicant also referred in this connection to the question of non-compliance with provisional measures, but this matter has already been examined above (paragraphs 451 to 458), and will be mentioned further below. In

the circumstances, the Court considers that the declaration referred to in paragraph 465 above is sufficient as regards the Respondent's continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate.

467. Finally, the Applicant has presented the following submission:

> "That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

The provisional measures indicated by the Court's Order of 8 April 1993, and reiterated by the Order of 13 September 1993, were addressed specifically to the Respondent's obligation "to prevent commission of the crime of genocide" and to certain measures which should "in particular" be taken to that end (*I.C.J. Reports 1993*, p. 24, para. 52 (A) (1) and (2)).

468. Provisional measures under Article 41 of the Statute are indicated "pending [the] final decision" in the case, and the measures indicated in 1993 will thus lapse on the delivery of the present Judgment (cf. *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objections, Judgment, I.C.J. Reports 1952*, p. 114; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 112). However, as already observed (paragraph 452 above), orders made by the Court indicating provisional measures under Article 41 of the Statute have binding effect, and their purpose is to protect the rights of either party, pending the final decision in the case.

469. The Court has found above (paragraph 456) that, in respect of the massacres at Srebrenica in July 1995, the Respondent failed to take measures which would have satisfied the requirements of paragraphs 52 (A) (1) and (2) of the Court's Order of 8 April 1993 (reaffirmed in the Order of 13 September 1993). The Court however considers that, for purposes of reparation, the Respondent's non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention. The Court does not therefore find it appropriate to give effect to the Applicant's request for an order for symbolic compensation in this respect. The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court's Orders indicating provisional measures.

470. The Court further notes that one of the provisional measures indicated in the Order of 8 April and reaffirmed in that of 13 September 1993 was addressed to both Parties. The Court's findings in paragraphs 456 to 457 and 469 are without prejudice to the question whether the Applicant did not also fail to comply with the Orders indicating provisional measures.

* * *

## XII. Operative Clause

471. For these reasons,

THE COURT,

(1) by ten votes to five,

*Rejects* the objections contained in the final submissions made by the Respondent to the effect that the Court has no jurisdiction; and *affirms* that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to adjudicate upon the dispute brought before it on 20 March 1993 by the Republic of Bosnia and Herzegovina;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; *Judge* ad hoc Mahiou;

AGAINST: *Judges* Ranjeva, Shi, Koroma, Skotnikov; *Judge* ad hoc Kreća;

(2) by thirteen votes to two,

*Finds* that Serbia has not committed genocide, through its organs or persons whose acts engage its responsibility under customary international law, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President* Higgins; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Kreća;

AGAINST: *Vice-President* Al-Khasawneh; *Judge* ad hoc Mahiou;

(3) by thirteen votes to two,

*Finds* that Serbia has not conspired to commit genocide, nor incited the commission of genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President* Higgins; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Kreća;

AGAINST: *Vice-President* Al-Khasawneh; *Judge* ad hoc Mahiou;

(4) by eleven votes to four,

*Finds* that Serbia has not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: *President* Higgins; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Sepúlveda-Amor, Skotnikov; *Judge* ad hoc Kreća;

AGAINST: *Vice-President* Al-Khasawneh; *Judges* Keith, Bennouna; *Judge* ad hoc Mahiou;

(5) by twelve votes to three,

*Finds* that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; *Judge* ad hoc Mahiou;

AGAINST: *Judges* Tomka, Skotnikov; *Judge* ad hoc Kreća;

(6) by fourteen votes to one,

*Finds* that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Mahiou;

AGAINST: *Judge* ad hoc Kreća;

(7) by thirteen votes to two,

*Finds* that Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; *Judge* ad hoc Mahiou;

AGAINST: *Judge* Skotnikov; *Judge* ad hoc Kreća;

(8) by fourteen votes to one,

*Decides* that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention

and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal;

IN FAVOUR: *President* Higgins; *Vice-President* Al-Khasawneh; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Mahiou;

AGAINST: *Judge* ad hoc Kreća;

(9) by thirteen votes to two,

*Finds* that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court's findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate.

IN FAVOUR: *President* Higgins; *Judges* Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; *Judge* ad hoc Kreća;

AGAINST: *Vice-President* Al-Khasawneh; *Judge* ad hoc Mahiou.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of February, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Bosnia and Herzegovina and the Government of Serbia, respectively.

*(Signed)* Rosalyn HIGGINS,
President.

*(Signed)* Philippe COUVREUR,
Registrar.

Vice-President AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judges RANJEVA, SHI and KOROMA append a joint dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a separate opinion to the Judgment of the Court; Judges SHI and KOROMA append a joint declaration to the Judgment of the Court; Judges OWADA and TOMKA append separate opinions to the Judgment of the Court; Judges KEITH, BENNOUNA and SKOTNIKOV append declarations

to the Judgment of the Court; Judge *ad hoc* MAHIOU appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* KREĆA appends a separate opinion to the Judgment of the Court.

*(Initialled)* R.H.

*(Initialled)* Ph.C.

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# General comment No. 21

## Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)

## I. Introduction and basic premises

1. Cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.

2. The right of everyone to take part in cultural life is closely related to the other cultural rights contained in article 15: the right to enjoy the benefits of scientific progress and its applications (art. 15, para. 1 (b)); the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author (art. 15, para. 1 (c)); and the right to freedom indispensable for scientific research and creative activity (art. 15, para. 3). The right of everyone to take part in cultural life is also intrinsically linked to the right to education (arts. 13 and 14), through which individuals and communities pass on their values, religion, customs, language and other cultural references, and which helps to foster an atmosphere of mutual understanding and respect for cultural values. The right to take part in cultural life is also interdependent on other rights enshrined in the Covenant, including the right of all peoples to self-determination (art. 1) and the right to an adequate standard of living (art. 11).

3. The right of everyone to take part in cultural life is also recognized in article 27, paragraph 1, of the Universal Declaration of Human Rights, which states that "everyone has the right freely to participate in the cultural life of the community". Other international instruments refer to the right to equal participation in cultural activities;[1] the right to participate in all aspects of social and cultural life;[2] the right to participate fully in cultural

[1] International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (e) (vi).
[2] Convention on the Elimination of All Forms of Discrimination against Women, art. 13 (c).

and artistic life;[3] the right of access to and participation in cultural life;[4] and the right to take part on an equal basis with others in cultural life.[5] Instruments on civil and political rights,[6] on the rights of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public,[7] and to participate effectively in cultural life,[8] on the rights of indigenous peoples to their cultural institutions, ancestral lands, natural resources and traditional knowledge,[9] and on the right to development[10] also contain important provisions on this subject.

4. In the present general comment, the Committee addresses specifically the right of everyone under article 15 paragraph 1 (a), to take part in cultural life, in conjunction with paragraphs 2, 3 and 4, as they relate to culture, creative activity and the development of international contacts and cooperation in cultural fields, respectively. The right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author, as provided for in article 15, paragraph 1 (c), was the subject of general comment No. 17 (2005).

5. The Committee has gained long experience on this subject through its consideration of reports and dialogue with States parties. In addition, it has twice organized a day of general discussion, once in 1992 and again in 2008, with representatives of international organizations and civil society with a view to preparing the present general comment.

## II. Normative content of article 15, paragraph 1 (a)

6. The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).

7. The decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality. This is especially important for all indigenous peoples, who have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law, as well as the United Nations Declaration on the Rights of Indigenous Peoples.

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[3] Convention on the Rights of the Child, art. 31, para. 2.

[4] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43, para. 1 (g).

[5] Convention on the Rights of Persons with Disabilities, art. 30, para. 1.

[6] In particular the International Covenant on Civil and Political Rights, arts. 17, 18, 19, 21 and 22.

[7] International Covenant on Civil and Political Rights, art. 27.

[8] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2, paras. 1 and 2. See also Framework Convention for the Protection of National Minorities (Council of Europe, ETS No. 157), art. 15.

[9] United Nations Declaration on the Rights of Indigenous Peoples, in particular arts. 5, 8, and 10–13 ff. See also ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, in particular arts. 2, 5, 7, 8, and 13–15 ff.

[10] Declaration on the Right to Development (General Assembly resolution 41/128), art. 1. In its general comment No. 4, paragraph 9, the Committee considers that rights cannot be viewed in isolation from other human rights contained in the two international Covenants and other applicable international instruments.

## A. Components of article 15, paragraph 1 (a)

8. The content or scope of the terms used in article 15, paragraph 1 (a), on the right of everyone to take part in cultural life, is to be understood as set out below:

**"Everyone"**

9. In its general comment No. 17 on the right to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which one is the author,[11] the Committee recognizes that the term "everyone" in the first line of article 15 may denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.

**"Cultural life"**

10. Various definitions of "culture" have been postulated in the past and others may arise in the future. All of them, however, refer to the multifaceted content implicit in the concept of culture.[12]

11. In the Committee's view, culture is a broad, inclusive concept encompassing all manifestations of human existence. The expression "cultural life" is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.

12. The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society.

13. The Committee considers that culture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food,

[11] See definition of "author" in general comment No. 17 (2005), paras. 7 and 8.

[12] Culture is (a) "the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs" (UNESCO Universal Declaration on Cultural Diversity, fifth preambular paragraph); (b) "in its very essence, a social phenomenon resulting from individuals joining and cooperating in creative activities [and] is not limited to access to works of art and the human rights, but is at one and the same time the acquisition of knowledge, the demand for a way of life and need to communicate" (UNESCO recommendation on participation by the people at large in cultural life and their contribution to it, 1976, the Nairobi recommendation, fifth preambular paragraph (a) and (c)); (c) "covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development" (Fribourg Declaration on Cultural Rights, art. 2 (a) (definitions); (d) "the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups [and] a system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life". (Rodolfo Stavenhagen, "Cultural Rights: A social science perspective", in H. Niec (ed.), *Cultural Rights and Wrongs: A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights*, Paris and Leicester, UNESCO Publishing and Institute of Art and Law).

clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.

**"To participate" or "to take part"**

14. The terms "to participate" and "to take part" have the same meaning and are used interchangeably in other international and regional instruments.

15. There are, among others, three interrelated main components of the right to participate or take part in cultural life: (a) participation in, (b) access to, and (c) contribution to cultural life.

(a) *Participation* covers in particular the right of everyone — alone, or in association with others or as a community — to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one's own cultural practices and to express oneself in the language of one's choice. Everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity;

(b) *Access* covers in particular the right of everyone — alone, in association with others or as a community — to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water,[13] biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities;

(c) *Contribution to cultural life* refers to the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights.[14]

## B. Elements of the right to take part in cultural life

16. The following are necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination.

(a) *Availability* is the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sports stadiums; literature, including folklore, and the arts in all forms; the shared open spaces essential to cultural interaction, such as parks, squares, avenues and streets; nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as

[13] General comment No. 15 (2002), paras. 6 and 11.

[14] UNESCO Universal Declaration on Cultural Diversity, art. 5. See also Fribourg Declaration on Cultural Rights, art. 7.

well as values, which make up identity and contribute to the cultural diversity of individuals and communities. Of all the cultural goods, one of special value is the productive intercultural kinship that arises where diverse groups, minorities and communities can freely share the same territory;

(b) *Accessibility* consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination.[15] It is essential, in this regard, that access for older persons and persons with disabilities, as well as for those who live in poverty, is provided and facilitated. Accessibility also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination.

(c) *Acceptability* entails that the laws, policies, strategies, programmes and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved. In this regard, consultations should be held with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them;

(d) *Adaptability* refers to the flexibility and relevance of strategies, policies, programmes and measures adopted by the State party in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities;

(e) *Appropriateness* refers to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples.[16] The Committee has in many instances referred to the notion of cultural appropriateness (or cultural acceptability or adequacy) in past general comments, in relation in particular to the rights to food, health, water, housing and education. The way in which rights are implemented may also have an impact on cultural life and cultural diversity. The Committee wishes to stress in this regard the need to take into account, as far as possible, cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed.

## C. Limitations to the right to take part in cultural life

17. The right of everyone to take part in cultural life is closely linked to the enjoyment of other rights recognized in the international human rights instruments. Consequently, States parties have a duty to implement their obligations under article 15, paragraph 1 (a), together with their obligations under other provisions of the Covenant and international instruments, in order to promote and protect the entire range of human rights guaranteed under international law.

18. The Committee wishes to recall that, while account must be taken of national and regional particularities and various historical, cultural and religious backgrounds, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms.[17] Thus, no one may invoke cultural

[15] See general comment No. 20 (2009).
[16] Fribourg Declaration on Cultural Rights, art. 1 (e).
[17] Vienna Declaration and Programme of Action, para. 5.

diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.[18]

19. Applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights. Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed. The Committee also wishes to stress the need to take into consideration existing international human rights standards on limitations that can or cannot be legitimately imposed on rights that are intrinsically linked to the right to take part in cultural life, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association.

20. Article 15, paragraph 1 (a) may not be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Covenant or at their limitation to a greater extent than is provided for therein.[19]

## D. Special topics of broad application

### Non-discrimination and equal treatment

21. Article 2, paragraph 2, and article 3 of the Covenant prohibit any discrimination in the exercise of the right of everyone to take part in cultural life on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[20]

22. In particular, no one shall be discriminated against because he or she chooses to belong, or not to belong, to a given cultural community or group, or to practise or not to practise a particular cultural activity. Likewise, no one shall be excluded from access to cultural practices, goods and services.

23. The Committee emphasizes that the elimination of all forms of discrimination in order to guarantee the exercise of the right of everyone to take part in cultural life can, in many cases, be achieved with limited resources[21] by the adoption, amendment or repeal of legislation, or through publicity and information. In particular, a first and important step towards the elimination of discrimination, whether direct or indirect, is for States to recognize the existence of diverse cultural identities of individuals and communities on their territories. The Committee also refers States parties to its general comment No. 3 (1990), paragraph 12, on the nature of States parties' obligations, which establishes that, even in times of severe resource constraints, the most disadvantaged and marginalized individuals and groups can and indeed must be protected by the adoption of relatively low-cost targeted programmes.

[18] Universal Declaration on Cultural Diversity, art. 4.
[19] International Covenant on Economic, Social and Cultural Rights, art. 5, para. 1.
[20] See general comment No. 20 (2009).
[21] See general comment No. 3 (1990); statement by the Committee: an evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the Covenant (E/C.12/2007/1).

24. The adoption of temporary special measures with the sole purpose of achieving de facto equality does not constitute discrimination, provided that such measures do not perpetuate unequal protection or form a separate system of protection for certain individuals or groups of individuals, and that they are discontinued when the objectives for which they were taken have been achieved.

## E. Persons and communities requiring special protection

### 1. Women

25. Ensuring the equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties.[22] Implementing article 3 of the Covenant, in relation to article 15, paragraph 1 (a), requires, inter alia, the elimination of institutional and legal obstacles as well as those based on negative practices, including those attributed to customs and traditions, that prevent women from participating fully in cultural life, science education and scientific research.[23]

### 2. Children

26. Children play a fundamental role as the bearers and transmitters of cultural values from generation to generation. States parties should take all the steps necessary to stimulate and develop children's full potential in the area of cultural life, with due regard for the rights and responsibilities of their parents or guardians. In particular, when taking into consideration their obligations under the Covenant and other human rights instruments on the right to education, including with regard to the aims of education,[24] States should recall that the fundamental aim of educational development is the transmission and enrichment of common cultural and moral values in which the individual and society find their identity and worth.[25] Thus, education must be culturally appropriate, include human rights education, enable children to develop their personality and cultural identity and to learn and understand cultural values and practices of the communities to which they belong, as well as those of other communities and societies.

27. The Committee wishes to recall in this regard that educational programmes of States parties should respect the cultural specificities of national or ethnic, linguistic and religious minorities as well as indigenous peoples, and incorporate in those programmes their history, knowledge and technologies, as well as their social, economic and cultural values and aspirations. Such programmes should be included in school curricula for all, not only for minorities and indigenous peoples. States parties should adopt measures and spare no effort to ensure that educational programmes for minorities and indigenous groups are conducted on or in their own language, taking into consideration the wishes expressed by communities and in the international human rights standards in this area.[26] Educational programmes should also transmit the necessary knowledge to enable everyone to participate fully and on an equal footing in their own and in national communities.

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[22] General comment No. 16 (2005), para. 16.

[23] Ibid., para. 31.

[24] In particular articles 28 and 29 of the Convention on the Rights of the Child.

[25] World Declaration on Education for All: Meeting Basic Learning Needs, art. I-3.

[26] In particular the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the Declaration on the Rights of Indigenous Peoples and the International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169).

### 3. Older persons

28. The Committee is of the view that States parties to the Covenant are obligated to pay particular attention to the promotion and protection of the cultural rights of older persons. The Committee emphasizes the important role that older persons continue to play in most societies by reason of their creative, artistic and intellectual abilities, and as the transmitters of information, knowledge, traditions and cultural values. Consequently, the Committee attaches particular importance to the message contained in recommendations 44 and 48 of the Vienna International Plan of Action on Aging, calling for the development of programmes featuring older persons as teachers and transmitters of knowledge, culture and spiritual values, and encouraging Governments and international organizations to support programmes aimed at providing older persons with easier physical access to cultural institutions (such as museums, theatres, concert halls and cinemas).[27]

29. The Committee therefore urges States parties to take account of the recommendations contained in the United Nations Principles for Older Persons, and in particular of principle 7, that older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations; and principle 16, that older persons should have access to the educational, cultural, spiritual and recreational resources of society.[28]

### 4. Persons with disabilities

30. Paragraph 17 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities provides that States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas, and that States should promote accessibility to and availability of places for cultural performances and services.[29]

31. In order to facilitate participation of persons with disabilities in cultural life, States parties should, inter alia, recognize the right of these persons to have access to cultural material, television programmes, films, theatre and other cultural activities, in accessible forms; to have access to places where cultural performances or services are offered, such as theatres, museums, cinemas, libraries and tourist services and, to the extent possible, to monuments and places of national cultural importance; to the recognition of their specific cultural and linguistic identity, including sign language and the culture of the deaf; and to the encouragement and promotion of their participation, to the extent possible, in recreational, leisure and sporting activities.[30]

### 5. Minorities

32. In the Committee's view, article 15, paragraph 1 (a) of the Covenant also includes the right of minorities and of persons belonging to minorities to take part in the cultural life of society, and also to conserve, promote and develop their own culture.[31] This right entails the obligation of States parties to recognize, respect and protect minority cultures as an essential component of the identity of the States themselves. Consequently, minorities have

[27] General comment No. 6 (1995), paras. 38 and 40.
[28] General comment No. 6 (1995), para. 39.
[29] General Assembly resolution 48/96, annex.
[30] Convention on the Rights of Persons with Disabilities, art. 30.
[31] International Covenant on Civil and Political Rights, art. 27; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, para. 1 (1).

the right to their cultural diversity, traditions, customs, religion, forms of education, languages, communication media (press, radio, television, Internet) and other manifestations of their cultural identity and membership.

33. Minorities, as well as persons belonging to minorities, have the right not only to their own identity but also to development in all areas of cultural life. Any programme intended to promote the constructive integration of minorities and persons belonging to minorities into the society of a State party should thus be based on inclusion, participation and non-discrimination, with a view to preserving the distinctive character of minority cultures.

### 6. Migrants

34. States parties should pay particular attention to the protection of the cultural identities of migrants, as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events. States parties should not prevent migrants from maintaining their cultural links with their countries of origin.[32]

35. As education is intrinsically related to culture, the Committee recommends that States parties adopt appropriate measures to enable the children of migrants to attend, on a basis of equal treatment, State-run educational institution and programmes.

### 7. Indigenous peoples

36. States parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples.[33] The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.[34] Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.[35] States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.

37. Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts.[36] States parties should respect the principle of free,

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[32] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 31.

[33] See Declaration on the Rights of Indigenous Peoples, art. 1. See also ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), art. 1, para. 2.

[34] United Nations Declaration on the Rights of Indigenous Peoples, art. 26 (a).

[35] Convention No. 169, arts. 13–16. See also the United Nations Declaration on the Rights of Indigenous Peoples, arts. 20 and 33.

[36] ILO Convention No. 169, arts. 5 and 31. See also the United Nations Declaration on the Rights of Indigenous Peoples, arts. 11–13.

prior and informed consent of indigenous peoples in all matters covered by their specific rights.[37]

### 8. Persons living in poverty

38. The Committee considers that every person or group of persons is endowed with a cultural richness inherent in their humanity and therefore can make, and continues to make, a significant contribution to the development of culture. Nevertheless, it must be borne in mind that, in practice, poverty seriously restricts the ability of a person or a group of persons to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to enjoy effectively their own culture. The common underlying theme in the experience of persons living in poverty is a sense of powerlessness that is often a consequence of their situation. Awareness of their human rights, and particularly the right of every person to take part in cultural life, can significantly empower persons or groups of persons living in poverty.[38]

39. Culture as a social product must be brought within the reach of all, on the basis of equality, non-discrimination and participation. Therefore, in implementing the legal obligations enshrined in article 15, paragraph 1 (a), of the Covenant, States parties must adopt, without delay, concrete measures to ensure adequate protection and the full exercise of the right of persons living in poverty and their communities to enjoy and take part in cultural life. In this respect, the Committee refers States parties to its statement on poverty and the International Covenant on Economic, Social and Cultural Rights.[39]

## F. Cultural diversity and the right to take part in cultural life

40. The protection of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, and requires the full implementation of cultural rights, including the right to take part in cultural life.[40]

41. Cultures have no fixed borders. The phenomena of migration, integration, assimilation and globalization have brought cultures, groups and individuals into closer contact than ever before, at a time when each of them is striving to keep their own identity.

42. Given that globalization has positive and negative effects, States parties must take appropriate steps to avoid its adverse consequences on the right to take part in cultural life, particularly for the most disadvantaged and marginalized individuals and groups, such as persons living in poverty. Far from having produced a single world culture, globalization has demonstrated that the concept of culture implies the coexistence of different cultures.

43. States parties should also bear in mind that cultural activities, goods and services have economic and cultural dimensions, conveying identity, values and meanings. They must not be treated as having solely a commercial value.[41] In particular, bearing in mind article 15 (2) of the Covenant, States parties should adopt measures to protect and promote

[37] ILO Convention No. 169, art. 6 (a). See also the United Nations Declaration on the Rights of Indigenous Peoples, art. 19.
[38] See E/C.12/2001/10, para. 5.
[39] Ibid., para. 14.
[40] See the Universal Declaration on Cultural Diversity, arts. 4 and 5.
[41] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, preamble, para. 18. See also the Universal Declaration on Cultural Diversity, art. 8.

the diversity of cultural expressions,[42] and enable all cultures to express themselves and make themselves known.[43] In this respect, due regard should be paid to human rights standards, including the right to information and expression, and to the need to protect the free flow of ideas by word and image. The measures may also aim at preventing the signs, symbols and expressions of a particular culture from being taken out of context for the sole purpose of marketing or exploitation by the mass media.

# III. States parties' obligations

## A. General legal obligations

44. The Covenant imposes on States parties the immediate obligation to guarantee that the right set out in article 15, paragraph 1 (a), is exercised without discrimination, to recognize cultural practices and to refrain from interfering in their enjoyment and development.[44]

45. While the Covenant provides for the "progressive" realization of the rights set out in its provisions and recognizes the problems arising from limited resources, it imposes on States parties the specific and continuing obligation to take deliberate and concrete measures aimed at the full implementation of the right of everyone to take part in cultural life.[45]

46. As in the case of the other rights set out in the Covenant, regressive measures taken in relation to the right of everyone to take part in cultural life are not permitted. Consequently, if any such measure is taken deliberately, the State party has to prove that it was taken after careful consideration of all alternatives and that the measure in question is justified, bearing in mind the complete set of rights recognized in the Covenant.[46]

47. Given the interrelationship between the rights set out in article 15 of the Covenant (see paragraph 2 above), the full realization of the right of everyone to take part in cultural life also requires the adoption of steps necessary for the conservation, development and dissemination of science and culture, as well as steps to ensure respect for the freedom indispensable to scientific research and creative activity, in accordance with paragraphs 2 and 3, respectively, of article 15.[47]

## B. Specific legal obligations

48. The right of everyone to take part in cultural life, like the other rights enshrined in the Covenant, imposes three types or levels of obligations on States parties: (a) the obligation to respect; (b) the obligation to protect; and (c) the obligation to fulfil. The

[42] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. IV-5.

[43] See the Universal Declaration on Cultural Diversity, art. 6.

[44] See general comment No. 20 (2009).

[45] See general comments No. 3 (1990), para. 9, No. 13 (1999), para. 44, No. 14 (2000), para. 31, No. 17 (2005), para. 26 and No. 18 (2005), para. 20. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 21.

[46] See general comments No. 3 (1990), para. 9, No. 13 (1999), para. 45, No. 14 (2000), para. 32, No. 17 (2005), para. 27 and No. 18 (2005), para. 21.

[47] See general comments No. 13 (1999), paras. 46 and 47, No. 14 (2000), para. 33, No. 17 (2005), para. 28 and No. 18 (2005), para. 22.

obligation to respect requires States parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life. The obligation to protect requires States parties to take steps to prevent third parties from interfering in the right to take part in cultural life. Lastly, the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in article 15, paragraph 1 (a), of the Covenant.[48]

49. The obligation to respect includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group:

(a) To freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected;

This includes the right not to be subjected to any form of discrimination based on cultural identity, exclusion or forced assimilation,[49] and the right of all persons to express their cultural identity freely and to exercise their cultural practices and way of life. States parties should consequently ensure that their legislation does not impair the enjoyment of these rights through direct or indirect discrimination.

(b) To enjoy freedom of opinion, freedom of expression in the language or languages of their choice, and the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind;

This implies the right of all persons to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning.[50]

(c) To enjoy the freedom to create, individually, in association with others, or within a community or group, which implies that States parties must abolish censorship of cultural activities in the arts and other forms of expression, if any;

This obligation is closely related to the duty of States parties, under article 15, paragraph 3, "to respect the freedom indispensable for scientific research and creative activity".

(d) To have access to their own cultural and linguistic heritage and to that of others;

In particular, States must respect free access by minorities to their own culture, heritage and other forms of expression, as well as the free exercise of their cultural identity and practices. This includes the right to be taught about one's own culture as well as those of others.[51] States parties must also respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life.

[48] See general comments No. 13 (1990), paras. 46 and 47, No. 14 (2000), para. 33, No. 17 (2005), para. 28 and No. 18 (2005), para. 22. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 6.

[49] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 31

[50] Universal Declaration on Cultural Diversity, para. 8.

[51] Fribourg Declaration on Cultural Rights, arts. 6 (b) and 7 (b).

(e) To take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights under article 15, paragraph 1 (a).

50. In many instances, the obligations to respect and to protect freedoms, cultural heritage and diversity are interconnected. Consequently, the obligation to protect is to be understood as requiring States to take measures to prevent third parties from interfering in the exercise of rights listed in paragraph 49 above. In addition, States parties are obliged to:

(a) Respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters;

Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others.[52]

(b) Respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups, in economic development and environmental policies and programmes;

Particular attention should be paid to the adverse consequences of globalization, undue privatization of goods and services, and deregulation on the right to participate in cultural life.

(c) Respect and protect the cultural productions of indigenous peoples, including their traditional knowledge, natural medicines, folklore, rituals and other forms of expression;

This includes protection from illegal or unjust exploitation of their lands, territories and resources by State entities or private or transnational enterprises and corporations.

(d) Promulgate and enforce legislation to prohibit discrimination based on cultural identity, as well as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, taking into consideration articles 19 and 20 of the International Covenant on Civil and Political Rights and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

51. The obligation to fulfil can be subdivided into the obligations to facilitate, promote and provide.

52. States parties are under an obligation to facilitate the right of everyone to take part in cultural life by taking a wide range of positive measures, including financial measures, that would contribute to the realization of this right, such as:

(a) Adopting policies for the protection and promotion of cultural diversity, and facilitating access to a rich and diversified range of cultural expressions, including through, inter alia, measures aimed at establishing and supporting public institutions and the cultural infrastructure necessary for the implementation of such policies; and measures aimed at enhancing diversity through public broadcasting in regional and minority languages;

(b) Adopting policies enabling persons belonging to diverse cultural communities to engage freely and without discrimination in their own cultural practices and those of others, and to choose freely their way of life;

[52] Universal Declaration on Cultural Diversity, art. 7.

(c) Promoting the exercise of the right of association for cultural and linguistic minorities for the development of their cultural and linguistic rights;

(d) Granting assistance, financial or other, to artists, public and private organizations, including science academies, cultural associations, trade unions and other individuals and institutions engaged in scientific and creative activities;

(e) Encouraging scientists, artists and others to take part in international scientific and cultural research activities, such as symposiums, conferences, seminars and workshops;

(f) Taking appropriate measures or programmes to support minorities or other communities, including migrant communities, in their efforts to preserve their culture;

(g) Taking appropriate measures to remedy structural forms of discrimination so as to ensure that the underrepresentation of persons from certain communities in public life does not adversely affect their right to take part in cultural life;

(h) Taking appropriate measures to create conditions conducive to a constructive intercultural relationship between individuals and groups based on mutual respect, understanding and tolerance;

(i) Taking appropriate measures to conduct public campaigns through the media, educational institutions and other available channels, with a view to eliminating any form of prejudice against individuals or communities, based on their cultural identity.

53. The obligation to promote requires States parties to take effective steps to ensure that there is appropriate education and public awareness concerning the right to take part in cultural life, particularly in rural and deprived urban areas, or in relation to the specific situation of, inter alia, minorities and indigenous peoples. This includes education and awareness-raising on the need to respect cultural heritage and cultural diversity.

54. The obligation to fulfil requires that States parties must provide all that is necessary for fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons outside their control, to realize this right for themselves with the means at their disposal. This level of obligation includes, for example:

(a) The enactment of appropriate legislation and the establishment of effective mechanisms allowing persons, individually, in association with others, or within a community or group, to participate effectively in decision-making processes, to claim protection of their right to take part in cultural life, and to claim and receive compensation if their rights have been violated;

(b) Programmes aimed at preserving and restoring cultural heritage;

(c) The inclusion of cultural education at every level in school curricula, including history, literature, music and the history of other cultures, in consultation with all concerned;

(d) Guaranteed access for all, without discrimination on grounds of financial or any other status, to museums, libraries, cinemas and theatres and to cultural activities, services and events.

## C. Core obligations

55. In its general comment No. 3 (1990), the Committee stressed that States parties have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights set out in the Covenant. Thus, in accordance with the Covenant and other international instruments dealing with human rights and the protection

of cultural diversity, the Committee considers that article 15, paragraph 1 (a), of the Covenant entails at least the obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice, which includes the following core obligations applicable with immediate effect:

(a) To take legislative and any other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life;

(b) To respect the right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice;

(c) To respect and protect the right of everyone to engage in their own cultural practices, while respecting human rights which entails, in particular, respecting freedom of thought, belief and religion; freedom of opinion and expression; a person's right to use the language of his or her choice; freedom of association and peaceful assembly; and freedom to choose and set up educational establishments;

(d) To eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures, without discrimination and without consideration for frontiers of any kind;

(e) To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.

## D. International obligations

56. In its general comment No. 3 (1990), the Committee draws attention to the obligation of States parties to take steps, individually and through international assistance and cooperation, especially through economic and technical cooperation, with a view to achieving the full realization of the rights recognized in the Covenant. In the spirit of Article 56 of the Charter of the United Nations, as well as specific provisions of the International Covenant on Economic, Social and Cultural Rights (art. 2, para. 1, and arts. 15 and 23), States parties should recognize and promote the essential role of international cooperation in the achievement of the rights recognized in the Covenant, including the right of everyone to take part in cultural life, and should fulfil their commitment to take joint and separate action to that effect.

57. States parties should, through international agreements where appropriate, ensure that the realization of the right of everyone to take part in cultural life receives due attention.[53]

58. The Committee recalls that international cooperation for development and thus for the realization of economic, social and cultural rights, including the right to take part in cultural life, is an obligation of States parties, especially of those States that are in a position to provide assistance. This obligation is in accordance with Articles 55 and 56 of

[53] See general comment No. 18 (2005), para. 29.

the Charter of the United Nations, as well as articles 2, paragraph 1, and articles 15 and 23 of the Covenant.[54]

59. In negotiations with international financial institutions and in concluding bilateral agreements, States parties should ensure that the enjoyment of the right enshrined in article 15, paragraph 1 (a), of the Covenant is not impaired. For example, the strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations in relation to the right of everyone, especially the most disadvantaged and marginalized individuals and groups, to take part in cultural life.[55]

## IV. Violations

60. To demonstrate compliance with their general and specific obligations, States parties must show that they have taken appropriate measures to ensure the respect for and protection of cultural freedoms, as well as the necessary steps towards the full realization of the right to take part in cultural life within their maximum available resources. States parties must also show that they have guaranteed that the right is enjoyed equally and without discrimination, by men and women.

61. In assessing whether States parties have complied with obligations to take action, the Committee looks at whether implementation is reasonable or proportionate with respect to the attainment of the relevant rights, complies with human rights and democratic principles, and whether it is subject to an adequate framework of monitoring and accountability.

62. Violations can occur through the direct action of a State party or of other entities or institutions that are insufficiently regulated by the State party, including, in particular, those in the private sector. Many violations of the right to take part in cultural life occur when States parties prevent access to cultural life, practices, goods and services by individuals or communities.

63. Violations of article 15, paragraph 1 (a), also occur through the omission or failure of a State party to take the necessary measures to comply with its legal obligations under this provision. Violations through omission include the failure to take appropriate steps to achieve the full realization of the right of everyone to take part in cultural life, and the failure to enforce relevant laws or to provide administrative, judicial or other appropriate remedies to enable people to exercise in full the right to take part in cultural life.

64. A violation also occurs when a State party fails to take steps to combat practices harmful to the well-being of a person or group of persons. These harmful practices, including those attributed to customs and traditions, such as female genital mutilation and allegations of the practice of witchcraft, are barriers to the full exercise by the affected persons of the right enshrined in article 15, paragraph 1 (a).

65. Any deliberately retrogressive measures in relation to the right to take part in cultural life would require the most careful consideration and need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

[54] General comment No. 3 (1990), para. 14. See also general comment No. 18 (2005), para. 37.
[55] See general comment No. 18 (2005), para. 30.

# V. Implementation at the national level

## A. Legislation, strategies and policies

66. While States parties have a wide margin of discretion in selecting the steps they consider most appropriate for the full realization of the right, they must immediately take those steps intended to guarantee access by everyone, without discrimination, to cultural life.

67. States parties must take the necessary steps without delay to guarantee immediately at least the minimum content of the core obligations (see paragraph 56 above). Many of these steps, such as those intended to guarantee non-discrimination de jure, do not necessarily require financial resources. While there may be other steps that require resources, these steps are nevertheless essential to ensure the implementation of that minimum content. Such steps are not static, and States parties are obliged to advance progressively towards the full realization of the rights recognized in the Covenant and, as far as the present general comment is concerned, of the right enshrined in article 15, paragraph 1 (a).

68. The Committee encourages States parties to make the greatest possible use of the valuable cultural resources that every society possesses and to bring them within the reach of everyone, paying particular attention to the most disadvantaged and marginalized individuals and groups, in order to ensure that everyone has effective access to cultural life.

69. The Committee emphasizes that inclusive cultural empowerment derived from the right of everyone to take part in cultural life is a tool for reducing the disparities so that everyone can enjoy, on an equal footing, the values of his or her own culture within a democratic society.

70. States parties, in implementing the right enshrined in article 15, paragraph 1 (a), of the Covenant, should go beyond the material aspects of culture (such as museums, libraries, theatres, cinemas, monuments and heritage sites) and adopt policies, programmes and proactive measures that also promote effective access by all to intangible cultural goods (such as language, knowledge and traditions).

## B. Indicators and benchmarks

71. In their national strategies and policies, States parties should identify appropriate indicators and benchmarks, including disaggregated statistics and time frames that allow them to monitor effectively the implementation of the right of everyone to take part in cultural life, and also to assess progress towards the full realization of this right.

## C. Remedies and accountability

72. The strategies and policies adopted by States parties should provide for the establishment of effective mechanisms and institutions, where these do not exist, to investigate and examine alleged infringements of article 15, paragraph 1 (a), identify responsibilities, publicize the results and offer the necessary administrative, judicial or other remedies to compensate victims.

## VI. Obligations of actors other than States

73. While compliance with the Covenant is mainly the responsibility of States parties, all members of civil society — individuals, groups, communities, minorities, indigenous peoples, religious bodies, private organizations, business and civil society in general — also have responsibilities in relation to the effective implementation of the right of everyone to take part in cultural life. States parties should regulate the responsibility incumbent upon the corporate sector and other non-State actors with regard to the respect for this right.

74. Communities and cultural associations play a fundamental role in the promotion of the right of everyone to take part in cultural life at the local and national levels, and in cooperating with States parties in the implementation of their obligations under article 15, paragraph 1 (a).

75. The Committee notes that, as members of international organizations such as United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization (WIPO), the International Labour Organization (ILO), the Food and Agriculture Organization of the United Nations (FAO), the World Health Organization (WHO) and the World Trade Organization (WTO), States parties have an obligation to adopt whatever measures they can to ensure that the policies and decisions of those organizations in the field of culture and related areas are in conformity with their obligations under the Covenant, in particular the obligations contained in article 15 article 2, paragraph 1, and articles 22 and 23, concerning international assistance and cooperation.

76. United Nations organs and specialized agencies, should, within their fields of competence and in accordance with articles 22 and 23 of the Covenant, adopt international measures likely to contribute to the progressive implementation of article 15, paragraph 1 (a). In particular, UNESCO, WIPO, ILO, FAO, WHO and other relevant agencies, funds and programmes of the United Nations are called upon to intensify their efforts to take into account human rights principles and obligations in their work concerning the right of everyone to take part in cultural life, in cooperation with the Office of the United Nations High Commissioner for Human Rights.

# BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW

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BY

JAMES CRAWFORD, SC, FBA

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## (B) THE INTERNATIONAL LABOUR ORGANIZATION (ILO)

Although its work is rather specialized, the ILO, created in 1919, has done a great deal towards giving practical expression to some important human rights and towards establishing standards of treatment. Its agenda has included forced labour, freedom of association, discrimination in employment, equal pay, social security, and the right to work.[8] The ILO's Constitution has a tripartite structure, with separate representation of employers and workers, as well as governments, in the Governing Body and the General Conference. In addition, there are provisions for union and employer organizations to make representations and complaints. This procedure was augmented in 1951 when the ILO Governing Body established a fact-finding and conciliation commission on freedom of association.[9]

## (C) THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948[10]

In 1948, the General Assembly adopted a Universal Declaration of Human Rights which has been notably influential.[11] The Declaration is not a treaty, but many of its provisions reflect general principles of law or elementary considerations of humanity, and the Declaration identified the catalogue of rights whose protection would come to be the aim of later instruments. Overall the indirect legal effect of the Declaration should not be underestimated. It has been invoked, for example, by the European Court of Human Rights as an aid to interpretation of the European Convention on

[8] See Jenks, *Social Justice in the Law of Nations* (1970); McNair, *The Expansion of International Law* (1962) 29–52; Wolf, in Meron (ed), 2 *Human Rights in International Law* (1984) 273; Swepston, in Symonides (ed), *Human Rights* (2003) 91–109; Rodgers, Swepston, Lee & van Daele (eds), *The International Labour Organization and the Quest for Social Justice, 1919–2009* (2009); Servais, *International Labour Law* (2nd edn, 2009); van Daele (ed), *ILO Histories* (2010).

[9] Other key developments included the creation of the International Institute for Labour Studies in 1960, an amendment to the Constitution in June 1986 affecting core aspects of the ILO's function and structure (not yet in force), the adoption of the Active Partnership Policy in 1993 to strengthen the ILO's field structure, and the establishment of the independent World Commission on the Social Dimension of Globalization in 2002. See www.ilo.org/public/english/support/lib/resource/subject/history.htm. On the impact of the 1998 ILO Declaration on Fundamental Principles and Rights at Work: Alston (2004) 15 *EJIL* 457.

[10] GA Res 217(III), 10 December 1948; Alfredsson & Eide (eds), *The Universal Declaration of Human Rights* (1999); Jaichand & Suksi (eds), *Sixty Years of the Universal Declaration of Human Rights in Europe* (2009); Baderin & Ssenyonjo (eds), *International Human Rights Law* (2010).

[11] For domestic recourse to the UDHR: e.g. *In re Flesche* (1949) 16 ILR 266, 269; *Duggan v Tapley* (1951) 18 ILR 336, 342; *Robinson v Secretary-General of the UN* (1952) 19 ILR 494, 496; *Extradition of Greek National (Germany)* (1955) 22 ILR 520, 524; *American European Beth-El Mission v Minister of Social Welfare* (1967) 47 ILR 205, 207–8; *Iranian Naturalization* (1968) 60 ILR 204, 207; *Waddington v Miah* [1974] 1 WLR 683, 694; *M v UN and Belgium* (1969) 69 ILR 139, 142–3; *Police v Labat* (1970) 70 ILR 191, 203; *Basic Right to Marry* (1971) 72 ILR 295, 298; *Charan Lal Sahu v Union of India* (1989) 118 ILR 451. Further: Hannum (1995–96) 25 *Ga JICL* 287.

Human Rights (ECHR),[12] and by the International Court in relation to the detention of hostages 'in conditions of hardship'.[13]

The Declaration is a good example of an informal prescription given legal significance by actions of authoritative decision-makers, and thus it has been used as an agreed point of reference in the Helsinki Final Act, the second of the 'non-binding' instruments which have been of considerable importance in practice.[14]

## (D) THE HELSINKI FINAL ACT, 1975

On 1 August 1975 the Final Act of the Conference on Security and Co-operation in Europe was adopted in Helsinki.[15] It contains a declaration of principles under the heading 'Questions Relating to Security in Europe'. The Final Act was signed by the representatives of 35 states, including the US and the USSR.

The Declaration is not in treaty form and was not intended to be legally binding.[16] At the same time it signified the acceptance by participating states of certain principles, including human rights standards. This significance was recognized by the International Court in *Nicaragua v US*.[17] That was a special context, but the Helsinki process was a significant element in the gradual move to acceptance, on the one hand, of the political status quo in Europe and, on the other hand, of the salience of human rights standards for Eastern Europe. As such it was a precursor to the changes of 1989.[18]

## (E) SUBSEQUENT DECLARATIONS

Subsequent important declarations on human rights include the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993, which led to the establishment of the Office of the High Commissioner for Human Rights,[19] the Beijing Declaration and Programme for Action adopted by the Fourth World Conference on Women on 15 September 1995,[20] and the UN Millennium Summit Declaration adopted on 8 September 2000,[21] among many others.

[12] 4 November 1950, ETS 5: e.g. *Golder* (1975) 57 ILR 200, 216–17.

[13] *United States Diplomatic and Consular Staff in Tehran (US v Iran)*, ICJ Reports 1980 p 3, 42.

[14] Some US writers have laid emphasis on the Universal Declaration as custom, given the weaknesses and lacunae in subsequent US human rights treaty practice: e.g. Sohn (1977) 12 *Texas ILJ* 129, 133; Lillich (1995–96) 25 *Ga JICL* 1; Hannum (1995–96) 25 *Ga JICL* 287.

[15] 1 August 1975, 14 ILM 1292.

[16] *US Digest* (1975) 325–7.

[17] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, ICJ Reports 1986 p 14, 100; also 133.

[18] E.g. van der Stoel (1995) 6 *Helsinki Monitor* 23; Brett (1996) 18 *HRQ* 668.

[19] GA Res 48/141, 20 December 1993.

[20] Endorsed by GA Res 50/203, 23 February 1996.

[21] GA Res 55/2, 8 September 2000.

# The Handbook of International Humanitarian Law

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# 9

# PROTECTION OF CULTURAL PROPERTY

## Introductory Remarks

1. The protection of cultural property in armed conflict, by which is meant its protection from damage and destruction and from all forms of misappropriation, has been a matter of legal concern since the rise of modern international law in the sixteenth and seventeenth centuries. When the laws of war were codified over the second half of the nineteenth and at the beginning of the twentieth centuries, cultural property was treated for certain purposes as a species of enemy property generally, so that it was protected by the classical rule as to military necessity which governed destruction and seizure of such property (Article 23, lit. g, HagueRegs) and by the prohibition on pillage (Articles 28 and 47 HagueRegs; Article 7 HC IX). For other purposes, it was treated specifically as cultural property, with special rules requiring its sparing as far as possible in the course of bombardment by land and air (Article 27 HagueRegs)[1] and by sea (Article 5 HC IX) and prohibiting its destruction, wilful damage, and seizure during belligerent occupation (Article 56 HagueRegs).

2. After the First World War, various efforts were made to establish a further, specialized treaty regime for the wartime protection of cultural property, starting with a 1919 proposal by the Netherlands Archaeological Society,[2] which was partly reflected in Article 26 of the 1923 draft Hague Rules on Aerial Warfare (HRAW). A draft text dedicated to the question, instigated by Nikolai Roerich, was picked up and adopted by a number of states of the Pan-American Union as the 1935 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, known as the Roerich Pact.[3] In 1938, the International Museums Office of the League of Nations finalized a Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War, with annexed Regulations for its execution,[4] but the Second World War broke out before a diplomatic conference for its adoption could be held. In the immediate aftermath of the War, the relevant Hague Regulations, which were treated as declaratory of customary international law, provided the basis on which several defendants at Nuremberg, chief among them Alfred Rosenberg, were convicted of war crimes for their roles in organizing the seizure and destruction of cultural property in occupied territory.[5] The same acts were also held to constitute crimes against humanity.

[1] The rule on aerial bombardment was subsequently reiterated in Article 25 HRAW 1923.
[2] (1919) 26 *RGDIP* 329, at 331.
[3] 167 LNTS 290. The Pact, still in force among eleven US states, applies during both war, as such, and peace. It has never been invoked, and will not be considered in detail.
[4] LNOJ, 19th Year, No. 11 (November 1938), 937.
[5] See Misc. No. 12 (1946), Cmd 6964, 56, 64–5, 95–6, 129. At the other end of the scale of gravity, see *Trial of Karl Lingenfelder*, 9 LRTWC 67 (1947).

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3. The Second World War spurred the eventual adoption of the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and the Regulations for its execution,[6] along with a separate optional Protocol, now known as the First Protocol.[7] The preamble to the former declares that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world'. CultPropConv applies during international armed conflict whether or not a legal state of war exists between the belligerents (Article 18, para. 1, CultPropConv), as well as to all cases of partial or total occupation of the territory of a party (Article 18, para. 2, CultPropConv). The provisions relating to respect for cultural property, by which is meant the various paragraphs of Article 4 (headed 'Respect for cultural property'), also apply to non-international armed conflict occurring within the territory of one of the parties (Article 19, para. 1, CultPropConv). CultPropConv offers two levels of protection for cultural property. So-called 'general protection'[8] (Chapter I CultPropConv) extends to all immovables and movables satisfying the definition of cultural property. 'Special protection' (Chapter II CultPropConv; Chapter II RegExCultPropConv) imposes a supplementary and nominally stricter standard of respect in relation to a narrower range of property. CultPropConv also lays down rules on the transport of cultural property during armed conflict (Chapter III CultPropConv; Chapter III RegExCultPropConv), the treatment of personnel engaged in its protection (Chapter IV CultPropConv), the creation and use of a 'distinctive emblem' for cultural property (Chapter V CultPropConv; Chapter IV RegExCultPropConv), the establishment and functioning of an elaborate international regime of control (RegExCultPropConv, Chapter I), the imposition of penal or disciplinary sanctions for breach (Article 28 CultPropConv) and the submission by the parties of periodic implementation reports (Article 26, para. 2, CultPropConv). UNESCO is granted a right of initiative in both international (Article 23, para. 2) and non-international (Article 19, para. 3, CultPropConv) armed conflict. For its part, Prot1CultPropConv deals with questions regarding the exportation and importation of cultural property from occupied territory, and with the return of cultural property deposited abroad for the duration of hostilities. By 1 June 2012, CultPropConv had 125 states parties and Prot1CultPropConv 101. CultPropConv remains the centrepiece of the international legal protection of cultural property in armed conflict, although some of its provisions now need to be read in the light of subsequent customary international law and, for parties to it, the Second Protocol to CultPropConv.

4. Although not itself an international humanitarian law treaty, the UNESCO-sponsored Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,[9] adopted in 1970, contains provisions for the protection of movable cultural property in occupied territory.

5. The 1977 Additional Protocols to the Geneva Conventions both embody brief provisions specifically relating to respect for cultural property. The motivation behind Article 53 AP I and Article 16 AP II was to affirm in a single article in each instrument the

[6] CultPropConv, 249 UNTS 240.
[7] Prot1CultPropConv, 249 UNTS 358.
[8] The label is not in fact used in CultPropConv. Ch. I lays down what it calls 'general provisions regarding protection'.
[9] IllicitImpExpTransConv, 823 UNTS 231.

essential obligations of respect for cultural property embodied more exhaustively in CultPropConv.[10] The derivative or secondary nature of these provisions is highlighted by the 'without prejudice' clause in the chapeau to each, which makes it clear that the provisions are not intended to modify the existing legal obligations of those parties to AP I and AP II which are also parties to CultPropConv,[11] a point underscored in Resolution 20(IV) of the Diplomatic Conference of Geneva.[12] The desire was to avoid the 'parallel application of two divergent systems for the protection of cultural property, which could only be a source of confusion',[13] with several delegates placing the primary emphasis on CultPropConv.[14] In certain cases, an attack against cultural property can constitute a grave breach (Article 85, para. 4, lit. d, AP I). In addition, the improper use of the emblem of cultural property is prohibited (Article 38, para. 1, AP I). Outside the scope of the *lex specialis* represented by Article 53 AP I and Article 16 AP II, cultural property is considered a civilian object, so that in international armed conflict it benefits from the prohibition on indiscriminate attacks (Article 51, paras. 4 and 5, lit. b, AP I) and from mandatory precautions to be taken in attack (Article 57 AP I).

For their part, 1980 Protocol II and 1996 Amended Protocol II to the 1980 Conventional Weapons Convention each contain two provisions relevant to cultural property.[15]

6. A process of review undertaken throughout the 1990s with a view to updating and improving aspects of CultPropConv's regime culminated in 1999 with the adoption of the Second Protocol to CultPropConv.[16] Prot2CultPropConv applies to international and non-international armed conflict without distinction. As made clear in the preamble, the instrument is designed to supplement, not supplant, the provisions of CultPropConv. It leaves intact the basic architecture of CultPropConv and operates, on a technical level, by reference back to it, elaborating on, refining and in places adding to CultPropConv's various obligations as between parties to Prot2CultPropConv, which, as a precondition to participation, must be parties to CultPropConv (Articles 40–42 Prot2CultPropConv). Prot2CultPropConv maintains the distinction between general and special protection of cultural property, albeit effectively replacing CultPropConv's scheme of the latter with a regime of 'enhanced' protection (Chapter 3 Prot2CultPropConv). General protection is updated and added to (Chapter 2 Prot2CultPropConv). A comprehensive regime of penal sanctions is provided for (Chapter 4 Prot2CultPropConv), as is a formalized institutional framework to facilitate and supervise the protection of cultural property in the event of armed conflict, comprising, *inter alia*, an intergovernmental Committee for

[10] *ICRC Commentary*, paras. 2039–40, 4826–7.

[11] *ICRC Commentary*, paras. 2046, 4832.

[12] Records 1974–7, I, Part 1, 213.

[13] CDDH/SR.53, para. 4, Records 1974–7, VII, 142 (FRG).

[14] As regards AP I, see CDDH/SR.42, para. 12, Records 1974–7, VI, 207 (Belgium); CDDH/SR.42, Annex, Records 1974–7, VI, 224 (Canada), 234 (Poland); CDDH/III/SR.15, para. 22, Records 1974–7, XIV, 121 (USSR); CDDH/III/SR.16, para. 15, Records 1974–7, XIV, 129 (Poland); CDDH/III/SR.24, paras. 28–30, Records 1974–7, XIV, 221–2 (the Netherlands). As regards AP II, see CDDH/SR.52, paras. 2, 7, Records 1974–7, VII, 125, 126 (Belgium).

[15] See Article 6, para. 1, lit. b(ix), Prot2WeaponsConv and Article 7, para. 1, lit. i, AmendedProt2WeaponsConv, prohibiting the use of booby traps which are in any way attached to or associated with cultural property, as well as Article 6, para. 1, lit. b(i), Prot2WeaponsConv and Article 7, para. 1, lit. a, AmendedProt2WeaponsConv, prohibiting the same as regards internationally protected signs and signals, which include the emblem of cultural property.

[16] Prot2CultPropConv, 2253 UNTS 212.

the Protection of Cultural Property in the Event of Armed Conflict and a centralized Fund for the Protection of Cultural Property in the Event of Armed Conflict (Chapter 6 Prot2CultPropConv). The instrument also incorporates obligations relating to the dissemination of information and to international assistance, and UNESCO is granted a right of initiative (Chapter 7 Prot2CultPropConv). In 2009, the third Meeting of the Parties endorsed both the Guidelines for the Implementation of the Second Protocol and the Guidelines concerning the Use of the Fund, each prepared by the Committee (Articles 23, para. 3, lits. b and c, 27, para. 1 lit. a, and 29, para. 3, Prot2CultPropConv).[17] As of 1 June 2012, Prot2CultPropConv had sixty-two states parties.

7. In parallel with these treaty regimes, a body of customary international law has developed over the years to protect cultural property in armed conflict. Many of the provisions cited above, where not declaratory of custom when adopted, have come to reflect it in the period since.[18]

The relationships among these various bodies of law are considered in the following sections, which give a synthetic account of the basic rules governing the protection of cultural property in armed conflict.[19]

## I. Definition of 'Cultural Property'

901 **The term 'cultural property' means movable or immovable property of great importance to the cultural heritage of peoples (e.g. buildings and other monuments of historic, artistic or architectural significance; archaeological sites; artworks, antiquities, manuscripts, books, and collections thereof; archives; etc.), whether of a secular or religious nature and irrespective of origin or ownership (Article 53, lit. a, AP I; Article 16 AP II; Article 1, lit. a, CultPropConv). The term extends to buildings for preserving or exhibiting, and refuges intended to shelter, movable cultural property (Article 1, lit. b, CultPropConv) and to centres containing a large amount of movable or immovable cultural property, known as 'centres containing monuments' (Article 1, lit. c, CultPropConv).**

1. CultPropConv and its two Protocols are the only conventions in the field of international humanitarian law actually to use the term 'cultural property', the formal legal definition of which for the purposes of all three instruments is found in Article 1 CultPropConv. This provision forms the basis of the definition given here. The term 'cultural property' refers in essence to 'movable or immovable property of great importance to the cultural heritage of every people' (Article 1, lit. a, CultPropConv). While the property protected by Articles 27 and 56 HagueRegs and Article 5 HC IX, by RoerichPact and by Article 53 AP I and Article 16 AP II can be referred to generically and in a strictly informal sense as cultural property, the provisions themselves use different terminology.

[17] See Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, CLT-09/CONF/219/3 REV.3 (24 November 2009) and Guidelines concerning the use of the Fund for the Protection of Cultural Property in the Event of Armed Conflict, CLT-09/CONF/219/4 REV (24 November 2009).

[18] A full account justifying this chapter's conclusions on points of customary international law can be found in R. O'Keefe, *The Protection of Cultural Property in Armed Conflict* (CUP, 2006), 316–59. See also *CIHL*, Ch. 12.

[19] Purely procedural rules, institutional arrangements and sanctions are not examined. Reference throughout to numbered/lettered documents is to UNESCO documents unless otherwise specified.

2. Whereas the relevant provisions of HagueRegs and HC IX apply *mutatis mutandis* to all buildings dedicated to religion, charitable purposes, and the arts and sciences and to every historic monument and work of art, the drafters of CultPropConv opted for a more selective approach.[20] CultPropConv seeks to protect only those immovable and movable objects 'of great importance to the cultural heritage of every people' (Article 1, lit. a, CultPropConv). On its face, the phrase 'of every people' is capable of two meanings, *viz* 'of all peoples jointly' or 'of each respective people'. Recourse to the French and Spanish texts, which are also authoritative, fails to establish which of these meanings is to be preferred, since both refer instead to the cultural heritage 'of peoples' ('le patrimoine culturel des peuples' and 'el patrimonio cultural de los pueblos'). But the second alternative is the correct one: the term 'cultural property' in Article 1 CultPropConv refers to movable or immovable property of great importance to the cultural heritage of each respective people—in other words, of great importance to the national cultural heritage of each respective party.[21] This follows from the preambular recital which declares 'that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world', especially the words 'any people' and 'each people' and their use in contradistinction to 'all mankind' (as opposed to 'every people'). It is also borne out in the practice of many parties, as evidenced in their implementation reports.[22] The definition of cultural property thus reflects the conviction, in the words of a former president of the International Court of Justice, that 'cultural objects and properties which make up a national heritage [are], consequently, the world's heritage'.[23]

3. It is left to each party to determine the property in its territory to which CultPropConv applies, in accordance with its own criteria of 'great importance' to its cultural heritage,[24] a discretion circumscribed only by the ordinary meaning of the words and the requirement

[20] Cultural objects not qualifying for CultPropConv's protection remain protected by the 1907 rules themselves and as civilian objects.

[21] See also M. Frigo, *La protezione dei beni culturali nel diritto internazionale* (Milan: Giuffrè, 1986), 98, 100, 272; J. H. Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80 *AJIL* 831 at 837 n. 2; A. Przyborowska-Klimczak, 'Les notions des "biens culturels" et du "patrimoine culturel mondial" dans le droit international' (1989–90) 18 *Polish Yearbook of International Law* 47 at 53; J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection* (Paris/Aldershot: UNESCO/Dartmouth, 1996), 50; D. Sabelli, 'La Convenzione sul patrimonio mondiale: limiti giuridico-politici', in M. C. Ciciriello (ed.), *La protezione del patrimonio mondiale culturale e naturale a venticinque anni dalla Convenzione dell'UNESCO* (Naples: Editoriale Scientifica, 1997), 143 at 149; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd edn (CUP, 2010), para. 435; K. Chamberlain, *War and Cultural Heritage: An Analysis of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two Protocols* (Leicester: Institute of Art and Law, 2004), 29; R. Wolfrum, 'Cultural Property, Protection in Armed Conflict', in *MPEPIL*, at para. 8.

[22] See, most explicitly, CLT-95/WS/13, 19 (Bulgaria), 31, 34 (Iran), 35 (Liechtenstein), 36 (Madagascar), 42 (Slovenia), 43–4 (Switzerland), 48 (Ukraine); CC/MD/11, 16 (India), 27 (the Netherlands), 38 (USSR); CLT/MD/3, 21 (Austria), 24 (Byelorussian SSR); CC/MD/41, 19 (Hungary), 20 (Jordan), 25 (Niger); SHC/MD/6, 16 (Luxembourg); SHC/MD/1, 32–3 (San Marino).

[23] CLT/MD/3, 15 (Nagendra Singh). See also CLT/MD/3, 13 (Manfred Lachs). This idea was expressed during the drafting of CultPropConv: see Records 1954, paras. 136 (USSR), 146 (FRG). It is also echoed in some parties' implementation reports: see CC/MD/41, 15 (Byelorussian SSR), 20 (Jordan), 27 (USSR); CLT-95/WS/13, 31, 34 (Iran), 48 (Ukraine).

[24] See, e.g., 7 C/PRG/7, Annex I, 7; CBC/4, 7 (Israel); Records 1954, paras. 163 (Israel), 164 (France), 869 (Denmark), 1201 (Italy). See also H. Niecówna, 'Sovereign Rights to Cultural Property' (1971) 4 *Polish Yearbook of International Law* 239 at 250; S. Nahlik, 'Convention for the Protection of Cultural Property in

of good faith. In practice, the overwhelming majority of parties which have submitted implementation reports appear, in the case of immovable cultural property, to consider CultPropConv to apply either to the full complement of their national cultural heritage, as defined and formally identified by domestic law and procedure, or to a not insubstantial proportion of the same. While few parties have cited figures, those given are of an order of magnitude of tens of thousands.[25] As for movable cultural property, only two states have cited figures, and they refer to the contents of between 100 and 250 museums, art galleries, libraries, and archives.[26] In the final analysis, however, numbers are less important than the principle reiterated by the twenty-seventh General Conference of UNESCO—comprising representatives of every member state of the organization, most of them parties to CultPropConv—that CultPropConv 'offers protection to cultural property that is of national and local importance as well as to sites of outstanding universal importance'.[27]

4. Since the object and purpose of Article 53 AP I and Article 16 AP II was to restate the fundamental obligations of respect laid down in CultPropConv, it stands to reason that the property protected by the provision, *viz* 'historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples',[28] should equate, as far as the ordinary meaning of the words permit, to cultural property within the meaning of its predecessor. In short, the wording of Article 53 AP I and Article 16 AP II was intended as an abbreviation or simplification of the formula used in Article 1 CultPropConv, the relevant working group speaking of 'the cultural heritage of peoples, in the words of the Hague Convention of 1954'.[29] Indeed, in the equally authentic French and Spanish texts of both instruments, the language is identical (except for the insertion of the words 'or spiritual'): the French and Spanish texts of

the Event of Armed Conflict, The Hague 1954: General and Special Protection', in Istituto Internazionale di Diritto Umanitario (ed.), *The International Protection of Cultural Property: Acts of the Symposium organized on the Occasion of the 30th Anniversary of the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflicts* (Rome: Fondazione Europea Dragan, 1986), 87 at 89, 95; A. Przyborowska-Klimczak (above, n. 21), at 53; M. Cornu, *Le droit culturel des biens. L'intérêt culturel juridiquement protégé* (Brussels: Bruylant, 1996), 159; Toman (above, n. 21), 50; M. Seršić, 'Protection of Cultural Property in Time of Armed Conflict' (1996) 27 *NethYIL* 3 at 9.

[25] See CLT/MD/3, 21 (Austria, 76,890); CC/MD/11, 27 (the Netherlands, 43,000); CLT-95/WS/13, 19 (Bulgaria, 39,412), 24 (Germany, 10,000 in former FRG alone, plus 2,000 museums, archives, libraries and archaeological sites); CC/MD/11, 20 (Iraq, 10,000 archaeological sites alone); CC/MD/11, 35 and CLT-95/WS/13, 43 (Switzerland, 8,000); CC/MD/41, 15 (Byelorussian SSR, more than 6,000); CLT-95/WS/13, 66 (Slovenia, 5,550). Because of its enormous size, the former USSR cited a figure of 254,000: CC/MD/11, 38. The UK, which in 2004 announced its intention to ratify CultPropConv and both of its Protocols, currently proposes to extend general protection to around 10,800 immovables: Department for Culture, Media and Sport Cultural Property Unit, *Consultation Paper on The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols of 1954 and 1999* (September 1995), 13.

[26] See CLT-95/WS/13, 20 (Bulgaria, 222 museums and art galleries). The UK currently proposes to extend general protection to the contents of 102 museums, galleries and collections, and to the contents of the National Record Offices and the country's five legal deposit libraries: Department for Culture, Media and Sport (above, n. 25), 13. Germany has cited a figure of 2,000 museums, archives, libraries and archaeological sites in the former FRG alone, although this is confounded for present purposes by the inclusion of archaeological sites: see CLT-95/WS/13, 24.

[27] 27 C/Resolution 3.5, para. 3. See also 142 EX/Decision 5.5.2, para. 7 lit. c; 142 EX/15, para. 8.

[28] The relevant provisions of Prot2WeaponsConv and AmendedProt2WeaponsConv also use this terminology.

[29] CDDH/III/224, Records 1974–7, XV, 333. See also CDDH/215/Rev.1, para. 69, Records 1974–7, XV, 278.

Article 1 CultPropConv make no use of the word 'every' found in the English version, referring simply to 'le patrimoine culturel des peuples' and 'el patrimonio cultural de los pueblos' respectively, while the French and Spanish texts of Article 53 AP I and Article 16 AP II speak of 'le patrimoine culturel ou spirituel des peuples' and 'el patrimonio cultural o espiritual de los pueblos'. The *ICRC Commentary* on the Additional Protocols, referring to the superficial divergence between the relative clause 'which constitute the cultural and spiritual heritage of peoples' in Article 53 AP I and Article 16 AP II and the clause 'which are of great importance to the cultural heritage of every people' in Article 1 CultPropConv, states that it 'does not seem that these expressions have a different meaning',[30] and makes it clear that 'there was no question of creating a new category of cultural objects'.[31] This view was endorsed by the Appeals Chamber of the ICTY in *Kordić*, where, drawing attention to the variation in wording between Article 53 AP I and Article 1 CultPropConv, it cited the *ICRC Commentary* to hold that, 'despite this difference in terminology, the basic idea is the same'.[32]

5. In this light, the terms 'historic monuments' and 'works of art' in Article 53 AP I and Article 16 AP II should be seen as shorthand for the full range of immovable and movable cultural property referred to Article 1 CultPropConv.[33] Additionally, the former's reference to the cultural or spiritual heritage 'of peoples' is to be construed as meaning the cultural or spiritual heritage of each respective people—that is, of each party, as determined by it according to its own criteria. In fact, the initial draft of Article 53 AP I spoke of 'the cultural heritage of a country',[34] and the earliest draft of the Article 16 AP II used the expression 'the national heritage of a country'.[35] Moreover, in its discussion of the differences of opinion which arose in relation to an intermediate draft over the application to places of worship of the clause 'which constitute the cultural heritage of peoples', Committee III of the Diplomatic Conference (in a statement applicable *mutatis mutandis* to historic monuments and works of art) suggested that 'cultural heterogeneity may be the key, for among some peoples any place of worship may be part of the cultural heritage, while among others only some places of worship may be so described'.[36] Similarly, the *ICRC Commentary*'s gloss on the notion of the spiritual heritage of peoples

[30] *ICRC Commentary*, para. 4844. See also J. Toman, 'La protection des biens culturels en cas de conflit armé non international', in W. Haller et al. (eds), *Im Dienst an der Gemeinschaft. Festschrift für Dietrich Schindler zum 65. Geburtstag* (Basel: Helbing & Lichtenhahn, 1989), 311 at 333–4.

[31] *ICRC Commentary*, para. 2064 n. 23.

[32] *Prosecutor v Kordić and Čerkez*, IT-95–14/2-A, Appeals Chamber Judgment, 17 December 2004, para. 91, citing *ICRC Commentary*, para. 2064. This was followed in *Prosecutor v Strugar*, IT-01–42-T, Trial Chamber Judgment, 31 January 2005, para. 307, which left open '[w]hether there may be precise differences'. See also para. 3 of the Russian Federation's declaration of 2 March 2005, 2308 *UNTS* 134, on becoming party to AmendedMinesProt, Article 7, para. 1, lit. i of which uses the expression 'historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples' as found in Article 53 AP I and Article 16 AP II. The paragraph states: 'For the purposes of interpreting subparagraph 1(i) of article 7, of Protocol II, the Russian Federation understands the cultural or spiritual heritage of peoples as cultural property in the terms of article 1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954.'

[33] See also *ICRC Commentary*, paras. 2068, 4838; K. J. Partsch, 'Protection of Cultural Property', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, 1st edn (OUP, 1995), 377 at 382.

[34] CDDH/III/17 and Rev.1, Records 1974–7, III, 213.

[35] CDDH/III/GT/95, Records 1974–7, IV, 65. See also CDDH/III/SR.49, paras 13, 14, Records 1974–7, XV, 110 (Greece); CDDH/III/SR.24, para. 29, Records 1974–7, XIV, 222 (the Netherlands).

[36] CDDH/236/Rev.1, para. 62, Records 1974–7, XV, 395. See also CDDH/III/353, Records 1974–7, XV, 437.

(applicable *mutatis mutandis* to the idea of the cultural heritage of peoples) is instructive: acknowledging that 'the expression remains rather subjective', it suggests that, in case of doubt, 'reference should be made in the first place to the value or veneration ascribed to the object by the people whose heritage it is'.[37]

6. The obvious textual divergence between Article 1 CultPropConv, on the one hand, and Article 53 AP I and Article 16 AP II, on the other, is the insertion in the latter of places of worship and of the concept of the spiritual heritage of peoples. The *ICRC Commentary* elaborates that in general 'the adjective "cultural" applies to historic monuments and works of art, while the adjective "spiritual" applies to places of worship', yet emphasizes that a religious building may qualify for protection on account of its cultural value, just as under CultPropConv.[38] Putting it more simply, the majority of delegates, who adopted Article 53 AP I and Article 16 AP II by consensus, took the unequivocal view that not all places of worship are protected by these provisions but only those which constitute the cultural or spiritual heritage of peoples.[39] In practice, the addition of places of worship which constitute part of the cultural or spiritual heritage of peoples does not make a real difference to the relative scope of application of Article 53 AP I and Article 16 AP II vis-à-vis Article 1 CultPropConv. Those places of worship important enough to constitute part of the spiritual heritage of a people will, in practice, also be historic monuments forming part of the cultural heritage of that people for the purposes of both Article 53 AP I and Article 16 AP II, on the one hand, and Article 1 CultPropConv, on the other.[40] Indeed, the drafting records make it clear that the insertion of places of worship and of the concept of the spiritual heritage of peoples had a purely rhetorical significance.[41]

7. The conclusion that Article 53 AP I and Article 16 AP II serve to protect the national cultural and spiritual heritage of each party as determined by that party is not undermined by the *ICRC Commentary*'s additional assertion that 'the Conference intended to protect in particular the most important objects, a category akin to property granted special protection as provided in Article 8 of the Hague Convention'.[42] The apparent attribution to the drafters of explicit reference to Article 8 CultPropConv is editorial licence.[43] The *travaux* reveal no such reference or, indeed, specificity. Committee III spoke only of 'objects of considerable historical, cultural, and artistic importance'.[44] Furthermore, the suggestion that Article 53 AP I and Article 16 AP II apply to a category of cultural property akin to that covered by Article 8 CultPropConv fails to account for

[37] *ICRC Commentary*, para. 2065.

[38] *ICRC Commentary*, paras. 2065, 4843.

[39] *ICRC Commentary*, para. 2067. Places of worship not constituting the cultural or spiritual heritage of peoples are protected as civilian objects by Article 52 AP I, as made clear by the reference to them in Article 52, para. 3.

[40] See, e.g., CDDH/III/SR.59, para. 61, Records 1974–7, XV, 219 (Ireland).

[41] See CDDH/SR.42, Annex, Records 1974–7, VI, 227. See also CDDH/SR.41, para. 167, Records 1974–7, VI, 171 (Holy See). The relevant amendment was proposed by Saudi Arabia, the Holy See, Italy, and a coalition of Islamic states.

[42] *ICRC Commentary*, para. 4844.

[43] So too the statements in *ICRC Commentary*, paras. 2064 and 4840, based solely on an intervention by the Greek delegate at the diplomatic conference (CDDH/III/SR.59, para. 69, Records 1974–7, XV, 220), subsequently cited in *Kordić*, Appeals Chamber Judgment, para. 91.

[44] CDDH/215/Rev.1, para. 69, Records 1974–7, XV, 278. See also CDDH/III/224, Records 1974–7, XV, 333.

the fact that the latter encompasses only immovable cultural property, with movables enjoying only *de facto* protection insofar as they are placed in specially protected refuges or situated in specially protected centres containing monuments. Article 53 AP I and Article 16 AP II, on the contrary, expressly apply to 'works of art' in their own right. It is also hard to imagine that the Geneva diplomatic conference would have troubled itself to debate and adopt Article 53 AP I and Article 16 AP II for the benefit of what were at the time eight examples of immovable cultural property, as inscribed in the International Register of Cultural Property under Special Protection.

8. Nonetheless, the ICRC Study on Customary International Humanitarian Law draws a distinction between cultural property 'which forms part of the cultural or spiritual heritage of "peoples" (i.e., mankind)', as protected by Article 53 AP I and Article 16 AP II, and the 'broader' scope of CultPropConv, 'which covers property which forms part of the cultural heritage of "every people" ',[45] concluding that the property covered by the Additional Protocols 'must be of such importance that it will be recognised by everyone'.[46] But this statement reflects only the English-language texts. As seen above, leaving aside Article 53 AP I and Article 16 AP II's reference to the spiritual heritage, the equally authentic French and Spanish texts of the respective wordings are identical: both translate as 'the cultural heritage . . . of peoples'. Additionally, even restricting one's attention to the English text, the ICRC's construction of the word 'mankind' overlooks the key statement in the preamble to CultPropConv that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world'. The ICRC Study claims support for its view in the interpretative declarations entered by several states at the time of Article 53 AP I's adoption.[47] But, as reproduced in the Study itself, the distinction drawn by these states is between the scope of application of Article 53 of AP I and the scope of application of Article 27 HagueRegs, not of Article 1 CultPropConv.[48]

9. In principle it is up to each party in whose territory the relevant property is situated to determine whether or not that property is of great importance to its cultural heritage and is therefore protected as cultural property. In practice, however, things are not so straightforward. Unless a party has taken measures to notify other parties of the identity and location of all such property by means of inventories and/or maps, or has marked all such property with CultPropConv's distinctive emblem, there will be no definitive way for an opposing party to know what movables and immovables are protected. In such a situation, which is likely to be the rule rather than the exception, it will ultimately fall by default to the opposing party to determine, for the purposes of compliance with its own obligations of respect, which movables and immovables situated in the territory of the first party satisfy the definition of 'cultural property' by being of great importance to the cultural heritage of that first party. In such an event, the safest course is to err on the side of caution.

[45] Vol. I *CIHL*, 130, 132.
[46] Vol. I *CIHL*, 130.
[47] Vol. I *CIHL*, 130, especially n. 19.
[48] See Vol. II/1 *CIHL*, chap. 12, paras. 180 (Canada), 193 (FRG), 220 (UK), 227 (the US). The statement by the Netherlands cited, as reproduced and in the original, makes no reference either to Article 1 CultPropConv or to Article 27 HagueRegs, and the Australian statement cited deals with a different question altogether.

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## II. Respect for Cultural Property

### 1. General Rules

902 **It is prohibited to attack cultural property unless it becomes a military objective and there is no feasible alternative for obtaining a similar military advantage (Articles 53, lit. a, and 52 AP I; Article 16 AP II; Article 4, paras. 1 and 2, CultPropConv and Article 6, lit. a, Prot2CultPropConv). The parties to the conflict shall do everything feasible to verify that objectives to be attacked are not cultural property (Article 57, para. 2, lit. a(i), AP I; Article 7, lit. a, Prot2CultPropConv). They shall cancel or suspend an attack if it becomes apparent that the objective is cultural property (Article 57, para. 2, lit. b, AP I; Article 7, lit. d(i), Prot2CultPropConv).**

1. The three rules stated here are applicable during both international and non-international armed conflict, and apply to all attacks, whether by land, sea, or air. In the context of international armed conflict, all three accord with customary international law. In the context of non-international armed conflict, the first is customary, but evidence in support of the second and third is not yet conclusive.

2. The second limb of Article 4, para. 1, CultPropConv obliges parties to respect cultural property by refraining from any act of hostility against such property, an obligation encompassing *inter alia* attacks against such property. This must be read subject to Article 4, para. 2, CultPropConv, which provides that the obligations laid down in the preceding paragraph may be waived where military necessity imperatively requires such a waiver. On the face of it, the phrase 'where military necessity imperatively requires' is an open-textured one. But the waiver in Article 4, para. 2, CultPropConv must today be read through the lens of the customary rules on targeting, applicable to both international and non-international armed conflict, which emerged after the adoption of CultPropConv, specifically the subsequent definition of a military objective, as per Article 52, para. 2, AP I.[49] This is in line with the approach taken to the phrase 'not justified by military necessity' by the ICTY.[50] As a consequence, a party may invoke the waiver in Article 4, para. 2, CultPropConv to justify attacking cultural property only in cases where the cultural property in question, by its nature, location, purpose or use, makes an effective contribution to military action and where its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In accordance with Article 53, lit. a, AP I and Article 16 AP II, it is prohibited to direct acts of hostility against cultural property. But whereas Article 4, para. 1, CultPropConv is subject to Article 4, para. 2, Article 53, lit. a, AP I and Article 16 AP II contain no exception in respect of military necessity. Military necessity as such provides no justification under these articles for attacking cultural property. Nor is the prohibition on acts

[49] See also *ICRC Commentary*, para. 2079, n. 30; Toman (above, n. 21), 389; *UK Manual*, para. 5.26.8.
[50] *Prosecutor v Brđanin*, IT-99-36-A, Appeals Chamber Judgment, 3 April 2007, para. 337. See also Article 8, para. 2 lit. b(ix) and Article 8, para. 2, lit. e(iv), ICC Statute, providing for the war crime of directing attacks against historic monuments 'provided they are not military objectives'.

of hostility against cultural property reciprocal with the prohibition on the use of such property in support of the military effort.[51] That said, if and for as long as an object covered by Article 53, lit. a, AP I is used in support of the military effort contrary to Article 53, lit. b, the legality of any attack against that object (and only that object) falls to be determined by reference to Article 52, para. 2, AP I,[52] and will be lawful provided such use makes an effective contribution to military action and the object's total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. The practical effect, therefore, of the additional protection afforded by Article 53 AP I is that whereas other civilian objects may be targeted pursuant to Article 52, para. 2, AP I on account of their nature, location, purpose or use, cultural property may be attacked only on account of its use. For its part, AP II contains no provision equivalent to the definition of a military objective in Article 52, para. 2, AP I, since nowhere does AP II embody a prohibition on attacking civilian objects as such or the concomitant obligation to limit attacks strictly to military objectives. The use of cultural property contrary to Article 16 AP II results, therefore, in the lawfulness of any attack against it falling to be determined by reference to the customary international law of targeting in non-international armed conflict. In the end, however, there is no practical difference between the situation under AP I and that under AP II, since it is now sufficiently clear that customary international law prohibits attacks against cultural property in the course of non-international armed conflict unless such property becomes a military objective within the meaning of the definition encapsulated in Article 52, para. 2, AP I. In short, under both AP I and AP II, cultural property may be attacked only on account of its use.

4. But Article 53, lit. a, AP I and Article 16 AP II are stated to be without prejudice to CultPropConv. As a consequence, where the parties to an armed conflict are parties both to AP I and AP II, on the one hand, and to CultPropConv, on the other, conduct covered by both regimes is governed by the provisions of CultPropConv.[53] The result is that parties to both regimes are entitled to invoke the waiver as to military necessity embodied in Article 4, para. 2, CultPropConv, as elaborated on by customary international law, to justify attacking cultural property.[54] But the difference is slight: whereas parties to AP I and AP II alone may attack cultural property only on account of its use, parties to AP I and AP II which are also parties to CultPropConv may additionally invoke its nature, location, and purpose—which, in the context of cultural property, is scarcely a difference at all (see below).

5. Article 6, lit. a, Prot2CultPropConv refines the application of Article 4, para. 2, CultPropConv among parties to Prot2CultPropConv. It states that a waiver on the basis of imperative military necessity pursuant to Article 4, para. 2, CultPropConv may be invoked to direct an act of hostility against cultural property only when, and for as long as, two cumulative conditions are met: first, when and for as long as the cultural property

[51] See also *ICRC Commentary*, para. 2079.

[52] See also *ICRC Commentary*, para. 2079; Toman (above, n. 21), 390; Wolfrum (above, n. 21), para. 17.

[53] See Article 30, para. 2, Vienna Convention on the Law of Treaties.

[54] See also *Strugar*, Trial Chamber Judgment, para. 309; *ICRC Commentary*, para. 2072 n. 28; Toman (above, n. 21), 389; E. David, *Principes de droit des conflits armés*, 4th edn (Brussels: Bruylant, 2008), para. 2.82; R. Kolb, *Ius in bello. Le droit international des conflits armés*, 2nd edn (Basel/Brussels: Helbing & Lichtenhahn/Bruylant, 2009), 282.

in question has, by its function, been made into a military objective (Article 6, lit. a(i), Prot2CultPropConv); and, second, when and for as long as there is no feasible alternative available for obtaining a similar military advantage to that offered by directing an act of hostility against that objective (Article 6, lit. a(ii)). 'Military objective' is defined in Article 1, lit. f, Prot2CultPropConv in accordance with the now-customary definition found in Article 52, para. 2, AP I. But a terminological disjuncture is immediately apparent: Article 6, lit. a(i), Prot2CultPropConv refers to cultural property being made into a military objective by its 'function', whereas Article 1, lit. f, speaks of its 'nature, location, purpose, or use'. The daily précis of the 1999 Hague diplomatic conference[55] reveal the explanation. Opinion was sharply divided between those states which supported reference to cultural property which 'has, by its use, become a military objective',[56] 'feeling that "nature", "purpose" and/or "location" were not on their own sufficient to define a military objective',[57] and those which sought a full restatement of the definition of a military objective found in Article 1, lit. f, Prot2CultPropConv. In other words, some delegates favoured the higher standard of protection afforded cultural property by Article 53, lit. a, AP I and Article 16 AP II, whereas others wished simply to put on an explicit treaty footing the customary gloss on Article 4, para. 2, CultPropConv. Faced with this impasse, the chair of the conference invited the informal working group on Chapter 2 of the draft Prot2CultPropConv to reconvene 'in order to try to find a balance between the need to protect cultural property, and the actions that have to be taken in certain military situations'.[58] The upshot was the compromise word 'function', a term open-textured enough to accommodate both positions—indeed, deliberately designed to permit a degree of discretion in its interpretation and application. Those states favouring the lower standard are free to hold that cultural property can become a military objective under Article 6, lit. a(i), by virtue of its nature, location or purpose, in addition to its use.[59] At the same time, states supporting the higher standard are not precluded from maintaining that only its use can make cultural property a military objective. Room is also left for the possibility that the higher standard may emerge in future as customary international law, in which case Article 6, lit. a(i), will have to be read consistently with it. It should be emphasized, however, that the practical difference between the two levels of protection is unlikely to be great (see below).

6. The requirement in Article 6, lit. a(ii), Prot2CultPropConv that there be no feasible alternative available for obtaining a similar military advantage to that offered by attacking

[55] Diplomatic Conference on a Draft Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 15–26 March 1999, Daily précis of the Diplomatic Conference, <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/hague_1999_diplo-conf_precis_en_20120523.pdf>. The full *travaux préparatoires* of Prot2CultPropConv remain publicly unavailable. But see the excerpts reproduced in J. Toman, *Cultural Property in War: Improvement in Protection. Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (Paris: UNESCO Publishing, 2009), 105–10.

[56] HC/1999/5/Add.5, draft Article 4 (eventual Article 6 Prot2CultPropConv).

[57] Précis, Wednesday 24 March 1999, in Diplomatic Conference on a Draft Second Protocol, Daily précis (above, n. 55), sixteenth unnumbered page.

[58] Ibid. seventeenth unnumbered page.

[59] Canada, for example, annexed to its instrument of accession to Prot2CultPropConv a statement declaring its understanding 'that the definition of a military objective in Article 2(f) is to be interpreted the same way as Article 52(2) of Additional Protocol I to the Geneva Conventions of 1949' and 'that under Article 6(a)(i), cultural property can be made into a military objective because of its nature, location, purpose or use' (<http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES>).

the cultural property is really no more than an explicit elaboration of the limits imposed by imperative military necessity, as embodied in Article 4, para. 2, CultPropConv and reflected in Article 57, para. 3, AP I.[60]

7. The reference in Article 53 AP I's 'without prejudice' clause to 'other relevant international instruments' would appear to be to RoerichPact, in force when the provision was adopted, but the ordinary meaning of the phrase would also encompass any similar specialist international agreement for the protection of cultural property in the event of armed conflict as may be concluded in the future. In this light, where parties to AP I are also parties to Prot2CultPropConv, conduct covered by both instruments is governed by the provisions of Prot2CultPropConv. Article 16 AP II's 'without prejudice' clause makes no mention of 'other relevant international instruments', seemingly reflecting the fact that, insofar as it applies during wartime, RoerichPact applies only to wars between states, and not to civil wars. Given the relationship between Article 53 AP I and Prot2CultPropConv, however, and in the light of the drafters' intention that Article 16 AP II should not affect the application of the specialist regime represented at the time by CultPropConv, it is reasonable to treat Prot2CultPropConv as a *de facto* integral part of CultPropConv for the specific purposes of Article 16 AP II, with the result that Article 16 AP II is without prejudice to the provisions of Prot2CultPropConv. As such, where a state is party to both AP II and Prot2CultPropConv, conduct by that state which is covered by both instruments is governed by the provisions of Prot2CultPropConv. At present, however, in neither international nor non-international armed conflict does any of this make a practical difference.

8. When it comes to applying the rule on attacks against cultural property, such property may be considered a military objective in certain circumstances, although these circumstances will be rare. It is not absurd to suggest that very specific cultural property—historic fortresses, barracks, arsenals, and the like—can, by its nature, make an effective contribution to military action. That said, if it is decommissioned, an eighteenth-century fortress, to take an example, is better characterized by its nature as a historic monument, rather than a fortress; and if it is still in service, any effective contribution it may make to military action will be through its use, rather than its nature. Similarly, while the vast majority of cultural property cannot make an effective contribution to military action through its purpose (defined as 'the future intended use of an object'[61]), a historic bridge, railway station, or dock could conceivably, by its purpose, make such a contribution, although whether this contribution is genuinely effective will depend on the circumstances. Generally speaking, one would not expect infrastructure built in and for another age to play a significant military role today. As for location, it is not unimaginable that the position of cultural property during a battle could serve to block a party's line of fire. At the same time, any contribution this may make to the military action of the opposing party is arguably better seen as a function of the property's passive or

[60] Article 57, para. 3, AP I provides that when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be the one which, if attacked, may be expected to cause the least danger to civilian lives and to civilian objects. Cultural property is a species of civilian object.

[61] *Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26* (Eritrea/Ethiopia), Partial Award, 135 ILR 565 at para. 120, endorsing *UK Manual*, para. 5.4.4, in turn endorsing *ICRC Commentary*, para. 2022.

*de facto* use.[62] In the final analysis, then, it is principally through its use, if it all, that cultural property could be expected to make an effective contribution to military action.[63] In other words, use in support of military action is the principal reason which a party to the conflict could be expected to invoke to justify attacking cultural property. Indeed, it is inconceivable today that a party would cite the nature of cultural property to this end, scarcely imaginable that it would cite its purpose, and highly unlikely that it would cite its location.

9. It is crucial to note in all of the above cases that, whatever contribution cultural property may make to military action, an attack against it is lawful only when its total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. '[A]nd even then attacks on it may not be necessary'.[64] For example, as Rogers points out, if enemy snipers have installed themselves in cultural property, it may be possible simply to bypass it.[65] Equally, it may be possible to surround it and wait, while pursuing a peaceful resolution through negotiation and reliance on diplomatic good offices, as the Israel Defence Forces did for over a month in 2002 at the Church of the Nativity in Bethlehem, in which a large number of armed Palestinian militants had taken up position. In short, there must be no feasible alternative method for dealing with the situation before an attack on cultural property can be held permissible.[66]

10. The prohibition on attacks against cultural property is backed up by two mandatory precautions in attack deriving from Article 57, para. 2, AP I, Article 7 Prot2CultPropConv and customary international law. AP II makes no mention of such precautions.

903 **The parties to the conflict shall take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental damage to cultural property (Article 57, para. 2, lit. a(ii), AP I; Article 7, lit. b, Prot2CultPropConv). They shall refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property which would be excessive in relation to the concrete and direct military advantage anticipated (Article 57, para. 2 lit. a(iii), AP I; Article 7, lit. c, Prot2CultPropConv). They shall cancel or suspend an attack if it becomes apparent that it may be expected to cause incidental damage to cultural property which would be excessive in relation to the concrete and direct military advantage anticipated (Article 57, para. 2, lit. b, AP I; Article 7, lit. d(ii), Prot2CultPropConv).**

1. The three rules stated here apply during both international and non-international armed conflict, and apply to all attacks, whether by land, sea, or air. In the context of international armed conflict, all three accord with customary international law. In the context of non-international armed conflict, the first is probably consonant with custom, but evidence for the second and third is not yet conclusive.

[62] See also *ICRC Commentary*, para. 2078. For example, the defending German forces can be taken to have made passive or *de facto* use of the abbey of Monte Cassino in the Second World War.

[63] See also J. M. Henckaerts, 'New rules for the protection of cultural property in armed conflict' (1991) 81 *IRRC* 593, at 602–6. Indeed, *UK Manual*, para. 5.26.3 n. 120, goes so far as to state that waiver under Article 4, para. 2, CultPropConv 'only arises where the enemy unlawfully uses such property for military purposes'. See also Wolfrum (above, n. 21), para. 14.

[64] *UK Manual*, para. 5.26.3 n. 120.

[65] A. P. V. Rogers, *Law on the Battlefield*, 3rd edn (Manchester and New York: Manchester University Press, 2012), 186.

[66] *UK Manual*, para. 5.26.8; Rogers (above, n. 65), 186–7.

2. Incidental damage inflicted in the course of attacks against otherwise lawful targets has historically posed the single greatest threat to cultural property in armed conflict, at least since the rise of modern forms of bombardment. One of the most significant advances in the protection of cultural property in armed conflict came, therefore, with the adoption in Article 51, para. 5, lit. b, AP I, cross-referable to Article 51, para. 4, AP I, of a prohibition on attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects (including cultural property), or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. The standard is one of proportionality. It is supported by the three obligatory precautions in attack found in Article 57, para. 2, lit. a(ii), Article 57, para. 2, lit. a(iii) and Article 57, para. 2, lit. b, AP I, reproduced in the specific context of cultural property in Article 7, lit. b, Article 7 lit. c, and Article 7, lit. d(ii), Prot2CultPropConv.

3. As applied to cultural property, proportionality in the context of incidental damage implicates qualitative as much as quantitative factors. The extent of incidental loss occasioned by damage to or destruction of cultural property is a question not just of square metres but also of the cultural value represented thereby. In this light, it is significant that cultural property is by definition of great importance to the cultural heritage of a people, and that the preamble to CultPropConv, as echoed in Resolution 20(IV) of the Diplomatic Conference of Geneva, declares that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind. Since elements of this heritage are often irreplaceable, only the anticipation of very considerable concrete and direct military advantage, in many cases overwhelming, will, in practice, suffice to justify an attack likely to cause incidental damage to cultural property. A textbook example of the application of the rule of proportionality came during the Gulf War in 1991, when Iraq positioned two fighter aircraft next to the ancient ziggurat of Ur. Coalition commanders decided not to attack the aircraft 'on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple'.[67]

**All other acts of hostility against cultural property are prohibited unless imperatively required by military necessity (Article 23, lit. g, HagueReg; Article 4, paras. 1 and 2, CultPropConv).** 904

1. The rule stated here is applicable to both international armed conflict and non-international armed conflict, and accords with customary international law in both contexts.

2. Article 23, lit. g, HagueRegs prohibits the destruction of enemy property unless it is imperatively demanded by the necessities of war. The rule is reiterated in the specific context of cultural property in Article 4, para. 1, CultPropConv, as qualified by Article 4, para. 2, CultPropConv, in accordance with which parties are obliged to respect cultural property by refraining from any act of hostility against it, unless military necessity imperatively requires otherwise. The term 'any act of hostility' is significant in forbidding

[67] Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, Appendix O: The Role of the Law of War (1992) 31 *ILM* 626.

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not just attacks against cultural property but also *inter alia* its demolition,[68] whether by way of explosives or bulldozers or other wrecking equipment, and whether to impede the progress of enemy columns, to clear a line of fire, to deny cover to enemy fighters or *a fortiori* for motives other than military. Since acts of hostility other than attacks are not amenable to an analysis based on the concept of a military objective, the latter being relevant only to attacks,[69] the rule stated here reflects the plain language of Article 4, paras. 1 and 2, CultPropConv and Article 23, lit. g, HagueRegs.

3. Article 53 AP I and Article 16 AP II similarly apply to any acts of hostility directed against cultural property, and thus encompass demolitions as much as attacks. It will be recalled that neither provision embodies a waiver in respect of military necessity. Nor, in the context of acts of hostility other than attacks, does Article 53 AP I interact with the concept of a military objective in Article 52, para. 2, AP I, since the latter applies only to attacks. The same goes *mutatis mutandis* for Article 16 AP II and the customary analogue of Article 52, para. 2, AP I applicable to non-international armed conflict. The result is that acts of hostility against cultural property other than attacks are absolutely prohibited by Article 53 AP I and Article 16 AP II. But Article 53 AP I and Article 16 AP II are without prejudice to CultPropConv, with the consequence that parties to both regimes are entitled to invoke the waiver in respect of imperative military necessity embodied in Article 4, para. 2, CultPropConv.

4. Imperative military necessity implies no feasible alternative for dealing with the situation. As emphasized by Eisenhower, military necessity is not the same as military convenience,[70] a view reiterated in 1997 by the third meeting of the parties to CultPropConv[71] and the following year by a meeting of governmental experts drawn from fifty-seven parties.[72] 'It is not sufficient that the objective could be more easily attained by endangering the protected object'; rather, 'an imperative necessity presupposes that the military objective cannot be reached in any other manner'.[73] Military necessity also serves to calibrate the extent of any damage or destruction compelled by military considerations: harm to cultural property occasioned by the invocation of the concept must be only to a degree that is imperatively necessary.

905 **It is prohibited to make cultural property the object of reprisals (Articles 52, para. 1, and 53, lit. c, AP I; Article 4, para. 4 CultPropConv; see above, Section 488).**

1. The rule stated here applies during both international and non-international armed conflict. In the context of international armed conflict, it accords with customary international law. The position is uncertain as regards non-international armed conflict.

[68] See also M. Bothe et al., *New Rules for Victims of Armed Conflicts* (The Hague/Boston/London: Nijhoff, 1982), para. 2.5.2; *ICRC Commentary*, para. 2070; Toman (above, n. 21), 389.

[69] Article 52, para. 2, AP I, as consonant with custom.

[70] Covering memorandum to General Order No. 68, 29 Dec. 1943, reproduced in *Hansard*, HC, Vol. 396, col. 1116, 1 February 1944.

[71] CLT-97/CONF.208/3, para. 5(ii).

[72] 155 EX/51, Annex, para. 14.

[73] Partsch (above, n. 33), 388. See also *UK Manual*, paras. 5.26.3 n. 120, 5.26.8; Rogers (above, n. 65), 186–7; R. Wolfrum, 'Protection of Cultural Property in Armed Conflict' 32 *IsrYHR* (2003) 305 at 325. See too H. Grotius, *De Jure Belli ac Pacis*, first published 1625, text of 1646 translated by F. W. Kelsey (Oxford: Clarendon Press, 1925), Book II, Ch. 22, s. 6 ('Advantage does not confer the same right as necessity').

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2. Article 4, para. 4, CultPropConv obliges parties to refrain from any act directed by way of reprisals against cultural property, a prohibition to which the waiver in respect of imperative military necessity in Article 4, para. 2, CultPropConv is not applicable. This absolute prohibition is reiterated in Article 53, lit. c, AP I and, as regards civilian objects generally, in Article 52, para. 1, AP I. Article 16 AP II, on the other hand, makes no mention of reprisals.

**It is prohibited to make any use of cultural property likely to expose it to destruction or damage in the event of armed conflict unless no choice is possible between such use and another feasible method for obtaining a similar military advantage (Article 4, paras. 1 and 2 CultPropConv and Article 6, lit. b, Prot2CultPropConv).** 906

1. The rule stated here is applicable to both international and non-international armed conflict, and accords with customary international law in both contexts.

2. The first limb of Article 4, para. 1, CultPropConv obliges parties to respect cultural property by refraining from any use of the property and its immediate surroundings for purposes which are likely to expose it to destruction or damage in the event of armed conflict. The wording makes this provision more than a prohibition on the use of cultural property for hostile purposes. The reference to 'its immediate surroundings' and to any use 'for purposes which are likely to expose it to destruction or damage' means that the prohibition extends to its *de facto* or passive use in any manner likely to draw fire on it.[74] Article 4, para. 1, CultPropConv therefore prohibits the deliberate interposition of cultural property in the line of fire, for example by retreating to a position obscured by a monument from the opposing party's view. The provision also serves to forbid the effective incorporation of a monument into a defensive line, as with the German 'Gustav line' around the abbey at Monte Cassino in the Second World War. Nor is it only use in combat that the rule prohibits. If it is foreseeable that the use of a protected building as a field headquarters or barracks, for example, will expose it to attack, such use is forbidden. The first limb of Article 4, para. 1, CultPropConv would also prohibit parking military aircraft in the immediate surroundings of cultural property,[75] as Iraq did in the Gulf War of 1991. Nor, indeed, need such use expose the property in question to attack for it to fall foul of the rule: the provision forbids any use likely to expose cultural property to damage during armed conflict (which, as per Article 18, para. 2, CultPropConv, includes belligerent occupation), with the result that the likelihood of more than *de minimis* deterioration in the fabric of a monument, and *a fortiori* the risk of vandalism, through its use as a headquarters, barracks, or the like is enough to render such use impermissible. It is important to note too that the first limb of Article 4, para. 1, CultPropConv prohibits the use of cultural property and its surroundings in any manner likely to expose it to damage or destruction 'in the event of armed conflict'. In other words, if such use in peacetime is likely to expose cultural property to attack on the outbreak of hostilities, it is not permitted.[76]

[74] Partsch (above, n. 33), 385, speaks in this respect of 'indirect' use.

[75] Rogers (above, n. 65), 188 n. 101.

[76] So, for example, the former Ukrainian SSR reported that, even in peacetime, Soviet armed forces were not allowed to be quartered, to stock arms or to install military targets in the immediate surroundings of historic monuments or groups of historic monuments, 'as stated in Article 4, paragraph 1 of the Convention': CC/MD/11, 38. That certain provisions of the CultPropConv apply in peacetime is made clear in Article 18, para. 1.

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3. But Article 4, para. 1, CultPropConv is qualified by the waiver as to military necessity in Article 4, para. 2, CultPropConv. As such, if military necessity imperatively requires the use of cultural property and its surroundings for purposes likely to expose it to attack, such use is not prohibited. An example of one of the '*rare* cases where it is essential to use cultural property for military purposes' is a historic bridge which constitutes the only available river crossing.[77] A further example is the positioning of an artillery piece in the immediate vicinity of cultural property if that is the only point from which an enemy stronghold dominating the battlefield can be attacked.[78]

4. It should be emphasized that a party's use of cultural property and its surroundings in any manner likely to expose it to destruction or damage does not as such make it lawful for an opposing party to attack it. That is, a party's breach of the first limb of Article 4, para. 1, CultPropConv does not *ipso facto* relieve an opposing party from its obligation under the second limb of the provision, as stressed by the Legal Committee during the drafting of the Convention.[79] Cultural property put to such use may be attacked only if it makes an effective contribution to military action and its total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

5. Article 53, lit. b, AP I and Article 16 AP II prohibit parties from using cultural property in support of the military effort. The concept of 'the military effort' is arguably wider than the notion of 'military action' referred to in the definition of a military objective in Article 52, para. 2, AP I. According to the *ICRC Commentary*, the military effort is 'a very broad concept, encompassing all military activities connected with the conduct of a war'.[80] For example, the use of the cellars of a historic castle a long way behind the front line to store rations may be considered supportive of the military effort but may not be thought to make an effective contribution to military action. The same may go for the billeting of non-front-line troops there. Such use may be held to violate Article 53, lit. b, AP I or Article 16 AP II but would arguably not render the castle a military objective. Since neither Article 53, lit. b, AP I nor Article 16 AP II contains an exception in respect of military necessity, their respective prohibitions on the use of cultural property in support of the military effort are absolute. But as these provisions are without prejudice to CultPropConv, parties to both regimes may invoke the waiver as to military necessity in Article 4, para. 2, CultPropConv.

6. Article 6, lit. b, Prot2CultPropConv provides that a waiver on the basis of imperative military necessity pursuant to Article 4, para. 2, CultPropConv may be invoked to use cultural property for purposes which are likely to expose it to destruction or damage only when, and for as long as, no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage. The provision is no more than a codified statement of the proper application of Article 4, para. 2, CultPropConv as it applies to the use of cultural property.

[77] *UK Manual*, para. 5.25.3, original emphasis.

[78] *Der Schutz von Kulturgut bei bewaffneten Konflikten*, Federal Ministry of Defence publication ZDv 15/9, 15 July 1964, 16, cited in Rogers (above, n. 65), 187.

[79] Records 1954, para. 1170. See also Toman (above, n. 21), 70, 75; *UK Manual*, paras. 5.26.3 n. 120, 5.26.8.

[80] *ICRC Commentary*, para. 2078.

**All forms of theft, pillage, misappropriation, confiscation or vandalism of cultural property are prohibited. The parties to the conflict shall prohibit, prevent and, if necessary, put a stop to all such acts. They shall refrain from requisitioning movable cultural property situated in the territory of an opposing party (Article 4, para. 3, CultPropConv).** 907

1. The first two rules stated here apply during international and non-international armed conflict alike; the third by definition only during international armed conflict. In the context of international armed conflict, all three accord with customary international law. The first two are also more likely than not to be consonant with custom in non-international armed conflict.

2. The undertaking in Article 4, para. 3, CultPropConv to prohibit, prevent, and, if necessary, put a stop to all forms of theft, pillage, misappropriation, confiscation, or vandalism of cultural property is not limited to the commission of such acts by a party's own armed forces but extends to commission by the local populace and by remnants of the opposing armed forces. This explains why the first limb of the provision is formulated as an obligation to prohibit, prevent, and, if necessary, put a stop to the relevant conduct, instead of merely an obligation to refrain from it, as is the case with the second limb of the provision and with Art 4, paras. 1 and 4, CultPropConv. Indeed, somewhat curiously, Article 4, para. 3, does not in terms oblige a party to refrain from theft, pillage, misappropriation, confiscation, or vandalism of cultural property. But a prohibition to this effect must be implied, reasoning *a fortiori*.[81] Any other outcome would fly in the face of the Article's object and purpose. The implication is strengthened by the adoption of Article 15, para. 1, lit e, Prot2CultPropConv, which recognizes as a war crime, when committed intentionally and in violation of CultPropConv, theft, pillage, or misappropriation of, or acts of vandalism directed against, cultural property protected under CultPropConv. Article 4, para. 3, CultPropConv is not subject to Article 4, para. 2's waiver in respect of military necessity.

**The parties to the conflict shall take the necessary precautions to protect cultural property under their control against the dangers resulting from military operations (Article 58, lit. c, AP I). They shall, to the maximum extent feasible, remove cultural property from the vicinity of military objectives (Article 58, lit. a, AP I; Article 8, lit. a, Prot2CultPropConv) or provide for adequate *in situ* protection (Article 8, lit. a, Prot2CultPropConv), and they shall avoid locating military objectives near cultural property (Article 8, lit. b, Prot2CultPropConv).** 908

The first rule stated here applies only to international armed conflict, the following two rules to both international and non-international armed conflict. The customary status of all three is unclear in either context.

## 2. Special Protection

**Contracting parties may request that a limited number of refuges for movable cultural property and of centres containing monuments and a limited amount of** 909

[81] For the use of identical *a fortiori* reasoning to read a prohibition on commission into an obligation to prevent, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Merits, Judgment, *ICJ Reports 2007*, 43 at para. 166.

**immovable cultural property of very great importance be placed under special protection (Article 8, para. 1, CultPropConv).**

1. Chapter II CultPropConv (Articles 8–11) establishes a regime of 'special protection' applicable over and above the general protection provided for in Chapter I CultPropConv. This supplementary regime is designed to provide a higher standard of protection in respect of a narrower range of property, a higher standard which relates specifically to the obligation to refrain from using cultural property and its surroundings for military purposes and the obligation to refrain from directing acts of hostility against it. These twin obligations aside, all the obligations otherwise applicable to movables and immovables which satisfy the definition of cultural property under Article 1 CultPropConv are equally applicable to property which additionally qualifies for special protection under Article 8 CultPropConv. Special protection is available only in respect of refuges intended to shelter movable cultural property, centres containing monuments, and other immovable cultural property. It is not available for movable cultural property as such. Moreover, refuges, centres containing monuments, and other immovable cultural property are entitled to special protection only if they satisfy strict criteria.

2. The difference between the standards imposed during armed conflict by the regime of special protection and the respect owed to cultural property under general protection is extraordinarily minor. Although labelled 'immunity', the additional restraints mandated in relation to specially protected property amount to no more than a slight tightening of the conditions under which the waiver as to military necessity may be invoked. Any greater substantive protection that such property may stand to enjoy effectively derives from the regime's criteria for eligibility, which prescribe a *cordon sanitaire* around the property.

3. The success of the arrangements for special protection 'has proved very limited'.[82] Putting it less delicately, Chapter II CultPropConv is a white elephant. Only one centre containing monuments, the Vatican City, and eight refuges for movable cultural property (six of them in the Netherlands) have ever been entered in the International Register of Cultural Property under Special Protection, and the Vatican City's entry was possible only thanks to a special undertaking by Italy ostensibly under Article 8, para. 5, CultPropConv. Four of the refuges have since been removed at the request of the respective parties, leaving the Register to comprise now four refuges (three in the Netherlands and one in Germany), and a lone centre containing monuments.[83] The reasons for this underwhelming uptake are obvious: the criteria of eligibility for special protection are cripplingly difficult to satisfy, while the procedure by which such protection is granted is potentially tortuous, time-consuming, and, with precious little reward for success, hardly worth the effort.

4. The regime of special protection is now also, in effect, a dead letter, since it has, for all intents and purposes, been replaced by the regime of 'enhanced protection' under Chapter 3 Prot2CultPropConv. But it has not been formally abolished, making a bare outline of its rules a necessity.[84]

[82] Toman (above, n. 21), 108.
[83] See CLT/CIH/MCO/2008/PI/46 (December 2000), as manually amended.
[84] For a full account, see O'Keefe (above, n. 18), 140–62.

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5. The rules stated in Sections 910–915 apply only during international armed conflict, and do not reflect customary international law.

910 The grant of special protection is subject to the following criteria:
— The cultural property must be situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point (e.g. an aerodrome, broadcasting station, major port, railway station, or main line of communication) (Article 8, para. 1, lit. a, CultPropConv). Cultural property not so situated may, nonetheless, be placed under special protection if the contracting party requesting such protection undertakes, in the event of armed conflict, to make no use of the military objective in question and, in the case of a port, railway station, or aerodrome, to divert all traffic therefrom (Article 8, para. 5, CultPropConv). A refuge for movable cultural property not so situated may, nonetheless, be placed under special protection if it is designed in such a way that it will not, in all probability, be damaged in the event of attack (Article 8, para. 2, CultPropConv).
— The cultural property must not be used for military purposes (Article 8, para. 1, lit. b, CultPropConv). A centre containing monuments shall be deemed to be used for military purposes whenever it is used for the movement of military forces or material, even by way of transit, or whenever activities directly connected with military operations, the stationing of military forces or the production of military material take place within the centre (Article 8, para. 3, CultPropConv). The guarding of cultural property by specially authorized armed custodians or the presence in the vicinity of police forces responsible for the maintenance of public order shall not be deemed to be use for military purposes (Article 8, para. 4, CultPropConv).

Special protection is granted to cultural property by its entry in the International Register of Cultural Property under Special Protection (Article 8, para. 6, CultPropConv) maintained by the Director General of UNESCO (Articles 12–16 RegExCultPropConv).

911 If during an armed conflict a contracting party is induced by unforeseen circumstances to set up an improvised refuge for movable cultural property, and if in the view of the Commissioner General for Cultural Property accredited to that party (Articles 2, 4, 6, 8–10 RegExCultPropConv) the refuge fulfils the criteria for special protection, the refuge may, subject to the consent of the delegates of the protecting powers accredited to the opposing parties (Articles 2, 3, 5, 8–10 RegExCultPropConv), be granted special protection by its entry in the International Register of Cultural Property under Special Protection (Article 11 RegExCultPropConv).

912 Contracting parties shall ensure the immunity of cultural property under special protection by refraining from any act of hostility against such property, except in exceptional cases of unavoidable military necessity (Articles 9 and 11, para. 2, CultPropConv).

913 Contracting parties shall ensure the immunity of cultural property under special protection by refraining from any use of such property or its surroundings for military purposes, except in exceptional cases of unavoidable military necessity (Articles 9 and 11, para. 2, CultPropConv).

914 Unavoidable military necessity can be established only by the commander of a division or higher-ranking officer. When circumstances permit, the opposing

**party shall be notified a reasonable time in advance of the decision (Article 11, para. 2, CultPropConv). The contracting party taking the decision shall, as soon as possible, and in writing, inform the Commissioner General for Cultural Property accredited to it of the decision, giving reasons (Article 11, para. 3, CultPropConv).**

915 **If a contracting party violates one of its obligations towards cultural property under special protection, the opposing party shall, for as long as the violation persists, be released from its obligation to ensure the immunity of the property concerned, although whenever possible the latter party shall first request the cessation of the violation within a reasonable time (Article 11, para. 1, CultPropConv). The contracting party taking the decision shall, as soon as possible, and in writing, inform the Commissioner General for Cultural Property accredited to it of the decision, giving reasons (Article 11, para. 3, CultPropConv). The cultural property in question shall remain protected by the general rules on respect for cultural property.**

## 3. Enhanced Protection

916 **Contracting parties may request that cultural property be placed under enhanced protection (Article 10 Prot2CultPropConv).**

1. The predominant view during the review of CultPropConv was that the regime of special protection had been a failure. At the same time, although doubts were expressed as to the utility of maintaining two different levels of protection, it was generally agreed that the distinction should be kept. In the event, the effective replacement of special protection by the new regime of enhanced protection emerged as one of the core rationales of Prot2CultPropConv, as underscored in the first preambular recital.

2. Enhanced protection, unlike special protection, is available for immovable and movable cultural property alike. Its conditions of eligibility are intended to be more realizable than those for special protection, with the absence of any requirement that the property in question be situated an adequate distance from military objectives. The procedure by which enhanced protection is granted is designed to be more objective and transparent, with the final decision being taken by the Committee for the Protection of Cultural Property in the Event of Armed Conflict established under Article 24 Prot2CultPropConv. The immunity afforded is more substantial than is the case under special protection: cultural property under enhanced protection and its immediate surroundings may never be used in support of military action, it may never be subject to acts of hostility other than attacks, such as demolitions, and it may be attacked only if its use renders it a military objective.

3. The relationship between enhanced and special protection is outlined in Article 4, lit. b, Prot2CultPropConv: as between parties to Prot2CultPropConv, where cultural property has been granted both special and enhanced protection, the rules on enhanced protection alone apply.

4. Article 4, lit. a, Prot2CultPropConv states that Chapter 3 Prot2CultPropConv is without prejudice to Chapter I CultPropConv and Chapter 2 Prot2CultPropConv. What this means is that cultural property under enhanced protection enjoys the benefit of the general provisions regarding protection laid down in CultPropConv and Prot2CultPropConv, except to the extent that the rules on enhanced protection constitute *lex specialis*. The upshot

is that cultural property under enhanced protection is protected not only by Article 12 Prot2CultPropConv, as refined by Article 13, but also by Article 3, Article 4, paras. 3–5 and Article 5 CultPropConv and by Articles 5, 7, 8, and 9 Prot2CultPropConv. It also has the consequence that cultural property under enhanced protection is protected by Article 4, para. 1, CultPropConv to the extent that the expression 'act of hostility' used in that provision is more compendious than the term 'attack' used in Articles 12 and 13 Prot2CultPropConv.

**The grant of enhanced protection is subject to the following criteria:** 917

- **The cultural property must be cultural heritage of the greatest importance for humanity (Article 10, lit. a, Prot2CultPropConv).**
- **The cultural property must be protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection (Article 10, lit. b, Prot2CultPropConv).**
- **The cultural property must not be used for military purposes or to shield military sites, and the party having control over the cultural property must make a declaration that it will not be so used (Article 10, lit. c, Prot2CultPropConv).**

**Enhanced protection is granted to cultural property by its entry in the International List of Cultural Property under Enhanced Protection (Article 11, para. 10, Prot2CultPropConv) maintained by the Committee for the Protection of Cultural Property in the Event of Armed Conflict (Articles 11, 24, and 27, para. 1 lit. b, Prot2CultPropConv).**

1. The conditions of eligibility for enhanced protection are laid down in Article 10 Prot2CultPropConv, which provides that cultural property may be placed under enhanced protection if it meets the three cumulative criteria stated here. Such property enjoys enhanced protection, however, only if entered in the International List of Cultural Property under Enhanced Protection (Article 11, para. 10, Prot2CultPropConv) maintained by the Committee for the Protection of Cultural Property in the Event of Armed Conflict (Articles 11, 24, and 27, para. 1, lit. b, Prot2CultPropConv), which decides upon any request for inclusion in the List (Article 11, para. 5, Prot2CultPropConv).

2. The requirement in Article 10, lit. a, Prot2CultPropConv that the cultural property in question constitute 'cultural heritage of the greatest importance to humanity' is stricter than the requirement in Article 8 CultPropConv, which speaks of 'very great importance'. This tough threshold criterion was the *quid pro quo* for the freeing up of what might be called the objective criteria for enhanced protection. It does not, however, represent a quantifiable legal standard. The open-textured formulation, reached by consensus, appears a means of accommodating both inclusivist and exclusivist schools of thought, deferring the debate to the case-by-case deliberations of the Committee. The term 'heritage', as distinct from 'property', and the word 'humanity', as compared with the draft text 'all peoples', were settled on for purely rhetorical reasons, the former to connote intergenerational ethical responsibilities of a fiduciary character, the latter to emphasize 'the common interest in safeguarding important cultural heritage'.[85]

3. The reference in Article 10, lit. b, Prot2CultPropConv to 'cultural and historic' value, where 'cultural' alone would have sufficed, wrongly implies that the adjectives

[85] Diplomatic Conference on the Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 15–26 March 1999), Summary Report, <http://unesdoc.unesco.org/images/0013/001332/133243eo.pdf> (June 1999), para. 15.

are mutually exclusive, is inconsistent with Article 10, lit. a, Prot2CultPropConv, which uses 'cultural' only, and sits uncomfortably with Article 1 CultPropConv, which employs 'cultural' as a catch-all term for 'historical', 'artistic', 'archaeological', 'scientific', and even bibliographical and archival.

4. The first entries in the International List of Cultural Property under Enhanced Protection were made by the Committee for the Protection of Cultural Property in Armed Conflict in November 2010. All four—namely Choirokoitia, the Painted Churches of the Troodos region and Paphos (both site I, Kato Paphos town, and site II, Kouklia village) in Cyprus and Castel del Monte in Italy—are inscribed on the World Heritage List.[86] To these were added in December 2011 the Kernavé Achaeological Site (Cultural Reserve of Kernavé) in Lithuania, which is also on the World Heritage List.[87]

**918** **The parties to the conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack (Article 12 Prot2CultPropConv). Cultural property under enhanced protection may, however, be made the object of attack if:**

- **— it becomes, by its use, a military objective (Article 13, para. 1 lit. b, Prot2 CultPropConv);**
- **— the attack is the only feasible means of terminating such use (Article 13, para. 2 lit. a, Prot2CultPropConv);**
- **— all feasible precautions are taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimizing, damage to the cultural property (Article 13, para. 2, lit. b, Prot2CultPropConv);**
- **— unless circumstances do not permit owing to requirements of immediate self-defence, the attack is ordered at the highest operational level of command, effective advance warning is issued to the opposing forces requiring the termination of the use, and reasonable time is given to the opposing forces to redress the situation (Article 13, para. 2 lit. c, Prot2CultPropConv).**

1. The rules stated here apply during both international and non-international armed conflict, but do not reflect customary international law.

2. For no obvious reason, Article 12 Prot2CultPropConv uses the phrase 'by refraining from making such property the object of attack' in preference to the more compendious 'by refraining . . . from any act of hostility directed against such property', the latter being employed in Article 9 CultPropConv (special protection), as well as *mutatis mutandis* in Article 4, para. 1, CultPropConv and Article 6 Prot2CultPropConv (general protection) and in Article 53, lit. a, AP I and Article 16 AP II. As a result of this more restrictive formulation, Article 12 Prot2CultPropConv does not encompass acts of hostility other than attacks, such as demolitions. But where the rules on enhanced protection does not constitute *lex specialis*, cultural property under enhanced protection benefits from the general provisions regarding protection in CultPropConv and Prot2CultPropConv. In

[86] See Article 11, para. 2, 1972 Convention concerning the Protection of the World Cultural and Natural Heritage, 1037 *UNTS* 151.

[87] For its part, the UK currently proposes to request enhanced protection for its twenty-two cultural sites on the World Heritage List. In the case of movable cultural property, in the absence of any internationally agreed criteria for designating the collections of museums, galleries, or archives, the UK proposes to request enhanced protection for the contents of twenty-six museums and galleries, as well as of the National Record Offices and the country's five legal deposit libraries. See Department of Culture, Media and Sport (above, n. 25), 30–3.

 

this light, the prohibition on demolitions inherent in the obligation in Article 4, para. 1, CultPropConv to refrain from acts of hostility against cultural property applies to cultural property under enhanced protection.

3. Article 13, para. 1, Prot2CultPropConv specifies two circumstances in which cultural property under enhanced protection can 'lose such protection', in the words of the chapeau. The wording is unfortunate, since what the cultural property is better characterized as losing in the second of the two circumstances is its immunity, rather than its enhanced protection as such. It is, however, a distinction without a difference, given the exact formulation of Article 13, para. 1, lit. b.

4. The first situation in which enhanced protection can be lost, as spelled out in Article 13, para. 1, lit. a, Prot2CultPropConv, is if such protection is suspended or cancelled in accordance with Article 14 Prot2CultPropConv. This eventuality is not included in the rule stated here, for the simple reason that, where enhanced protection is suspended or cancelled, the property in question is not cultural property under enhanced protection.

5. The other circumstance in which cultural property can lose its enhanced protection, or more accurately in this case its immunity, is if and for as long as it has, by its use, become a military objective (Article 13, para. 1, lit. b, Prot2CultPropConv). Two crucial implications are to be drawn from this provision. First, provided it is not suspended or cancelled, enhanced protection can be lost only in relation to attacks, since it is only attacks which depend on whether an object is a military objective. In other words, in contrast to the immunity of specially protected cultural property under CultPropConv, but no different from the protection afforded cultural property more generally by Article 53 AP I and Article 16 AP II, the immunity of cultural property under enhanced protection is absolute when it comes to acts of hostility other than attacks, such as demolitions. Military necessity can never justify such acts. Second, whereas cultural property under general protection can become a military objective through any one of its nature, location, purpose, or use, cultural property under enhanced protection, like cultural property under Article 53 AP I and Article 16 AP II, can become a military objective only through its use. It was this that a majority of delegates to the 1999 Hague diplomatic conference saw as the main difference in the protection afforded by general and enhanced protection respectively.[88]

**The parties to the conflict shall ensure the immunity of cultural property under enhanced protection by refraining from any use of such property or its immediate surroundings in support of military action (Article 12 Prot2CultPropConv).** 919

1. The rule stated here applies during both international and non-international armed conflict, but does not reflect customary international law.

2. Article 12 Prot2CultPropConv uses the expression 'in support of military action', as found in Article 52, para. 2, AP I, rather than 'in support of the military effort', as contained in Article 53, lit. b, AP I and Article 16 AP II. The concept of 'military action', referring to military operations, is arguably more restrictive than the notion of 'the military effort', which is 'a very broad concept, encompassing all military activities connected with the conduct of a war',[89] with the result that the protection granted by

[88] Diplomatic Conference on the Second Protocol, Summary Report (above, n. 85), para. 22. See also Toman (above, n. 55), 231.

[89] *ICRC Commentary*, para. 2078.

Article 12 Prot2CultPropConv against military use, generically speaking, is possibly narrower than that provided by Article 53, lit. b, AP I and Article 16 AP II. The term 'military action' is also possibly narrower than 'military purposes', as used in Article 11, para. 2, CultPropConv.

3. The only[90] situation in which enhanced protection, or more accurately immunity, can be lost is if the cultural property has, by its use, become a military objective (Article 13, para. 1, lit. b, Prot2CultPropConv), and this is applicable only to attacks against such property. The result is that the immunity of cultural property under enhanced protection is absolute when it comes to its use in support of military action. Military necessity can never justify such use.

920 **Where cultural property under enhanced protection no longer meets any of the criteria for such protection, the Committee for the Protection of Cultural Property in the Event of Armed Conflict may suspend this protection or may cancel this protection by removing the cultural property from the International List of Cultural Property under Enhanced Protection (Article 14, para. 1, Prot2CultPropConv). The Committee may also suspend the enhanced protection granted to cultural property in the case of a serious violation of the immunity of that property through its use in support of military action. Where such violation is continuous, the Committee may exceptionally cancel the enhanced protection granted to the property by removing the property from the List (Article 14, para. 2, Prot2CultPropConv). The Committee shall afford an opportunity to the contracting parties to make their views known before taking a decision to suspend or cancel enhanced protection (Article 14, para. 3, Prot2CultPropConv).**

## III. Safeguarding of Cultural Property

921 **Contracting parties shall prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate (Article 3 CultPropConv). Such measures shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision of adequate *in situ* protection of such property, and the designation of competent authorities responsible for the safeguarding of cultural property (Article 5 Prot2CultPropConv).**

1. The rule stated here does not reflect customary international law.

2. For the purposes of CultPropConv, the protection of cultural property is defined to comprise both the safeguarding of and respect for cultural property (Article 2 CultPropConv), the latter referring to restraints on methods of warfare, the former referring to so-called 'material' protection, that is practical measures, prepared in advance in peacetime, against the foreseeable effects of armed conflict. The obligation to safeguard cultural property is laid down in Article 3 CultPropConv, which obliges parties to prepare in time of peace for the safeguarding of cultural property situated within their own

[90] Leaving aside, that is, Article 13, para. 1, lit. a, Prot2CultPropConv, not considered here.

territory against the foreseeable effects of an armed conflict by taking such measures as they consider appropriate. What the drafters had in mind were '[s]pecial measures of an architectonic nature' designed to protect immovable cultural property, 'particularly against the dangers of fire and collapse'; special measures designed to protect movable cultural property 'in the building where it is generally to be found or in the immediate neighbourhood of the latter (organization, stocking of packing material, etc.)'; the establishment of refuges for movables and the organization of transport to them in the event of armed conflict; and the institution of a civilian service to execute such measures.[91] But the text of Article 3 leaves the choice of measures to be adopted to the complete discretion of the party in whose territory the cultural property is situated, and the ordinary meaning of the key phrase 'such measures as they consider appropriate' is capable of encompassing all conceivable sorts of measures.

3. Since the obligation is to take such measures as they consider appropriate, the parties are not compelled to undertake equally rigorous preparations in relation to each item of cultural property in their territory. The wording of Article 3 CultPropConv takes into account financial and technical constraints, leaving it to the parties to prioritize their resources as they see fit.[92] In the case of immovables, the drafters themselves foresaw that measures of safeguard would be taken only in relation to 'a certain number of buildings of great value and of buildings containing collections of cultural property (museums, archives, libraries, etc.)',[93] and this likelihood is acknowledged in Article 4, para. 5, CultPropConv, which provides that no party may evade the obligations of respect for cultural property incumbent upon it by reason of the fact that the opposing party has not applied the measures of safeguard referred to in Article 3. This selectivity has been borne out in the parties' practice. Those parties which in principle apply CultPropConv to the whole or a large proportion of their national cultural heritage seem generally to take fully fledged measures of safeguard in relation to only a very small fraction of immovables. For example, the Netherlands has instituted such measures for between 70 and 100 of the 43,000 immovables in the country to which it considers CultPropConv to apply.[94] As regards movables, many parties make provision for the evacuation in the event of armed conflict of only the most important artworks and antiquities, as effected in Croatia in 1991.[95]

4. Given that Article 1 CultPropConv leaves it to each party to determine the applicability of CultPropConv to specific cultural property in its territory, the measure *sine qua non* that a party can and should take in pursuance of the obligation laid down in Article 3 CultPropConv is the identification of the property in question. Linked to this, a useful practical measure of peacetime preparation undertaken in the past by some parties is the compilation and submission to UNESCO, as CultPropConv's depositary, of updated inventories of immovable cultural property and of collections of movable cultural property in their territories, for dissemination among the parties.[96] The drafters of

[91] 7 C/PRG/7, Annex I, 8.
[92] 7 C/PRG/7, Annex I, 8.
[93] 7 C/PRG/7, Annex I, 8, emphasis omitted.
[94] CC/MD/11, 28.
[95] CLT-95/WS/13, 22.
[96] See, e.g., CC/MD/11, 15 (FRG). See also, in this light, Article 4 RoerichPact, providing for an obligatory system of this nature.

CultPropConv themselves recognized that the encouragement of a standard practice of notification had, 'to a very large extent, become the essential factor in identifying property and facilitating its protection'.[97] Even better still, in the spirit of the drafters' view that cultural property will not be safe from bombardment unless its location is known,[98] Switzerland has previously sent to the Director General of UNESCO a map showing the location of cultural property in its territory and in Liechtenstein.[99] In turn, the Director General transmitted copies of the map to all the parties.[100] An updated topographic map showing 1,500 high-priority objects in Swiss territory and an inventory of the complete 8,000 'cultural items that Switzerland wished to protect and have protected' were subsequently circulated.[101] For their part, after an artillery attack in July 1991 on the town of Erdut damaged its medieval fortress, the Croatian authorities sent lists of cultural monuments marked with CultPropConv's distinctive sign to the Yugoslav Federal Defence Secretariat and to all headquarters of the Yugoslav National Army.[102]

5. There was general agreement during the review of CultPropConv that Article 3 CultPropConv was unhelpfully impressionistic. A more programmatic provision was needed, 'listing steps to be taken in peacetime to ensure overall risk-prevention'.[103] As a result, Article 5 Prot2CultPropConv puts flesh on the bare bones of Article 3 CultPropConv by providing that preparatory measures taken pursuant to Article 3 shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of cultural property or the provision for its adequate *in situ* protection, and the designation of competent authorities responsible for the safeguarding of cultural property. The measures listed are merely indicative.[104]

## IV. Protection of Cultural Property during Occupation

922 **All acts of hostility against cultural property are prohibited during belligerent occupation unless imperatively demanded by military necessity (Articles 56 and 23, lit. g, HagueReg; Article 53 GC IV; Article 4, paras. 1 and 2, CultPropConv).**

1. The rule stated here applies only during international armed conflict, and accords with customary international law.

2. Article 23, lit. g, HagueRegs prohibits the destruction of enemy property unless it is imperatively demanded by the necessities of war. In the specific context of belligerent

[97] CL/484, Annex, 14.
[98] CL/484, Annex, 11.
[99] SHC/MD/1, 34. See also the recommendation to this end in Final Communiqué of the NATO-Partnership for Peace (PfP) Conference on Cultural Heritage Protection in Wartime and in State of Emergency (21 June 1996), para. 3.5, and the analogous suggestion in M. Dutli (ed.), *Protection of Cultural Property in the Event of Armed Conflict: Report on the Meeting of Experts (Geneva, 5–6 October 2000)* (Geneva: ICRC, 2002), 178.
[100] SHC/MD/1, para. 13.
[101] CLT-95/WS/13, 43.
[102] CLT-95/WS/13, 22.
[103] CLT/CH/94/608/2, 6.
[104] CLT/CH/94/608/2, 6.

occupation, and as specifically regards cultural property, Article 56 HagueRegs lays down an absolute prohibition on the destruction and wilful damage of the latter. It is important to appreciate, however, that what Article 56 HagueRegs forbids is destruction and wilful damage to cultural property unconnected with military operations. Insofar as any destruction or damage is for the purpose of furthering military operations, it is governed under HagueRegs not by Article 56 but by Article 23, lit. g, regulating the destruction of enemy property in the context of hostilities. This accords with Article 53 GC IV, which provides that any destruction by the occupying power of real or personal property is prohibited, except where such destruction is rendered absolutely necessary by military operations.

3. The provisions of Article 4 CultPropConv apply as much to belligerent occupation as to active hostilities. As a consequence, all acts of hostility against cultural property are prohibited during belligerent occupation unless imperatively demanded by military necessity (Article 4, paras 1 and 2, CultPropConv) (see above, Section 904).

4. Reasoning along the lines of the rule stated here was relied on by the Supreme Court of Israel (sitting as the High Court of Justice) in *Hess v Commander of the IDF in the West Bank*,[105] where the Court, referring to HagueRegs, GC IV and CultPropConv without citing provisions, upheld an order of the commander of Israeli occupation forces in the West Bank to demolish, *inter alia*, a structure forming part of the historic streetscape of the Old City of Hebron in order to prevent armed attacks by Palestinian militants. The commander had revised his original order, which would have involved the destruction of twenty-two Ottoman and Mameluke buildings, some dating from the fifteenth century, in response to an earlier interim decision of the Court.[106] Although eventually upholding the order to demolish one building comprising cultural property, the Court ruled that the demolition had to be supervised by an expert in the preservation of historic buildings and an archaeologist, so as to protect as much heritage value as possible.

**All forms of theft, pillage, misappropriation, confiscation, or vandalism of cultural property are prohibited during belligerent occupation (Article 56 HagueReg; Article 4, para. 3, CultPropConv). The occupying power shall prohibit, prevent and, if necessary, put a stop to all such acts (Article 4, para. 3, CultPropConv). It shall refrain from seizing or requisitioning cultural property situated in the occupied territory (Article 56 HagueReg; Article 4, para. 3, CultPropConv).** 923

1. All three rules stated here apply only during international armed conflict, and accord with customary international law.

2. Article 56 HagueRegs lays down an absolute prohibition on all seizure of cultural property during belligerent occupation.

3. Article 4, para. 3, CultPropConv (see above, Section 907) is applicable as much to belligerent occupation as to active hostilities.

**The occupying power shall as far as possible support the competent authorities of the occupied country in safeguarding and preserving cultural property (Article 5, para. 1, CultPropConv). Should it prove necessary to take measures to preserve** 924

[105] 58(3) PD 443 (2004).
[106] *Hess v Commander of the IDF in the West Bank*, HCJ 10356/02, Interim decision, 12 February 2003.

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**cultural property situated in occupied territory and damaged by military operations, and should the competent authorities be unable to take such measures, the occupying power shall, as far as possible, and in close co-operation with these authorities, take the most necessary measures of preservation (Article 5, para. 2, CultPropConv).**

1. The two rules stated here apply only during international armed conflict, and accord with customary international law.

2. Article 5 CultPropConv is to be read against the backdrop of the pre-existing customary law of belligerent occupation, especially the rule reflected in Article 43 HagueRegs, which obliges the occupying power (unless absolutely prevented from doing so, and within the parameters set by the powers vested in and obligations imposed on it by specific rules[107]) to leave existing administrative authority intact and free to operate. In this light, the task of preserving cultural property under belligerent occupation continues to fall to the competent national authorities.

3. The obligation in Article 5, para. 1, CultPropConv goes beyond the obligation to refrain from hampering the competent national authorities to include, as far as possible, assistance. At the same time, the drafters made it clear that Article 5, para. 1, does not require the occupying power to take measures *proprio motu* to preserve (as distinct from to respect) cultural property in the territory, since such measures remain the responsibility of the competent national authorities.[108]

4. The words 'safeguarding' and 'preserving' in Article 5, para. 1, CultPropConv denote two distinct things. The former refers to the measures of safeguard mandated by Article 3 CultPropConv. The concept of 'preserving' refers to measures taken after the cessation of active hostilities to conserve and protect cultural property in the occupied territory—measures which, but for the state of belligerent occupation, would be considered peacetime measures. This second element of Article 5, para. 1, obliges the occupying power to support the competent national authorities, as far as possible, in implementing the legislative and administrative regime in force in the occupied territory for the preservation of cultural property, such as local planning laws requiring permits for construction on sensitive sites and laws regulating the upkeep of historic buildings.

925 **The occupying power shall prohibit and prevent in relation to the territory any illicit export, other removal or transfer of ownership of cultural property (Article 5 CultPropConv; Section 1 Prot1CultPropConv; Article 9, para. 1, lit. a, Prot2CultPropConv; Article 2, para. 2, and Article 11 IllicitImpExpTransConv).**

1. The rule stated here applies only during international armed conflict, and accords with customary international law.

2. Section 1 Prot1CultPropConv,[109] inspired by the systematic removal by Germany and the Soviet Union of artworks and antiquities from some of the countries occupied

[107] An example is the obligation under Article 4, para. 3, CultPropConv to prohibit, prevent and, if necessary, put a stop to all forms of theft, pillage, misappropriation, or vandalism of cultural property in the territory (see above, Section 923).

[108] 7 C/PRG/7, Annex I, 9.

[109] While the provisions of binding international agreements are usually called 'articles', Prot1CultPropConv refers to its provisions as 'paragraphs'.

by them during the Second World War, requires each party to prevent the export of cultural property from territory occupied by it during armed conflict. The obligation imposed on an occupying power goes beyond ensuring that its own occupation authorities or military forces do not export cultural property from the territory: para. 1 encompasses a duty to prevent private parties from doing so. Nor is the obligation limited to export contrary to local law: para. 1 obliges a belligerent occupant to prevent all export of cultural property.

3. In Article 2, para. 2, IllicitImpExpTransConv, parties undertake to oppose with the means at their disposal the illicit export and transfer of ownership of movable cultural property, and Article 11 IllicitImpExpTransConv provides that the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.

4. Article 9, para. 1, lit. a, Prot2CultPropConv requires an occupying power, in respect of the occupied territory, to prohibit and prevent any illicit export, other removal or transfer of ownership of cultural property. The provision's generic reference to 'cultural property' comprehends not only movables (even if, in practice, the acts of export and removal can relate only to these) but also immovables, so that an occupying power is obliged to prohibit and prevent the illicit transfer of ownership not only of antiquities, works of art and the like but also of buildings, monuments, in the narrow sense, and archaeological sites in the territory. Like Article 4, para. 3, CultPropConv, Article 9 Prot2CultPropConv obliges parties to prohibit and prevent the impugned acts not only when committed by their own forces and occupation authorities but also, and this is the thrust of both provisions, when committed by private persons. Indeed, like Article 4, para. 3, CultPropConv, Article 9 Prot2CultPropConv does not, on its face, prohibit a party from engaging in such activities itself; but just as with Article 4, para. 3, CultPropConv, a prohibition to this effect must be read into Article 9 Prot2CultPropConv, reasoning *a fortiori*. The term 'illicit' for the purposes of Article 9 Prot2CultPropConv is defined in Article 1, lit. g, Prot2CultPropConv to mean under compulsion or otherwise in violation of the applicable rules of the domestic law of the occupied territory or of international law.

**A contracting party in occupation of the whole or part of the territory of another contracting party shall prohibit and prevent any archaeological excavation in the occupied territory, save where this is strictly required to safeguard, record, or preserve cultural property (Article 9, para. 1, lit. b, Prot2CultPropConv). The same shall apply in respect of any alteration to, or change of use of, cultural property which is intended to conceal or destroy cultural, historical, or scientific evidence (Article 9, para. 1, lit. c, Prot2CultPropConv). Any archaeological excavation of, alteration to, or change of use of, cultural property in the occupied territory shall, unless circumstances do not permit, be carried out in close co-operation with the competent authorities of that territory (Article 9, para. 2, Prot2CultPropConv).** 926

1. The rules stated here apply only during international armed conflict, and do not reflect customary international law.

2. No provision in CultPropConv deals with archaeological excavations in occupied territory. The suggested insertion in RegExCultPropConv of an article on the question was rejected at the Hague intergovernmental conference in 1954, although only just

and partly on procedural grounds."[110] It had subsequently been hoped by its drafters that Article 32 of UNESCO's Recommendation on International Principles Applicable to Archaeological Excavations,"[111] a hortatory provision on point adopted by the Organization's General Conference in 1956, would be incorporated, along with implementing regulations, in an addendum to CultPropConv, but this was never to be the case. The absence of binding rules on digs in occupied territory, and on the alteration of cultural property in this context, was exposed as a serious lacuna after 1967 by Israel's controversial activities in the occupied West Bank, particularly East Jerusalem. In the event, the 1999 Hague diplomatic conference reached consensus on three interrelated provisions, namely Article 9, para. 1, lits. a and b, and Article 9, para. 2.

3. The obligation imposed on an occupying power by Article 9, para. 1, lit. b, Prot2CultPropConv to prohibit and prevent any archaeological excavation in the occupied territory, save where this is strictly required to safeguard, record, or preserve cultural property, extends on its face to digs authorized by the competent national authorities, including digs in progress. At first blush this seems odd, and it is unclear if this is what was intended. On the one hand, with the exception of those matters falling expressly or necessarily within the rights ceded to and duties imposed on the occupying power by specific rules, the regulation of cultural property in occupied territory remains the province of these competent national authorities, and there seems no reason why they should not be free to authorize whatever archaeological excavations they see fit. On the other hand, it is possible that the provision is a precautionary one, premised on the calculation that the only way to prevent illicit excavations in occupied territory is to ban all excavations for the duration of the occupation. Either way, it may be that the exception in respect of excavations strictly required to safeguard, record or preserve cultural property would permit the continuation of digs in progress insofar as this is necessary to enable the recording of finds already unearthed and to prepare the site for suspension of the work.

## V. Transport of Cultural Property

927 **Means of transport engaged exclusively in the transport of cultural property may, at the request of the contracting party concerned, be placed under special protection (Article 12, para. 1, CultPropConv and Article 17, paras. 1 and 2, RegExCultPropConv). Such transport shall take place under international supervision (Article 12, para. 2, CultPropConv and Article 17, para. 3, RegExCultPropConv). All acts of hostility directed against such means of transport are prohibited (Article 12, para 3, CultPropConv).**

1. The three rules stated here apply only during international armed conflict, and do not reflect customary international law.

2. The mass relocation of movable cultural property for protective purposes during the Second World War inspired the drafters of CultPropConv to make special provision for the transport of cultural property during armed conflict of an international

[110] Records 1954, paras. 1912–15.

[111] Records of the General Conference, Ninth Session, New Delhi 1956: Resolutions, 40. Article 32 provides that, in the event of armed conflict, any member state of UNESCO occupying the territory of another state should refrain from carrying out archaeological excavations in the occupied territory.

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character. The rules eventually adopted in Chapter III CultPropConv and Chapter III RegExCultPropConv are applicable without distinction to transport by land, sea, or air. The gist of these rules is the absolute immunity of duly authorized transports of cultural property.

3. CultPropConv's regime for the transport of cultural property has never formally been put to use, although during the international armed conflict in Cambodia in 1972, to which CultPropConv did not actually apply, many treasures were transported from Angkor to Phnom Penh on trucks displaying the distinctive emblem and driven by personnel wearing the armlet provided for in Article 21 RegExCultPropConv.[112] It is also extremely unlikely that it ever will be formally put to use. For a start, *in situ* protection of movable cultural property has, from the point of view of conservation, always been preferable to relocation. In fact, a group of experts convened at the first meeting of the parties to CultPropConv in 1962 considered that 'the principle of the protection of cultural property by removing it to safety should be abandoned in favour of the more realistic principle of immediate if incomplete protection on the spot'.[113] Added to this, the procedure under RegExCultPropConv for obtaining immunity for the transport of cultural property is unduly complicated and cedes an element of veto to the relevant Commissioner General for Cultural Property with which parties may be uncomfortable. Finally, the regime for the transport of cultural property depends on there having been appointed a Commissioner General for Cultural Property, delegates of the protecting powers and, indeed, protecting powers in the first place (Article 17 RegExCultPropConv). In short, it depends on the functioning as intended of CultPropConv's regime of control. But CultPropConv's regime of control has never functioned as intended. In this light, only the bare outline of the relevant provisions is given here.

> **Where, in the view of the contracting party concerned, the transport of cultural property is a matter of such urgency that the procedure for the grant of special protection cannot be followed, the opposing parties shall take, as far as possible, the necessary precautions to avoid directing acts of hostility such transport. The contracting party concerned shall, as far as possible, notify the opposing parties in advance of such transport (Article 13 CultPropConv).** 928

> **Contracting parties shall grant immunity from seizure, placing in prize and capture to cultural property transported under special protection or transported in urgent cases, as well as to the means of such transport (Article 14, para. 1, CultPropConv).** 929

This rule does not limit the right of visit and search (Article 14, para. 2, CultPropConv).

## VI. Personnel Engaged in the Protection of Cultural Property

> **Personnel engaged in the protection of cultural property shall, as far as is consistent with the interests of security, be respected. Should such personnel fall into the hands of the opposing party, they shall be allowed to continue to carry out their** 930

[112] E. Clément and F. Quinio, 'The role of the 1954 Hague Convention in protecting Cambodian cultural property during the period of armed conflict' (2004) 854 *IRRC* 389 at 394.

[113] CUA/120, 9.

**duties whenever the cultural property for which they are responsible has also fallen into the hands of the opposing party (Article 15 CultPropConv).**

1. The two rules stated here apply only during international armed conflict, and do not reflect customary international law.

2. It may be the case that, pursuant to Article 3 CultPropConv, a party designates competent authorities responsible for the safeguarding of cultural property against the foreseeable effects of armed conflict, a possibility expressly mentioned in Article 5 Prot2CultPropConv. Moreover, Article 7, para. 2, CultPropConv obliges parties to plan or establish in peacetime, within their armed forces, services or specialist personnel whose purpose will be to secure respect for cultural property and to co-operate with the civilian authorities responsible for safeguarding it. This second provision was inspired by German corps in both World Wars and by the monuments, fine arts, and archives officers in both the US and UK armies in the Second. Both categories of personnel engaged in the protection of cultural property are covered by the rule in Article 15 CultPropConv.

3. Should the specialist military personnel envisaged in Article 7, para. 2, CultPropConv fall into the hands of the opposing party, they are entitled to the protection of GC III. Their status is like that of medical personnel in the armed forces.[114]

4. RegExCultPropConv further provides for the involvement of a range of individuals in CultPropConv's regime of control, namely representatives for cultural property (Article 2, lit. a, RegExCultPropConv), delegates of Protecting Powers (Articles 2, 3, 5, and 8 RegExCultPropConv), Commissioners General for Cultural Property (Articles 2, 4, 6 and 8 RegExCultPropConv), inspectors of cultural property (Articles 7, para. 1, and 8 RegExCultPropConv), and experts (Articles 7, para. 2, and 8 RegExCultPropConv). These five categories of persons are not 'personnel engaged in the protection of cultural property' within the meaning of Article 15 CultPropConv. They are 'the persons responsible for the duties of control', as per Article 17, para. 2, lit. c, CultPropConv.

5. On the only occasion when Commissioners General for Cultural Property have been appointed, in the wake of the Six-Day War in 1967, the Executive Board of UNESCO invited the Director General of the organization to make the necessary arrangements to enable them to enjoy the privileges and immunities granted to senior officials of UN specialized agencies under the Convention on the Privileges and Immunities of the Specialized Agencies.[115]

931 **Personnel engaged in the protection of cultural property may wear an armlet bearing the distinctive emblem of cultural property, issued and stamped by the competent authorities of the contracting party concerned (Article 17, para. 2, lit. c, CultPropConv and Article 21, para. 1, RegExCultPropConv). They shall carry a special identity card bearing the distinctive emblem (Article 21, para. 2, RegExCultPropConv). Such personnel may not, without legitimate reason, be deprived of their identity card or of the right to wear the armlet (Article 21, para. 4, RegExCultPropConv).**

1. The three rules stated here apply only during international armed conflict, and do not reflect customary international law.

[114] Rogers (above, n. 65), 190.
[115] 77 EX/Decision 4.4.4, para. 5, lit. a, referring to 33 UNTS 261.

2. In contrast with Article 15 CultPropConv, the rules stated here apply also to the persons responsible for the duties of control (Article 17, para. 2, lit. b, CultPropConv and Article 21 RegExCultPropConv).

## VII. Distinctive Marking of Cultural Property

**The distinctive emblem of cultural property takes the form of a shield, pointed below, per saltire blue and white (Article 16, para. 1, CultPropConv; see below, Annex 'Distinctive Emblems' No. 8).** 932

1. The emblem described here is the so-called 'distinctive emblem' of CultPropConv. What the technical heraldic language means is explained parenthetically in Article 16, para. 1, CultPropConv, namely a shield consisting of a royal-blue square, one of the angles of which forms the point of a shield, and of a royal-blue triangle above the square, the space on either side being taken up by a white triangle.

2. While in practice it cannot be said to matter, it is not ideal that CultPropConv's distinctive emblem differs from the 'visible signs' stipulated by Article 5 HC IX ('large, stiff rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white') and from the 'distinctive flag' prescribed by Article 3 RoerichPact ('red circle with a triple red sphere in the circle on a white background'). As between parties to both CultPropConv and HC IX, however, the distinctive emblem of the former replaces the signs prescribed by the latter (Article 36 CultPropConv). The same goes *mutatis mutandis* for CultPropConv and RoerichPact (Article 36 CultPropConv).

**Contracting parties may, so as to facilitate its recognition, mark cultural property with the distinctive emblem used once (Articles 6 and 17, para. 2, CultPropConv).** 933

1. As the wording of Article 6 CultPropConv makes clear, the marking of protected cultural property with the distinctive emblem is not obligatory.

2. In principle, the emblem, used once, may be displayed on both immovable and movable cultural property, although practicality militates against the latter. The placing of the distinctive emblem and its degree of visibility is left to the discretion of the competent authorities of each party, and it may be displayed on flags, painted on an object or represented in any other appropriate form (Article 20, para. 1, RegExCultPropConv).

3. In practice, the peacetime distinctive marking of cultural property under general protection is rare among parties to CultPropConv. It may be, however, that the relevant authorities have in place plans for distinctive marking if and when hostilities are imminent, as was the case with the Croatian authorities in 1991.[116] It is clear that some parties supply emblems to owners or curators of protected buildings with instructions to affix them in the event of armed conflict.

4. There are several possible reasons for the apparent unpopularity of distinctive marking. Given the numbers of buildings typically protected by CultPropConv in each state,

[116] CLT-95/WS/13, 22.

marking is an expensive business, although, as regards parties to Prot2CultPropConv, the Fund for the Protection of Cultural Property in the Event of Armed Conflict would now be authorized to provide financial or other assistance in this regard (Article 29, para. 1, Prot2CultPropConv). Marking is also laborious, especially when one takes into account the requirement in Article 17, para. 4, CultPropConv of an authorization duly dated and signed by the competent authority each time the emblem is used. Ironically, a concern for the preservation, not to mention aesthetics, of cultural property can also contraindicate marking.[117] The use of the distinctive emblem has been criticized by curators of museums, galleries, and monuments. Nor do the benefits seem to outweigh the costs: the effectiveness of a small plaque in the event of an attack must seriously be questioned in the age of high-altitude bombing, ship-launched cruise missiles, and long-range artillery, and no less so when military objectives are identified by satellites and very high-altitude spy planes. In 1996, the NATO-Partnership for Peace Conference on Cultural Heritage Protection in Wartime and in State of Emergency suggested incorporating new technology into the emblem,[118] by which it presumably meant a microchip or transmitter 'visible' electronically, but the bill for installation and upkeep would surely be prohibitive.

5. Nonetheless, the marking of cultural property can scarcely undermine its protection from attack, even if the fanciful fear was expressed during the drafting of CultPropConv that it could help an attacking force to get its bearings,[119] and despite the fact that Iraq defended its failure to mark cultural property during the Iran–Iraq War by claiming that the emblem might be seen by the Iranian aircraft, missile batteries, and artillery positions which were attacking Iraqi towns.[120] Moreover, marking may help to prevent the use of such property for purposes likely to expose it to damage or destruction. There are also foreseeable advantages when it comes to belligerent occupation.

6. If a party does opt to mark cultural property in its territory, reason suggests that it should be all or nothing. While the absence of the distinctive emblem does not, as a matter of law, denote the absence of protection under CultPropConv, the assumption made in practice by an opposing party may well be *expressio unius exclusio alterius*. In this way, the selective use of the emblem, which seems not uncommon,[121] poses a threat to the protection of the property it is meant to facilitate.

934 **During international armed conflict, contracting parties shall mark cultural property under special protection with the distinctive emblem repeated three times in triangular formation with one shield below (Articles 10, 16, para. 2, and 17, para. 1, lit. a, CultPropConv; see below, Annex 'Distinctive Emblems' No. 9). The same shall apply in respect of means of transport engaged exclusively in the transport of cultural property (Articles 12, para. 2, 13, para. 1, 16, para. 2 and 17, para. 1, lit. b, CultPropConv) and improvised refuges for cultural property (Articles 16, para. 2, and 17, para. 1, lit. c, CultPropConv and Article 11, para. 2, RegExCultPropConv).**

[117] See, e.g., 7 C/PRG/7, Annex I, 12; Records 1954, para. 399 (Greece).
[118] NATO-PfP Conference on Cultural Heritage Protection, Final Communiqué, para. 3.4.
[119] 6 C/PRG/22, Annex, 13; 7 C/PRG/7, Annex I, 12.
[120] CC/MD/11, 20.
[121] For example, in 1991, the Croatian authorities affixed the emblem to 794 historic buildings, a fraction of the total immovable cultural heritage in the republic: CLT-95/WS/13, 22.

1. The three rules stated here apply only during international armed conflict, and do not reflect customary international law.

2. As remarked upon at the fourth meeting of the parties to CultPropConv, Prot2CultPropConv makes no provision for the distinctive marking of cultural property under enhanced protection.[122]

**During international armed conflict, the deliberate misuse of the distinctive emblem is prohibited (Article 38, para. 1, AP I; Article 17, para. 3, CultPropConv), as is the use for any purpose whatsoever of a sign resembling the distinctive emblem (Article 17, para. 3, CultPropConv).** 935

1. The rule stated here applies only during international armed conflict. It is unclear whether the first limb reflects customary international law. The second does not.

2. The abuse of the distinctive emblem in peacetime and the peacetime use of a sign resembling the emblem are both unregulated.

[122] CLT-99/CONF.206/4, para. 10(v).

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[*on the report of the Third Committee (A/73/589/Add.2)*]

### 73/176. Freedom of religion or belief

*The General Assembly*,

*Recalling* article 18 of the International Covenant on Civil and Political Rights,[1] article 18 of the Universal Declaration of Human Rights[2] and other relevant human rights provisions,

*Recalling also* its resolution 36/55 of 25 November 1981, by which it proclaimed the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,

*Recalling further* its previous resolutions on freedom of religion or belief and on the elimination of all forms of intolerance and of discrimination based on religion or belief, including its resolution 72/177 of 19 December 2017 and Human Rights Council resolution 37/9 of 22 March 2018,[3]

*Recognizing* the important work carried out by the Human Rights Committee in providing guidance with respect to the scope of freedom of religion or belief,

*Noting* the conclusions and recommendations of the expert workshops organized by the Office of the United Nations High Commissioner for Human Rights and contained in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, adopted in Rabat on 5 October 2012,[4]

*Considering* that religion or belief, for those who profess either, is one of the fundamental elements in their conception of life and that freedom of religion or belief, as a universal human right, should be fully respected and guaranteed,

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[1] See resolution 2200 A (XXI), annex.
[2] Resolution 217 A (III).
[3] See *Official Records of the General Assembly, Seventy-third Session, Supplement No. 53* (A/73/53), chap. IV, sect. A.
[4] A/HRC/22/17/Add.4, appendix.

*Seriously concerned* at continuing acts of intolerance and violence based on religion or belief against individuals, including against persons belonging to religious communities and religious minorities around the world, and at the increasing number and intensity of such incidents, which are often of a criminal nature and may have international characteristics,

*Deeply concerned* at the limited progress that has been made in the elimination of all forms of intolerance and of discrimination based on religion or belief, and believing that further intensified efforts are therefore required to promote and protect the right to freedom of thought, conscience and religion or belief and to eliminate all forms of hatred, intolerance and discrimination based on religion or belief, as noted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa, from 31 August to 8 September 2001, as well as at the Durban Review Conference, held in Geneva from 20 to 24 April 2009,

*Recalling* that States have the primary responsibility to promote and protect human rights, including the human rights of persons belonging to religious minorities, including their right to exercise their religion or belief freely,

*Concerned* that State and non-State actors sometimes tolerate or encourage acts of violence, or credible threats of violence, against persons belonging to religious communities and religious minorities,

*Concerned also* at the increasing number of laws and regulations that limit the freedom of thought, conscience and religion or belief and at the implementation of existing laws in a discriminatory manner,

*Convinced* of the need to urgently address the rapid rise in various parts of the world of religious extremism that affects the human rights of individuals, in particular persons belonging to religious communities and religious minorities, the situations of violence and discrimination that affect many individuals, particularly women and children, on the basis of or in the name of religion or belief or in accordance with cultural and traditional practices, and the misuse of religion or belief for ends inconsistent with the principles set out in the Charter of the United Nations and in other relevant instruments of the United Nations,

*Seriously concerned* about all attacks on religious places, sites and shrines that violate international law, in particular international human rights law and international humanitarian law, including any deliberate destruction of relics and monuments, and including also those carried out in connection with incitement to national, racial or religious hatred,

*Emphasizing* that States, regional organizations, national human rights institutions, non-governmental organizations, religious bodies, the media and civil society as a whole have an important role to play in promoting tolerance and respect for religious and cultural diversity and in the universal promotion and protection of human rights, including freedom of religion or belief,

*Underlining* the importance of education, including human rights education, in the promotion of tolerance, which involves the acceptance by the public of and its respect for diversity, including with regard to religious expression, and underlining also the fact that education, in particular at school, should contribute in a meaningful way to promoting tolerance and the elimination of discrimination based on religion or belief,

1. *Stresses* that everyone has the right to freedom of thought, conscience and religion or belief, which includes the freedom to have or not to have, or to adopt, a religion or belief of one's own choice and the freedom, either alone or in community

with others and in public or private, to manifest one's religion or belief in teaching, practice, worship and observance, including the right to change one's religion or belief;

2. *Emphasizes* that the right to freedom of thought, conscience and religion or belief applies equally to all persons, regardless of their religion or belief and without any discrimination as to their equal protection by the law;

3. *Strongly condemns* violations of freedom of thought, conscience and religion or belief, as well as all forms of intolerance, discrimination and violence based on religion or belief;

4. *Recognizes with deep concern* the overall rise in instances of discrimination, intolerance and violence, regardless of the actors, directed against members of many religious and other communities in various parts of the world, including cases motivated by Islamophobia, anti-Semitism and Christianophobia and prejudices against persons of other religions or beliefs;

5. *Reaffirms* that terrorism cannot and should not be associated with any religion or belief, as this may have adverse consequences for the enjoyment of the right to freedom of religion or belief of all members of the religious communities concerned;

6. *Strongly condemns* continuing violence and acts of terrorism targeting individuals, including persons belonging to religious minorities, on the basis of or in the name of religion or belief, and underlines the importance of a comprehensive and inclusive community-based preventive approach, involving a wide set of actors, including civil society and religious communities;

7. *Recalls* that States have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, intimidation and harassment against a person or a group of persons belonging to a religious minority, regardless of the perpetrator, and that failure to do so may constitute a human rights violation;

8. *Emphasizes* that freedom of religion or belief, freedom of opinion and expression, the right to peaceful assembly and the right to freedom of association are interdependent, interrelated and mutually reinforcing, and stresses the role that these rights can play in the fight against all forms of intolerance and of discrimination based on religion or belief;

9. *Strongly condemns* any advocacy of hatred based on religion or belief that constitutes incitement to discrimination, hostility or violence, whether it involves the use of print, audiovisual or electronic media or any other means;

10. *Expresses concern* at the persistence of institutionalized social intolerance and discrimination practised against many on the grounds of religion or belief, and emphasizes that legal procedures pertaining to religious or belief-based groups and places of worship are not a prerequisite for the exercise of the right to manifest one's religion or belief and that such procedures, when legally required at the national or local level, should be non-discriminatory in order to contribute to the effective protection of the right of all persons to practise their religion or belief, either individually or in community with others and in public or private;

11. *Recognizes with concern* the challenges that persons in vulnerable situations, including persons deprived of their liberty, refugees, asylum seekers and internally displaced persons, children, persons belonging to national or ethnic, religious and linguistic minorities and migrants, as well as women, are facing as regards their ability to freely exercise their right to freedom of religion or belief;

12. *Emphasizes* that, as underlined by the Human Rights Committee, restrictions on the freedom to manifest one's religion or belief are permitted only if limitations are prescribed by law, are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, are non-discriminatory and are applied in a manner that does not vitiate the right to freedom of thought, conscience and religion or belief;

13. *Expresses deep concern* at continued obstacles to the enjoyment of the right to freedom of religion or belief, as well as the increasing number of instances of intolerance, discrimination and violence based on religion or belief, including:

(a) Acts of violence and intolerance directed against individuals based on their religion or belief, including religious persons and persons belonging to religious minorities and other communities in various parts of the world;

(b) The rise of religious extremism in various parts of the world that affects the human rights of individuals, including persons belonging to religious minorities;

(c) Incidents of hatred, discrimination, intolerance and violence based on religion or belief, which may be associated with or manifested by the derogatory stereotyping, negative profiling and stigmatization of persons based on their religion or belief;

(d) Attacks on or destruction of religious places, sites and shrines that violate international law, in particular international human rights law and international humanitarian law, as they have more than material significance for the dignity and lives of persons holding spiritual or religious beliefs;

(e) Instances, both in law and practice, that constitute violations of the human right to freedom of religion or belief, including of the individual right to publicly express one's spiritual and religious beliefs, taking into account the relevant articles of the International Covenant on Civil and Political Rights,[1] as well as other international instruments;

(f) Constitutional and legislative systems that fail to provide adequate and effective guarantees of freedom of thought, conscience and religion or belief to all without distinction;

14. *Urges* States to step up their efforts to protect and promote freedom of thought, conscience and religion or belief, and to that end:

(a) To ensure that their constitutional and legislative systems provide adequate and effective guarantees of freedom of thought, conscience and religion or belief to all without distinction by, inter alia, providing access to justice, including by facilitating legal assistance and effective remedies in cases where the right to freedom of thought, conscience and religion or belief or the right to freely choose and practise one's religion or belief is violated, paying particular attention to persons belonging to religious minorities;

(b) To implement all accepted universal periodic review recommendations related to the promotion and protection of freedom of religion or belief;

(c) To ensure that no one within their territory and subject to their jurisdiction is deprived of the right to life, liberty and security of person because of religion or belief, to provide adequate protection to persons at risk of violent attack on the grounds of their religion or belief, to ensure that no one is subjected to torture or other cruel, inhuman or degrading treatment or punishment or arbitrary arrest or detention on that account and to bring to justice all perpetrators of violations of these rights;

(d) To end violations of the human rights of women and girls and to devote particular attention to appropriate measures modifying or abolishing existing laws,

regulations, customs and practices that discriminate against them, including in the exercise of their right to freedom of thought, conscience and religion or belief, and to foster practical ways to ensure gender equality;

(e) To ensure that existing legislation is not implemented in a discriminatory manner or does not result in discrimination based on religion or belief, that no one is discriminated against on the basis of his or her religion or belief when accessing, inter alia, education, medical care, employment, humanitarian assistance or social benefits, and that everyone has the right and the opportunity to have access, on general terms of equality, to public services in their country, without any discrimination based on religion or belief;

(f) To review, whenever relevant, existing registration practices in order to ensure that such practices do not limit the right of all persons to manifest their religion or belief, either alone or in community with others and in public or private;

(g) To ensure that no official documents are withheld from the individual on the grounds of religion or belief and that everyone has the right to refrain from disclosing information concerning their religious affiliation in such documents against their will;

(h) To ensure, in particular, the right of all persons to worship, assemble or teach in connection with a religion or belief, their right to establish and maintain places for these purposes and the right of all persons to seek, receive and impart information and ideas in these areas;

(i) To ensure that, in accordance with appropriate national legislation and in conformity with international human rights law, the freedom of all persons and members of groups to establish and maintain religious, charitable or humanitarian institutions is fully respected and protected;

(j) To ensure that all public officials and civil servants, including members of law enforcement bodies, and personnel of detention facilities, the military and educators, in the course of fulfilling their official duties, respect freedom of religion or belief and do not discriminate for reasons based on religion or belief, and that they receive all necessary and appropriate awareness-raising, education or training on respect for freedom of religion or belief;

(k) To take all necessary and appropriate action, in conformity with international standards of human rights, to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by intolerance based on religion or belief, as well as incitement to hostility and violence, with particular regard to persons belonging to religious minorities in all parts of the world;

(l) To promote, through education and other means, mutual understanding, tolerance, non-discrimination and respect in all matters relating to freedom of religion or belief by encouraging, in society at large, a wider knowledge of the diversity of religions and beliefs and of the history, traditions, languages and cultures of the various religious minorities existing within their jurisdiction;

(m) To prevent any distinction, exclusion, restriction or preference based on religion or belief that impairs the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis and to detect signs of intolerance that may lead to discrimination based on religion or belief;

15. *Welcomes and encourages* initiatives by the media to promote tolerance and respect for religious and cultural diversity and the universal promotion and protection of human rights, including freedom of religion or belief, and stresses the importance of unhindered participation in the media and in public discourse for all persons, regardless of their religion or belief;

16. *Stresses* the importance of a continued and strengthened dialogue in all its forms, including among and within religions or beliefs, and with broader participation, including of women, to promote greater tolerance, respect and mutual understanding, and welcomes different initiatives in this regard, including the United Nations Alliance of Civilizations initiative and the programmes led by the United Nations Educational, Scientific and Cultural Organization;

17. *Welcomes and encourages* the continuing efforts of all actors in society, including national human rights institutions, non-governmental organizations and bodies and groups based on religion or belief, to promote the implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[5] and further encourages their work in promoting freedom of religion or belief, in highlighting cases of religious intolerance, discrimination and persecution and in promoting religious tolerance;

18. *Recommends* that States, the United Nations and other actors, including national human rights institutions, non-governmental organizations and bodies and groups based on religion or belief, in their efforts to promote freedom of religion or belief, ensure the widest possible dissemination of the text of the Declaration in as many different languages as possible and promote its implementation;

19. *Takes note with appreciation* of the work and the interim report on the elimination of all forms of religious intolerance of the Special Rapporteur of the Human Rights Council on freedom of religion or belief;[6]

20. *Urges* all Governments to cooperate fully with the Special Rapporteur, to respond favourably to his requests to visit their countries and to provide all information and follow-up necessary for the effective fulfilment of his mandate;

21. *Requests* the Secretary-General to ensure that the Special Rapporteur receives the resources necessary to fully discharge his mandate;

22. *Requests* the Special Rapporteur to submit an interim report to the General Assembly at its seventy-fourth session;

23. *Decides* to consider the question of the elimination of all forms of religious intolerance at its seventy-fourth session under the item entitled “Promotion and protection of human rights”.

*55th plenary meeting*
*17 December 2018*

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[5] Resolution 36/55.
[6] A/73/362.

United Nations A/RES/73/285

General Assembly

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4 April 2019

**Seventy-third session**
Agenda item 72

## Resolution adopted by the General Assembly on 2 April 2019

[*without reference to a Main Committee (A/73/L.79 and A/73/L.79/Add.1)*]

### 73/285. Combating terrorism and other acts of violence based on religion or belief

*The General Assembly*,

*Recalling* that all States have pledged themselves, under the Charter of the United Nations and the Universal Declaration of Human Rights,[1] to promote universal respect for, and observance of, human rights and fundamental freedoms for all,

*Recalling also* its relevant resolutions, including resolution 73/164 of 17 December 2018 on combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief, and resolution 73/176 of 17 December 2018 on freedom of religion or belief,

*Reaffirming* that discrimination against human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter,

*Reaffirming also* the obligation of States to prohibit discrimination and violence on the basis of religion or belief and to implement measures to guarantee the equal and effective protection of the law,

*Recalling* that States have the primary responsibility to promote and protect human rights, including the human rights of persons belonging to religious minorities, including their right to exercise their religion or belief freely,

*Expressing deep concern* at the instances of intolerance and discrimination and acts of violence occurring in the world, including cases motivated by discrimination against persons belonging to religious minorities, in addition to the negative projection of the followers of religions and the enforcement of measures that specifically discriminate against persons on the basis of religion or belief,

[1] Resolution 217 A (III).

19-05485 (E) 080419

*Noting* the Secretary General's call upon the United Nations Alliance of Civilizations "to reach out to governments and faith-based organizations, religious leaders and others, and explore actions to prevent attacks against, and guarantee the sanctity of, religious sites",

*Reiterating* that terrorism and violent extremism as and when conducive to terrorism, in all its forms and manifestations, cannot and should not be associated with any religion, nationality, civilization or ethnic group,

*Deeply alarmed* by all terrorist attacks against places of worship that are motivated by religious hatred, including Islamophobia, anti-Semitism and Christianophobia,

1. *Condemns in the strongest terms* the heinous, cowardly terrorist attack aimed at Muslim worshippers in Christchurch, New Zealand, on 15 March 2019, and expresses its deepest condolences to the families of the victims and to the Government and the people of New Zealand;

2. *Strongly condemns* continuing violence and acts of terrorism targeting individuals, including persons belonging to religious minorities, on the basis of or in the name of religion or belief;

3. *Underlines* the need to hold perpetrators, organizers, financiers and sponsors of these acts of terrorism accountable and to bring them to justice;

4. *Strongly deplores* all acts of violence against persons on the basis of their religion or belief and such acts directed against their homes, businesses, properties, schools, cultural centres and places of worship, as well as all attacks on and in religious places, sites and shrines that are in violation of international law;

5. *Urges* all States to work together to protect individuals against acts of violence, discrimination and hate crimes based on racism, racial discrimination, xenophobia and related intolerance;

6. *Urges* States to protect and promote freedom of religion and belief and to foster a domestic environment of religious tolerance, peace and respect by countering incitement to religious hatred and violence and by strategizing and harmonizing actions at the local, national, regional and international levels through education and awareness-building;

7. *Calls for* strengthened international efforts to foster a global dialogue on the promotion of a culture of tolerance and peace at all levels, based on respect for human rights and for the diversity of religions and beliefs, emphasizing that States, regional organizations, national human rights institutions, non-governmental organizations, religious bodies, the media and civil society as a whole have an important role to play in such efforts.

*73rd plenary meeting*
*2 April 2019*

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# APPLICATION DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(ARMÉNIE c. AZERBAÏDJAN)

DEMANDE EN INDICATION
DE MESURES CONSERVATOIRES

**ORDONNANCE DU 7 DÉCEMBRE 2021**

# 2021

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(ARMENIA *v.* AZERBAIJAN)

REQUEST FOR THE INDICATION
OF PROVISIONAL MEASURES

**ORDER OF 7 DECEMBER 2021**

Mode officiel de citation :

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ORDER

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**7 December 2021**

# APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(ARMENIA *v.* AZERBAIJAN)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

## ORDER

*Present:* *President* DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE; *Judges* ad hoc KEITH, DAUDET; *Registrar* GAUTIER.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

*Makes the following Order:*

1. On 16 September 2021, the Republic of Armenia (hereinafter "Armenia") filed in the Registry of the Court an Application instituting proceedings against the Republic of Azerbaijan (hereinafter "Azerbaijan") concerning alleged violations of the International Convention on

the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention").

2. At the end of its Application, Armenia

"respectfully requests the Court to adjudge and declare:

1. That Azerbaijan is responsible for violating the CERD, including Articles 2, 3, 4, 5, 6 and 7.
2. That, as a consequence of its international responsibility for these breaches of the Convention, Azerbaijan must:

A. Cease forthwith any such ongoing internationally wrongful act and fully comply with its obligations under Articles 2, 3, 4, 5, 6 and 7 of the CERD, including by:

— refraining from practices of ethnic cleansing against Armenians;
— refraining from engaging in, glorifying, rewarding or condoning acts of racism against Armenians, including Armenian prisoners of war, hostages and other detained persons;
— refraining from engaging in or tolerating hate speech against Armenians, including in educational materials;

— refraining from suppressing the Armenian language, destroying Armenian cultural heritage or otherwise eliminating the existence of the historical Armenian cultural presence or inhibiting Armenians' access and enjoyment thereof;
— punishing all acts of racial discrimination, both public and private, against Armenians, including those taken by public officials;
— ensuring that the rights of Armenians, including Armenian prisoners of war, hostages and other detained persons are upheld on an equal basis;
— adopting the laws necessary to uphold its obligations under the CERD;
— providing Armenians with equal treatment before the tribunals and all other organs administering justice, and providing effective protection and remedies against acts of racial discrimination;
— refraining from hindering the registration and operation of NGOs and arresting, detaining and sentencing human rights activists or other individuals working towards reconciliation with Armenia and Armenians; and

— taking effective measures with a view to combatting prejudices against Armenians, and special measures for the purpose of securing their adequate advancement.

B. Make reparations for the injury caused by any such internationally wrongful act, including:

— by way of restitution, allowing the safe and dignified return of displaced Armenians to their homes, and restoring or returning any Armenian cultural and religious buildings and sites, artefacts or objects;

— providing additional forms of reparation for any harm, loss or injury suffered by Armenians that is not capable of full reparation by restitution, including by providing compensation to displaced Armenians until such time as it becomes safe for them to return to their homes.

C. Acknowledge its violations of the CERD and provide an apology to Armenia and Armenian victims of Azerbaijan's racial discrimination.

D. Offer assurances and guarantees of non-repetition of violations of its obligations under Articles 2, 3, 4, 5, 6 and 7 of the CERD."

3. In its Application, Armenia seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.

4. The Application contained a Request for the indication of provisional measures submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

5. At the end of its Request, Armenia asked the Court to indicate the following provisional measures:

"— Azerbaijan shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody who were made captive during the September-November 2020 armed hostilities or their aftermath;

— Pending their release, Azerbaijan shall treat all Armenian prisoners of war, hostages and other detainees in its custody in accordance with its obligations under the CERD, including with respect to their right to security of person and protection by the State against all bodily harm, and permit independent medical and psychological evaluations for that purpose;

— Azerbaijan shall refrain from espousing hatred of people of Armenian ethnic or national origin, including by closing or suspending the activities of the Military Trophies Park;

— Azerbaijan shall protect the right to access and enjoy Armenian historic, cultural and religious heritage, including but not limited to, churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, by *inter alia*

terminating, preventing, prohibiting and punishing their vandalisation, destruction or alteration, and allowing Armenians to visit places of worship;

— Azerbaijan shall facilitate, and refrain from placing any impediment on, efforts to protect and preserve Armenian historic, cultural and religious heritage, including but not limited to churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, relevant to the exercise of rights under the CERD;

— Azerbaijan shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of the CERD;

— Azerbaijan shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute that is the subject of the Application, or render it more difficult to resolve; and

— Azerbaijan shall provide a report to the Court on all measures taken to give effect to its Order indicating provisional measures, no later than three months from its issuance and shall report thereafter to the Court every six months."

6. The Registrar immediately communicated to the Government of Azerbaijan the Application containing the Request for the indication of provisional measures, in accordance with Article 40, paragraph 2, of the Statute of the Court, and Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing by Armenia of the Application and the Request for the indication of provisional measures.

7. Pending the notification provided for by Article 40, paragraph 3, of the Statute, the Registrar informed all States entitled to appear before the Court of the filing of the Application and the Request for the indication of provisional measures by a letter dated 22 September 2021.

8. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. Armenia chose Mr. Yves Daudet and Azerbaijan Mr. Kenneth Keith.

9. By letters dated 27 September 2021, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 14 and 15 October 2021 as the dates for the oral proceedings on the Request for the indication of provisional measures.

10. At the public hearings, oral observations on the Request for the indication of provisional measures were presented by:

*On behalf of Armenia:* H.E. Mr. Yeghishe Kirakosyan,
Mr. Robert Kolb,
Mr. Constantinos Salonidis,

Mr. Sean Murphy,
Mr. Pierre d'Argent,
Mr. Lawrence H. Martin.

*On behalf of Azerbaijan:* H.E. Mr. Elnur Mammadov,
Mr. Vaughan Lowe,
Mr. Peter Goldsmith,
Ms Laurence Boisson de Chazournes,
Ms Catherine Amirfar,
Mr. Donald Francis Donovan.

11. At the end of its second round of oral observations, Armenia asked the Court to indicate the following provisional measures:

"— Azerbaijan shall release immediately all Armenian prisoners of war, hostages and other detainees in its custody who were made captive during the September-November 2020 armed hostilities or their aftermath;
— Pending their release, Azerbaijan shall treat all Armenian prisoners of war, hostages and other detainees in its custody in accordance with its obligations under the CERD, including with respect to their right to security of person and protection by the State against all bodily harm, and permit independent medical and psychological evaluations for that purpose;

— Azerbaijan shall refrain from espousing hatred of people of Armenian ethnic or national origin, including by closing or suspending the activities of the Military Trophies Park;

— Azerbaijan shall protect the right to access and enjoy Armenian historic, cultural and religious heritage, including but not limited to, churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, by *inter alia* terminating, preventing, prohibiting and punishing their vandalisation, destruction or alteration, and allowing Armenians to visit places of worship;
— Azerbaijan shall facilitate, and refrain from placing any impediment on, efforts to protect and preserve Armenian historic, cultural and religious heritage, including but not limited to churches, cathedrals, places of worship, monuments, landmarks, cemeteries and other buildings and artefacts, relevant to the exercise of rights under the CERD;
— Azerbaijan shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of the CERD;

— Azerbaijan shall not take any action and shall assure that no action is taken which may aggravate or extend the existing dispute

that is the subject of the Application, or render it more difficult to resolve; and

— Azerbaijan shall provide a report to the Court on all measures taken to give effect to its Order indicating provisional measures, no later than three months from its issuance and shall report thereafter to the Court every six months."

12. At the end of its second round of oral observations, Azerbaijan requested the Court "to reject the request for the indication of provisional measures submitted by the Republic of Armenia".

* * *

## I. Introduction

13. Armenia and Azerbaijan, both of which were Republics of the former Union of Soviet Socialist Republics, declared independence on 21 September 1991 and 18 October 1991, respectively. In the Soviet Union, the Nagorno-Karabakh region had been an autonomous entity ("oblast") that had a majority Armenian ethnic population, lying within the territory of the Azerbaijani Soviet Socialist Republic. The Parties' competing claims over that region resulted in hostilities that ended with a ceasefire in May 1994. Further hostilities erupted in September 2020, in what Armenia calls "the Second Nagorno-Karabakh War" and Azerbaijan calls "the Second Garabagh War" (hereinafter the "2020 Conflict"), and lasted 44 days. On 9 November 2020, the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia, and the President of the Russian Federation signed a statement referred to by the Parties as the "Trilateral Statement". Under the terms of this statement, as of 10 November 2020, "[a] complete ceasefire and termination of all hostilities in the area of the Nagorno-Karabakh conflict [was] declared".

14. The differences between the Parties are longstanding and wide-ranging. The Applicant has invoked Article 22 of CERD as the title of jurisdiction in the present case, the scope of which is therefore circumscribed by that Convention.

## II. Prima Facie Jurisdiction

### *1. General Observations*

15. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for

example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 9, para. 16).

16. In the present case, Armenia seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD (see paragraph 3 above). The Court must therefore first determine whether those provisions prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

17. Article 22 of CERD reads as follows:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, 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."

18. Armenia and Azerbaijan are both parties to CERD; Armenia acceded to CERD on 23 June 1993, Azerbaijan on 16 August 1996. Neither Party made reservations to Article 22 or to any other provision of CERD.

*2. Existence of a Dispute relating to the Interpretation or Application of CERD*

19. Article 22 of CERD makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation or application of the Convention. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The two sides must "'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

20. In order to determine whether a dispute exists in the present case, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it (see *Application of*

*the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 414, para. 18). Since Armenia has invoked as the basis of the Court's jurisdiction the compromissory clause in an international convention, the Court must ascertain whether the acts and omissions complained of by the Applicant are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain (see *ibid.*).

* *

21. Armenia contends that a dispute exists with Azerbaijan regarding the interpretation and application of CERD, as demonstrated by the correspondence between the Parties. According to Armenia, this dispute arose in the context of longstanding racial discrimination directed by Azerbaijan at individuals of Armenian national or ethnic origin. In particular, Armenia claims that a "State-sponsored policy of Armenian hatred" by the Azerbaijani authorities has led to systematic discrimination against those individuals in Azerbaijan. It submits that Azerbaijan committed grave violations of obligations arising under CERD during the 2020 Conflict, and has continued to do so following the end of hostilities, in furtherance of its policy of "ethnic cleansing" intended to rid "Azerbaijan and Nagorno-Karabakh of Armenians and Armenian influence". According to Armenia, the violations committed by Azerbaijan are directed at individuals of Armenian national or ethnic origin, regardless of their nationality.

22. Armenia alleges that Azerbaijan has acted and continues to act in violation of its obligations under Articles 2, 3, 4, 5, 6 and 7 of CERD. Armenia asserts that Azerbaijan bears responsibility, *inter alia*, for the inhuman and degrading treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin held in its custody; for engaging in practices of ethnic cleansing; for glorifying, rewarding and condoning acts of racism; for inciting racial hatred, giving as an example, mannequins depicting Armenian soldiers in a degrading way at the "Military Trophies Park" which opened in Baku in the aftermath of the 2020 Conflict; for facilitating, tolerating and failing to punish and prevent hate speech; and for systematically destroying and falsifying Armenian cultural sites and heritage.

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23. Azerbaijan contends that there is no dispute between the Parties concerning the interpretation or application of CERD. It affirms that it is committed to respecting fully the values protected by CERD. The

Respondent denies that its actions during and after the 2020 Conflict were motivated by an "ethnic animus" and argues instead that, through those actions, it responded to "a blatant and unlawful use of force against its people and its sovereign territory" on the part of Armenia, in the context of its "decades-long unlawful occupation of Azerbaijan's territory" dating back to the hostilities that ended in 1994. In this connection, Azerbaijan states that its conduct was solely motivated by a desire to "liberate its territories from Armenia's illegal occupation". Azerbaijan asserts, *inter alia*, that Armenia failed to comply with four United Nations Security Council resolutions requiring the immediate, complete and unconditional withdrawal of Armenian forces from occupied areas of Azerbaijan.

24. With regard to the claims put forward by Armenia in support of its allegation that the actions of Azerbaijan constitute racial discrimination under CERD, the Respondent argues that these actions "are entirely unrelated to racial discrimination". According to Azerbaijan, Armenia's case before the Court is indeed not concerned with the protection of rights under CERD but instead reflects a strategy "to use the Court as a platform to broadcast [Armenia's] grievances against Azerbaijan". Azerbaijan moreover asserts that it does not condone statements or actions that promote hatred or incite violence targeting Armenians as a national or ethnic group; that it reaffirms its obligations to treat Armenian detainees in its custody in accordance with its obligations under CERD; and that it has commenced investigations and brought charges against Azerbaijani servicemen with respect to alleged crimes committed against Armenians during the 2020 Conflict.

25. In Azerbaijan's view, some of the measures requested by Armenia have in any event become moot. In particular, in addressing Armenia's request that the Court order Azerbaijan to close or suspend activities at the "Military Trophies Park", the Agent of Azerbaijan referred during the hearing to his "assurance [on the previous day] about the permanent removal of certain exhibits in the Trophies Park".

* *

26. The Court recalls that for the purposes of determining whether there was a dispute between the parties at the time of filing an application, it takes into account in particular any statements or documents exchanged between them (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 12, para. 26). In so doing, it pays special attention to "the author of the statement or document, their intended or actual addressee, and their content" *(ibid.)*. The existence of a dispute is a matter for objective determi-

nation by the Court; it is a matter of substance, and not a question of form or procedure (*I.C.J. Reports 2020*, p. 12, para. 26).

27. The Court considers that the exchanges between the Parties prior to the filing of the Application indicate that they differ as to whether certain acts or omissions allegedly committed by Azerbaijan gave rise to violations of its obligations under CERD. The Court notes that, according to Armenia, Azerbaijan has violated its obligations under the Convention in various ways (see paragraphs 21 to 22 above). Azerbaijan has denied that it has committed any of the alleged violations set out above and that the acts complained of fall within the scope of CERD (see paragraphs 23 to 24 above). The divergence of views between Armenia and Azerbaijan regarding the latter's compliance with its commitments under CERD was already apparent in the first exchange of letters between the Ministers for Foreign Affairs of the Parties, dated 11 November 2020 and 8 December 2020 respectively, in the immediate aftermath of the 2020 Conflict. It is further demonstrated by subsequent exchanges between the Parties.

28. For the purposes of the present proceedings, the Court is not required to ascertain whether any violations of Azerbaijan's obligations under CERD have occurred, a finding that could only be made as part of the examination of the merits of the case. At the stage of making an order on provisional measures, the Court's task is to establish whether the acts and omissions complained of by Armenia are capable of falling within the provisions of CERD. In the Court's view, at least some of the acts and omissions alleged by Armenia to have been committed by Azerbaijan are capable of falling within the provisions of the Convention.

29. The Court finds therefore that there is a sufficient basis at this stage to establish prima facie the existence of a dispute between the Parties relating to the interpretation or application of CERD.

*3. Procedural Preconditions*

30. Under Article 22 of CERD, a dispute may be referred to the Court only if it is "not settled by negotiation or by the procedures expressly provided for in this Convention". The Court has previously ruled that Article 22 of CERD establishes procedural preconditions to be met before the seisin of the Court (see *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. 141).

31. The Court has also held that the above-mentioned preconditions to its jurisdiction are alternative and not cumulative (*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), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 600, para. 113). Since Armenia does

not contend that its dispute with Azerbaijan was submitted to "procedures expressly provided for in [the] Convention", which begin with a referral to the Committee on the Elimination of Racial Discrimination under Article 11 of CERD, the Court will only ascertain whether the dispute is one that is "not settled by negotiation", within the meaning of Article 22.

32. In addition, Article 22 of CERD states that a dispute may be referred to the Court at the request of any of the parties to that dispute only if they have not agreed to another mode of settlement. The Court notes that neither Party contends that they have agreed to another mode of settlement.

33. At this stage of the proceedings, the Court will examine whether it appears, prima facie, that Armenia genuinely attempted to engage in negotiations with Azerbaijan, with a view to resolving their dispute concerning the latter's compliance with its substantive obligations under CERD, and whether Armenia pursued these negotiations as far as possible (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 420, para. 36).

* *

34. Regarding the procedural preconditions set out in Article 22 of CERD, Armenia states that, since the end of hostilities in autumn 2020, it has exchanged over 40 pieces of correspondence and held several rounds of meetings with Azerbaijan. Specifically, Armenia asserts that the Minister for Foreign Affairs of Armenia, in a letter dated 11 November 2020 addressed to his counterpart in Azerbaijan, expressly referred to violations of multiple provisions of CERD by Azerbaijan, and invited Azerbaijan to enter into negotiations with Armenia to remedy those violations. Armenia notes that in his letter of reply, dated 8 December 2020, the Minister for Foreign Affairs of Azerbaijan rejected Armenia's allegations. Armenia indicates that, from November 2020 to September 2021, the Parties engaged in further rounds of written exchanges and participated in at least seven rounds of meetings between March and September 2021, "in an effort to settle this dispute amicably".

35. Armenia claims that during these rounds of negotiations, the Parties' positions on the crucial points that divided them — namely whether Azerbaijan had violated its obligations under Articles 2, 3, 4, 5, 6 and 7 of CERD and whether it consequently owed reparation — did not change. Armenia further contends that, by 16 September 2021, the date on which it filed its Application, there was "no reasonable prospect" that the respective positions of the Parties would evolve, and that it thus considered that the negotiations had failed. In light of the impasse it describes, Armenia contends that the precondition of negotiations contained in Article 22 of CERD has thus been met.

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36. Azerbaijan, for its part, claims that Armenia did not genuinely attempt to engage in meaningful negotiations prior to the institution of proceedings before the Court against Azerbaijan. In its view, the time frame of the supposed negotiations shows that Armenia was never serious about finding a solution to the matters that divided the Parties. Specifically, Azerbaijan notes that the period from November 2020 to July 2021 was spent "talking about the procedural modalities" and that the first substantive meeting between the Parties was held in mid-July 2021. Moreover, Azerbaijan argues that, even thereafter, Armenia never attempted to engage constructively with any of the proposals put forward by the Respondent. In particular, Azerbaijan maintains that, during the bilateral meeting held on 30-31 August 2021, it presented counter-proposals that were never genuinely considered nor discussed by Armenia, which simply rejected those proposals altogether at the following meeting of 14-15 September 2021 before filing its Application and Request for the indication of provisional measures the following day.

37. Azerbaijan argues that a State is not entitled to bring a premature end to negotiations relating to alleged violations of obligations arising under CERD simply because it would rather raise these issues by means of proceedings before the Court. With regard to Armenia's position that the negotiations had reached an impasse, Azerbaijan states that it was not open to Armenia to make such a determination unilaterally, as the continuation of negotiations cannot be subject to "a right to exercise an unreasoned veto". In addition, according to Azerbaijan, Armenia's claim that the negotiations failed was based on Azerbaijan's refusal to accept that it had violated CERD, a claim which Azerbaijan considers both unreasonable and inappropriate, since "[a]cceptance of guilt as a threshold condition has no place in genuine negotiations". In sum, according to Azerbaijan, the record shows that it tried to engage in constructive negotiations whereas Armenia made no genuine attempt to do so. Azerbaijan concludes that the Court manifestly lacks jurisdiction either to determine the merits of the case or to order provisional measures because Armenia has failed to fulfil the precondition of negotiation contained in Article 22 of CERD.

* *

38. Regarding the precondition of negotiation contained in Article 22 of CERD, the Court observes that negotiations are distinct from mere protests or disputations and require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is met only when the attempt to negotiate has been unsuccessful or where negotiations have failed, become futile or deadlocked. In order to meet this precondition, "the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in

question" (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 419, para. 36, citing *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. 133, para. 161).

39. The Court notes that, as evidenced by the material before it, Armenia raised allegations of violations by Azerbaijan of its obligations under CERD in various bilateral exchanges subsequent to the signing of the Trilateral Statement in November 2020. In particular, the Parties corresponded through a series of diplomatic Notes over a period running from November 2020 to September 2021 and held several rounds of bilateral meetings covering the procedural modalities, scope and topics of their negotiations concerning alleged violations of obligations arising under CERD.

40. The Court observes that, between the first exchange between the Ministers for Foreign Affairs of Armenia and Azerbaijan, by letters dated 11 November 2020 and 8 December 2020 respectively, and the last bilateral meeting held on 14-15 September 2021, the positions of the Parties do not appear to have evolved. Although the Parties were able to agree on certain procedural modalities, including scheduling timetables and topics of discussion, no similar progress was made in terms of substantive matters relating to Armenia's allegations of Azerbaijan's non-compliance with its obligations under CERD. The information available to the Court regarding the bilateral sessions held on 15-16 July 2021, 30-31 August 2021 and 14-15 September 2021 shows a lack of progress in reaching common ground on substantive issues. In particular, in the Note Verbale dated 10 September 2021 from the Permanent Mission of Armenia to the United Nations Office and other International Organizations in Geneva to the Permanent Mission of Azerbaijan to the United Nations Office and other International Organizations in Geneva, Armenia stated that it considered Azerbaijan's "responses" (to the allegations of violations of obligations arising under CERD made against it) presented during the 15-16 July 2021 session to be "in fact categorical rejections of Armenia's claims and requested remedies". For its part, during the oral proceedings, Azerbaijan argued — with reference to the bilateral sessions held in July, August and September 2021 — that every time it put forward counter-proposals in response to Armenia's claims for remedies, Armenia failed to "put forward any proposals".

41. Despite the fact that Armenia alleged in bilateral exchanges that Azerbaijan had violated a number of obligations under CERD and that the Parties engaged in a significant number of written exchanges and meetings over a period of several months, it seems that their positions on

the alleged non-compliance by Azerbaijan with its obligations under CERD remained unchanged and that their negotiations had reached an impasse. It therefore appears to the Court that the dispute between the Parties regarding the interpretation and application of CERD had not been settled by negotiation as of the date of the filing of the Application.

42. Recalling that, at this stage of the proceedings, the Court need only decide whether, prima facie, it has jurisdiction, the Court finds that the procedural preconditions under Article 22 of CERD appear to have been met.

*4. Conclusion as to Prima Facie Jurisdiction*

43. In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article 22 of CERD to entertain the case to the extent that the dispute between the Parties relates to the "interpretation or application" of the Convention.

## III. The Rights whose Protection Is Sought and the Link between such Rights and the Measures Requested

44. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 18, para. 43).

45. At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which Armenia wishes to see protected exist; it need only decide whether the rights claimed by Armenia on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid.*, para. 44).

* *

46. In the present proceedings, Armenia asserts rights under Articles 2, 3, 4, 5, 6 and 7 of CERD. In particular, Armenia asserts the right of prisoners of war and civilian detainees of Armenian national or ethnic origin to be repatriated and their right to be protected from inhuman treatment,

the right of persons of Armenian national or ethnic origin not to be subject to hate speech by Azerbaijan and the right of persons of Armenian national or ethnic origin to access and enjoy their cultural heritage, as well as Azerbaijan's corresponding obligation not to destroy, erase or falsify such heritage. Armenia argues that these rights are plausible in so far as they are "grounded in a possible interpretation" of the Convention and that Azerbaijan's actions plausibly constitute acts of racial discrimination in violation of its obligations under CERD.

47. Armenia contends that the failure to repatriate prisoners of war and civilian detainees of Armenian national or ethnic origin following the ceasefire reached on 10 November 2020 constitutes a violation by Azerbaijan of its obligations under Articles 2 and 5 of CERD. More specifically, Armenia submits that the failure to repatriate prisoners of war and civilian detainees of Armenian national or ethnic origin is a denial of their right to equality before the law, namely "before or under international humanitarian law", and amounts to "racial discrimination" within the meaning of CERD. According to Armenia, these detainees have been subjected to "sham criminal proceedings", and it is "readily apparent" from the willingness of Azerbaijan to repatriate some prisoners of war on certain occasions, while refusing to repatriate others captured under similar circumstances, that their continued detention "has nothing to do with actual criminality". The Applicant is thus of the view that the Azerbaijani authorities are not "applying criminal law fairly and judiciously", but rather are "using criminal law arbitrarily as a subterfuge for prohibited, discriminatory conduct".

48. The Applicant further maintains that the inhuman and degrading treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin by Azerbaijan violates Article 5 *(b)* of CERD, which protects the "right to security of person and protection by the State against violence or bodily harm". It asserts that evidence in the case file establishes that "atrocious acts", including torture, targeting these persons, were committed with "clear hatred being shown to persons of Armenian origin". In Armenia's view, the treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin before Azerbaijani courts "clearly implicates" Article 5 *(a)* of CERD which recognizes "[t]he right to equal treatment before the tribunals and all other organs administering justice".

49. Armenia states that the rights of persons of Armenian national or ethnic origin not to be subject to racial hatred and racial hate speech are explicitly stated in Articles 2, 4 and 7 of CERD. It asserts that Azerbaijan, instead of respecting these rights, is violating them "on a daily basis through a constant rhetoric of hate". According to Armenia, this rhetoric "escalated" before and during the 2020 Conflict, and was employed by

politicians and high-ranking officials, including the President of Azerbaijan. Armenia further refers to "the racist depictions of Armenian soldiers in denigrating and dehumanizing scenes" in Azerbaijan's "Military Trophies Park". Armenia thus contends that its "rights under Article 2, 4 and 7 of the Convention meet any threshold of plausibility for purposes of this phase of the proceedings".

50. Armenia also refers to the rights of persons of Armenian national or ethnic origin under Articles 2 and 5 of CERD to access and enjoy, without discrimination, their historic, cultural and religious heritage. More specifically, Armenia invokes Article 5 *(d)* (vii) which prohibits racial discrimination in relation to the right to freedom of religion and Article 5 *(e)* (vi) which guarantees the right to equal participation in cultural activities, which, according to Armenia, entails a right to the protection and preservation of Armenian historic, cultural and religious heritage. Armenia alleges that acts of destruction and vandalism have been perpetrated by "Azerbaijani soldiers and mercenaries" against Armenian religious and cultural heritage sites, and that acts of desecration of Armenian cemeteries and religious artefacts, such as the "khachkars" (or "cross-stones") have also occurred. Armenia further alleges that Azerbaijan, by carrying out what it calls restoration works on the cathedral of Shushi, has altered features characteristic of Armenian cultural heritage. Considering the alleged general context of anti-Armenian hatred, Armenia contends that the repeated destruction, alteration and desecration of Armenian cultural heritage and religious sites in territories controlled by Azerbaijan constitutes "racial discrimination" in breach of Articles 2 and 5 of CERD and therefore that its rights under these provisions are plausible.

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51. Azerbaijan acknowledges that, as of 8 October 2021, 45 named individuals captured in relation to the 2020 Conflict remained in its custody. It asserts that these persons are not detained "on the basis of their national or ethnic origin" and maintains instead that they have been charged or convicted of serious offences including torture, murder or mercenarism. According to Azerbaijan, their detention is lawful under domestic and international law and does not have the "purpose or effect" of impairing their equal enjoyment of fundamental rights. It notes that "if Azerbaijan is engaged in a conflict with a wholly ethnically Armenian force, the detainees it holds are likely to be ethnically Armenian", but that this is not evidence of racial discrimination. Azerbaijan also underscores that it has "released or repatriated *the vast majority* of Armenians" (emphasis in the original) detained in relation to the 2020 hostilities, and

stresses that the release of eight Armenian detainees in recent months was "not pursuant to a bargain with Armenia", confirming therefore that "Azerbaijan investigated in each case whether there is a basis for continued detention". Accordingly, Azerbaijan claims that the detention of individuals of Armenian ethnic or national origin cannot be regarded as "racial discrimination" within the meaning of Article 1 of CERD and thus cannot plausibly engage rights under the Convention.

52. Azerbaijan adds that it has initiated investigations in cases where there have been credible allegations of mistreatment of Armenian detainees, which it says demonstrates that it does not condone torture or mistreatment of any kind, regardless of a detainee's origin. It considers that Armenia therefore has no plausible rights under CERD based on allegations of the inhuman and degrading treatment of prisoners of war and civilian detainees of Armenian national or ethnic origin.

53. Azerbaijan denies that it has incited hatred of people of Armenian national or ethnic origin and argues that Armenia's allegations in this regard are not supported by specific declarations or conduct on the part of Azerbaijan. Therefore, according to the Respondent, Armenia has not established any plausible rights under CERD based on its allegations that Azerbaijan violated its obligations by inciting racial hatred against persons of Armenian national or ethnic origin. As to Armenia's references to the "Military Trophies Park", Azerbaijan considers that, in light of the fact that the mannequins and helmets of Armenian soldiers have been "permanently removed" from display, "there is nothing remaining at the Park that could possibly implicate rights under CERD".

54. Regarding Armenian religious and cultural heritage, Azerbaijan accepts that all persons who are lawfully present in Azerbaijan, including persons of Armenian national or ethnic origin, must be able to visit on an equal basis historic, cultural and religious sites that are safely open to the public in its territory. Azerbaijan claims that certain heritage sites, however, are currently not accessible due to the placement of landmines by Armenia. According to the Respondent, restriction of access to those sites is aimed at ensuring the safety and security of persons, regardless of their national or ethnic origin, and cannot, therefore, constitute an act of racial discrimination under CERD or a basis to claim "a plausible CERD right". Azerbaijan adds that its law forbids vandalism and destruction of cultural and religious heritage and asserts that it is "facilitating efforts to protect and preserve" Armenian sites and artefacts relevant to the rights under CERD. Moreover, Azerbaijan contends that it has undertaken to investigate all credible allegations of vandalism, destruction, and unauthorized alteration of historic and cultural monuments and cemeteries used by ethnic Armenians.

55. Azerbaijan concludes that in the present case the Applicant has failed to show that it seeks to protect plausible rights on the merits in so far as it has not established that the acts complained of constitute acts of "racial discrimination" within the meaning of CERD.

* *

56. The Court notes that CERD imposes a number of obligations on States parties with regard to the elimination of racial discrimination in all its forms and manifestations. Article 1, paragraph 1, of CERD defines racial discrimination in the following terms:

> "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

Articles 2, 3, 4, 5, 6 and 7 of the Convention, invoked by Armenia in its Application and for the purposes of its Request for the indication of provisional measures, read as follows:

"*Article 2*

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
   *(a)* Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
   *(b)* Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
   *(c)* Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
   *(d)* Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

*(e)* Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

*Article 3*

States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

*Article 4*

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

*(a)* Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

*(b)* Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

*(c)* Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

*Article 5*

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

*(a)* The right to equal treatment before the tribunals and all other organs administering justice;

*(b)* The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

*(c)* Political rights, in particular the right to participate in elections — to vote and to stand for election — on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

*(d)* Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;
(ii) The right to leave any country, including one's own, and to return to one's country;
(iii) The right to nationality;
(iv) The right to marriage and choice of spouse;
(v) The right to own property alone as well as in association with others;
(vi) The right to inherit;
(vii) The right to freedom of thought, conscience and religion;
(viii) The right to freedom of opinion and expression;
(ix) The right to freedom of peaceful assembly and association;

*(e)* Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
(ii) The right to form and join trade unions;
(iii) The right to housing;
(iv) The right to public health, medical care, social security and social services;
(v) The right to education and training;
(vi) The right to equal participation in cultural activities;

*(f)* The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

*Article 6*

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

*Article 7*

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention."

57. The Court notes that Articles 2, 3, 4, 5, 6 and 7 of CERD are intended to protect individuals from racial discrimination. It recalls, as it did in past cases in which Article 22 of CERD was invoked as the basis of its jurisdiction, that there is a correlation between respect for individual rights enshrined in the Convention, the obligations of States parties under CERD and the right of States parties to seek compliance therewith (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 426, para. 51).

58. A State party to CERD may invoke the rights set out in the abovementioned articles only to the extent that the acts complained of constitute acts of racial discrimination as defined in Article 1 of the Convention (see *ibid.*, para. 52). In the context of a request for the indication of provisional measures, the Court examines whether the rights claimed by an applicant are at least plausible.

59. The Court considers, on the basis of the information presented to it by the Parties, that at least some of the rights claimed by Armenia are plausible rights under the Convention.

60. In relation to persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath, Armenia asserts two distinct rights: the right to be repatriated and the right to be protected from inhuman or degrading treatment. The Court notes that international humanitarian law governs the release of

persons fighting on behalf of one State who were detained during hostilities with another State. It also recalls that measures based on current nationality do not fall within the scope of CERD (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 106, para. 105). The Court does not consider that CERD plausibly requires Azerbaijan to repatriate all persons identified by Armenia as prisoners of war and civilian detainees. Armenia has not placed before the Court evidence indicating that these persons continue to be detained by reason of their national or ethnic origin. However, the Court finds plausible the right of such persons not to be subjected to inhuman or degrading treatment based on their national or ethnic origin while being detained by Azerbaijan.

61. The Court also considers plausible the rights allegedly violated through incitement and promotion of racial hatred and discrimination against persons of Armenian national or ethnic origin by high-ranking officials of Azerbaijan and through vandalism and desecration affecting Armenian cultural heritage.

* *

62. The Court now turns to the condition of the link between the rights claimed by Armenia and the provisional measures requested. In this regard the Court recalls that at this stage of the proceedings only some of the rights claimed by Armenia have been found to be plausible. It will therefore limit itself to considering the existence of the requisite link between these rights and the measures requested by Armenia.

* *

63. Armenia considers that each of the provisional measures requested is clearly linked to the rights for which it seeks protection. According to Armenia, the measures relating to prisoners of war and other detainees of Armenian national or ethnic origin will ensure that they can enjoy their right under Article 2 of CERD to be free from racial discrimination in all of its forms and their right, under Article 5 of CERD, to be secure and protected by the State from violence or bodily harm. For Armenia, the only genuine way to protect these rights is to order that the detainees be immediately released and that they be treated humanely pending their release. Armenia further asserts that the measure requesting that Azerbaijan refrain from espousing hatred of people of Armenian national or ethnic origin and that the "Military Trophies Park" be closed, is directly linked to rights under Articles 2, 4 and 7 of CERD, which set out specific ways in which a State party must act to meet its obligations to combat racial discrimination. With regard to the measures relating to the protection and preservation of Armenian historic, cultural and religious

heritage and the need to ensure a right of access, Armenia maintains that these measures are necessary in order to protect the right of persons of Armenian national or ethnic origin under Article 5 to equal participation in cultural activities, including the right of access to and enjoyment of their cultural heritage.

*

64. Azerbaijan considers that there is no link between the measures requested by Armenia and the rights under CERD that it claims on the merits. In particular, with regard to the measures aimed at obtaining the release of all Armenian detainees in its custody and at ensuring their proper treatment pending that outcome, Azerbaijan argues, first, that there is no provision in CERD on the basis of which Armenia could demand the release of lawfully detained individuals. Secondly, it contends that the individuals who remain in Azerbaijan have either been lawfully tried, convicted and are serving their sentences or are awaiting trial. Azerbaijan therefore does not accept that it is under any duty to release those persons before they have been tried or, if found guilty, before they have served their sentence. Azerbaijan argues, thirdly, that all Armenian detainees in Azerbaijan's custody are treated in accordance with Azerbaijan's obligations under CERD.

65. With regard to the measure requesting Azerbaijan to refrain from espousing hatred of people of Armenian national or ethnic origin, the Respondent asserts that it has pledged its adherence to the obligations under CERD not to condone statements or actions that promote hatred or incite violence targeting a specific group on the basis of its national or ethnic origin. Azerbaijan also notes that mannequins depicting Armenian soldiers and displays of helmets of Armenian soldiers were permanently removed from the "Military Trophies Park", as confirmed by a statement from its Agent (see paragraph 25 above).

66. With regard to the measures aimed at protecting Armenian historic, cultural and religious heritage sites, as well as at ensuring the rights of Armenians to access and enjoy them, Azerbaijan states that all persons who are lawfully present in Azerbaijan, including Armenians, are able to access such sites on an equal basis; Azerbaijan also refers to an Azerbaijani law forbidding the vandalism and destruction of sites of Armenian historic, cultural and religious heritage. The Respondent further notes that it is facilitating efforts to protect and preserve sites and artefacts that are relevant under CERD.

* *

67. The Court has already found that at least some of the rights claimed by Armenia under CERD are plausible (see paragraphs 59 to 61 above). It considers that a link exists between certain measures requested by Armenia (see paragraphs 5 and 11 above) and the plausible rights it seeks to protect. This is the case for measures aimed at requesting Azerbaijan to treat all persons that Armenia identifies as prisoners of war and civilian detainees taken captive during the 2020 Conflict or in its aftermath, in accordance with its obligations under CERD, including with respect to their right to security of person and protection by the State against all bodily harm; to refrain from espousing hatred against persons of Armenian national or ethnic origin; and to prevent, prohibit and punish vandalism, destruction or alteration of Armenian historic, cultural and religious heritage and to protect the right to access and enjoy that heritage. These measures, in the Court's view, are directed at safeguarding plausible rights invoked by Armenia under CERD.

68. The Court concludes, therefore, that a link exists between some of the rights claimed by Armenia and some of the requested provisional measures.

## IV. Risk of Irreparable Prejudice and Urgency

69. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 24, para. 64, referring to *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018 (II)*, p. 645, para. 77).

70. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case (*ibid.*, p. 24, para. 65). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

71. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of CERD, but to determine whether the circumstances require the indication of provisional measures for the protection

of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures.

* *

72. Armenia submits that there is an urgent need to protect prisoners of war and civilian detainees of Armenian national or ethnic origin from further mistreatment, to protect persons of Armenian national or ethnic origin from continued hate speech, and to protect Armenian historic, cultural and religious heritage from erasure.

73. Armenia alleges that the evidence shows a clear record and practice of Azerbaijani authorities abusing prisoners of war and civilian detainees of Armenian national or ethnic origin. Armenia adds that these individuals continue to be at grave risk of execution, torture or other forms of mistreatment. It contends that prisoners of war and civilian detainees of Armenian national or ethnic origin have been, and continue to be, exposed to stabbings, beatings, burnings and electric shocks, and that such treatment is often accompanied by ethnic slurs and other hate speech. Armenia states that a number of military and civilian detainees of Armenian national or ethnic origin have even been executed. Armenia maintains that the fact that the detainees are subject to the arbitrariness of criminal proceedings in Azerbaijan, in which they "are charged long after they should have been repatriated, and then tried and convicted in a matter of days, often in a language they do not understand", and that they are at risk of being given lengthy prison sentences makes them extremely vulnerable to continued abuse. For all these reasons, Armenia is of the view that there is a clear and imminent threat of psychological trauma, bodily harm and even death for detainees of Armenian national or ethnic origin.

74. Armenia further speaks of obsessive and continuing expressions of hatred for persons of Armenian national or ethnic origin emanating from Azerbaijani politicians and high-ranking government officials, including the President. It alleges that this environment of hate may entail irreparable consequences, in particular by making the physical and mental abuse of all Armenians more likely, "including those living in Nagorno-Karabakh and those still held in captivity" in Azerbaijan. For example, the racist depictions at the "Military Trophies Park" of Armenian soldiers in denigrating and dehumanizing scenes "exacerbate[] the already real and present threat to the detainees".

75. Armenia also contends that Azerbaijan has damaged, altered and destroyed Armenian churches (such as the Holy Saviour/Ghazanchetsots

Cathedral in Shushi, the Armenian church of Saint John the Baptist in Shushi and the Saint Yeghishe Church in Mataghis), gravestones (in Hadrut, in north of Shushi, in Mets Tagher, in Taghavard and in Sghnakh), and other cultural and religious sites and artefacts (such as "khachkars" (or "cross-stones")). Armenia claims that Azerbaijan continues to engage in these acts of destruction and vandalism or allows these acts to occur. It adds that even before the most recent armed conflict, Azerbaijan was prolific in its efforts to erase any vestige of the Armenian presence from its territory and that the continued racist hate speech by the President of Azerbaijan and senior government officials "only exacerbates this real and present risk". Indeed, according to Armenia, by refusing even to acknowledge the existence of Armenian cultural heritage, the President of Azerbaijan "is directly promoting a climate that is even more conducive to the hate-filled destruction of that heritage".

*

76. Azerbaijan denies that there exists an imminent risk of irreparable prejudice to the rights of the Applicant under CERD because it has already reaffirmed on several occasions its obligations under the Convention and has taken concrete action to comply with those obligations.

77. In particular, Azerbaijan asserts that it has given its commitment that no detainees should be subject to mistreatment on the basis of their national or ethnic origin. It notes that the International Committee of the Red Cross visits individuals detained in relation to the 2020 Conflict on a regular basis, assesses their treatment and conditions of detention and facilitates contact with their families. In addition, Azerbaijan states that, during visits by the Azerbaijani ombudsperson, Armenian detainees confirmed that they were provided with adequate food, both in quantity and nutritional value, had access to clean drinking water and were able to speak with their relatives. Detainees were also visited by the Azerbaijani National Preventive Group's doctor and were provided medical examinations at their request. Consequently, Azerbaijan is of the view that Armenia has not demonstrated an imminent risk of irreparable prejudice to the rights of detainees presently in custody.

78. Azerbaijan further points out that it does not condone statements or actions that promote hatred or incite violence targeting Armenians as a national or ethnic group. It claims that Armenia misinterprets the statements made by the President and senior government officials of Azerbaijan, which were directed against enemy forces in the context of an armed conflict, and not against Armenians as an ethnic group. Moreover, when certain statements were thought to have been directed against the Armenian people, as opposed to the policies and practices of Armenia, Azerbaijani officials took "immediate and positive measures designed to" combat hate

speech. Azerbaijan further observes that it has taken concrete steps to address Armenia's concerns by removing mannequins and helmets from the "Military Trophies Park" and that this removal of the only specific objects complained of by Armenia eliminates any urgency to act.

79. Azerbaijan further claims to have acknowledged publicly "its international obligation to protect and uphold historical, cultural and religious heritage in the liberated territories". It observes that the protection of historic and cultural monuments is also enshrined in Azerbaijan's Constitution and in its statutory law, which criminalizes the deliberate destruction or damaging of over 6,300 sites that are listed on its State Registry, which includes sites identified by Armenia. Azerbaijan adds that it has undertaken to "provide support for investigations of all credible allegations of vandalism, destruction, and unauthorized alteration of historical and cultural monuments and cemeteries used by ethnic Armenian individuals". It further notes that it is already working to restore sites on its National Registry damaged during the conflict. Azerbaijan argues that Armenia does not identify with any specificity any sites that it asserts to be in imminent danger of destruction unless the Court issues provisional measures. According to Azerbaijan, instead of pointing to specific, ongoing conduct that could demonstrate the risk of a real and imminent irreparable prejudice as required, Armenia contents itself with alleging only past conduct, primarily during or in the aftermath of active hostilities. For example, it refers to allegations of conflict-related damage to the Gazanchi Church, damage to war memorials, a cross-stone and a monument in Shusha by Azerbaijani soldiers, and soldiers vandalizing the Yegish Arakel Temple. The Respondent further submits that Armenia's requested provisional measure preventing or prohibiting "alterations" to cultural heritage is tantamount to a prohibition on Azerbaijan from pursuing reconstruction and restoration of such heritage in its own sovereign territory without consulting Armenia and that this request "assumes a right to 'enjoy' monuments reconstructed to its specification" which does not plausibly exist under CERD.

* *

80. Having previously determined that some of the rights asserted by the Applicant are plausible and that there is a link between those rights and the provisional measures requested, the Court now considers whether irreparable prejudice could be caused to those rights and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to those rights before the Court gives its final decision.

81. The Court recalls that in past cases in which CERD was at issue, it stated that the rights stipulated in Article 5 *(a)*, *(b)*, *(c)*, *(d)* and *(e)* are of such a nature that prejudice to them is capable of causing irreparable harm (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 142; *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*, p. 138, para. 96; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, pp. 430-431, para. 67). The Court considers that this statement also holds true in respect of the right of persons not to be subject to racial hatred and discrimination that stems from Article 4 of CERD.

82. As the Court has noted previously, individuals subject to inhuman and degrading treatment or torture could be exposed to a serious risk of irreparable prejudice (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 142). The Court has also recognized that psychological distress, like bodily harm, can lead to irreparable prejudice (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 431, para. 69).

83. In the view of the Court, acts prohibited under Article 4 of CERD — such as propaganda promoting racial hatred and incitement to racial discrimination or to acts of violence against any group of persons based on their national or ethnic origin — can generate a pervasive racially charged environment within society. This holds particularly true when rhetoric espousing racial discrimination is employed by high-ranking officials of the State. Such a situation may have serious damaging effects on individuals belonging to the protected group. Such damaging effects may include, but are not limited to, the risk of bodily harm or psychological harm and distress.

84. The Court has also indicated previously that cultural heritage could be subject to a serious risk of irreparable prejudice when such heritage "has been the scene of armed clashes between the Parties" and when "such clashes may reoccur" (see *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 552, para. 61).

85. In the present proceedings, the information placed before the Court by the Parties includes the resolution of the Parliamentary Assembly of

the Council of Europe on Humanitarian Consequences of the Conflict between Armenia and Azerbaijan adopted on 27 September 2021. It observes that the Assembly indicates, *inter alia*, that

> "[a]mong allegations made by both sides, backed up by reputable international NGOs and a wealth of information available from different sources, there [is] worrying . . . evidence of . . . [a] substantial number of . . . allegations of [systematic] inhuman and degrading treatment and torture of Armenian prisoners of war by Azerbaijanis".

The Court moreover observes that the Assembly "regrets that there remain statements at the highest level which continue to portray Armenians in an intolerant fashion".

86. The Court in addition notes that the Assembly

> "condemns the damage deliberately caused [by Azerbaijan] to [Armenian] cultural heritage during the 6-week war, and what appears to be the deliberate shelling of the Gazanchi Church/Holy Saviour, Ghazanchetsots Cathedral in Shusha/Shushi as well as the destruction or damage of other churches and cemeteries during and after the conflict; remains concerned, in the light of past destruction, about the future of the many Armenian churches, monasteries, including the monastery in Khutavank/Dadivank, cross-stones and other forms of cultural heritage which have returned under Azerbaijan control; [and] expresses concern about a developing narrative in Azerbaijan promoting a 'Caucasian Albanian' heritage to replace what is seen as an 'Armenian' cultural heritage" (resolution 2391 (2021), text adopted by the Assembly on 27 September 2021, 24th sitting).

87. The Court also takes note of the joint statement issued by several United Nations human rights experts who, on 1 February 2021, addressed the situation of Armenians being held captive in Azerbaijan and expressed grave concern "at allegations that prisoners of war and other protected persons have been subjected to extrajudicial killing, enforced disappearance, torture and other ill-treatment" (United Nations Office of the High Commissioner for Human Rights, "Nagorno-Karabakh: Captives Must Be Released — UN Experts" (1 February 2021)).

88. In light of the considerations set out above, the Court concludes that the alleged disregard of the rights deemed plausible by the Court (see paragraphs 59 to 61 above) may entail irreparable prejudice to those rights and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case.

## V. Conclusion and Measures to Be Adopted

89. The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Armenia, as identified above (see paragraphs 59 to 61).

90. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 28, para. 77).

91. In the present case, having considered the terms of the provisional measures requested by Armenia and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

92. The Court considers that, with regard to the situation described above, pending the final decision in the case, Azerbaijan must, in accordance with its obligations under CERD, protect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law; take all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin; and take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts.

93. The Court takes full cognizance of the representation made by the Agent of Azerbaijan during the oral proceedings regarding certain exhibits in the "Military Trophies Park", namely that mannequins depicting Armenian soldiers and displays of helmets allegedly worn by Armenian soldiers during the 2020 Conflict have been permanently removed from the park and will not be shown in the future (see paragraphs 25 and 65 above). In this regard, the Agent of Azerbaijan also referred to two letters of 6 and 13 October 2021, whereby the Director of the "Military Trophies Park" indicated that "all mannequins displayed at the Military Trophies Park . . . were removed on October 1, 2021" and that, "on October 08, 2021 all helmets were removed from the Military Trophies Park". The Director of the "Military Trophies Park" further indicated that "[t]he mannequins and helmets will not be displayed at the Military Trophy Park or the Memorial Complex/Museum in the future".

94. The Court recalls that Armenia has requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with Azerbaijan. When it is indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, pp. 432-433, para. 76). In the present case, having considered all the circumstances, in addition to the specific measures it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute.

95. The Court further recalls that Armenia requested it to indicate provisional measures directing Azerbaijan "to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of CERD" and to provide regular reports on the implementation of provisional measures. The Court, however, considers that, in the particular circumstances of the case, these measures are not warranted.

* * *

96. The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

* * *

97. The Court further reaffirms that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves. It leaves unaffected the right of the Governments of Armenia and Azerbaijan to submit arguments in respect of those questions.

* * *

98. For these reasons,

THE COURT,

*Indicates* the following provisional measures:

(1) The Republic of Azerbaijan shall, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,

*(a)* By fourteen votes to one,

Protect from violence and bodily harm all persons captured in relation to the 2020 Conflict who remain in detention, and ensure their security and equality before the law;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judges* ad hoc Keith, Daudet;

AGAINST: *Judge* Yusuf;

*(b)* Unanimously,

Take all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin;

*(c)* By thirteen votes to two,

Take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage, including but not limited to churches and other places of worship, monuments, landmarks, cemeteries and artefacts;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Daudet;

AGAINST: *Judge* Yusuf; *Judge* ad hoc Keith;

(2) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this seventh day of December, two thousand and twenty-one, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Armenia and the Government of the Republic of Azerbaijan, respectively.

*(Signed)* Joan E. DONOGHUE,
President.

*(Signed)* Philippe GAUTIER,
Registrar.

Judge YUSUF appends a dissenting opinion to the Order of the Court; Judge IWASAWA appends a declaration to the Order of the Court; Judge *ad hoc* KEITH appends a declaration to the Order of the Court.

*(Initialled)* J.E.D.

*(Initialled)* Ph.G.

# HP EXHIBIT 355

## Placeholder

## Please see file labelled:

## 355. Israeli Antiquities Authority Official YouTube Channel, New Discoveries at the Western Wall Tunnels (16 October 2017)

# HP EXHIBIT 356

## Placeholder

## Please see file labelled:

## 356. Al Jazeera, Watch the occupation forces attack the worshippers in Al-Qibli Mosque with bombs and tear gas (10 May 2021)

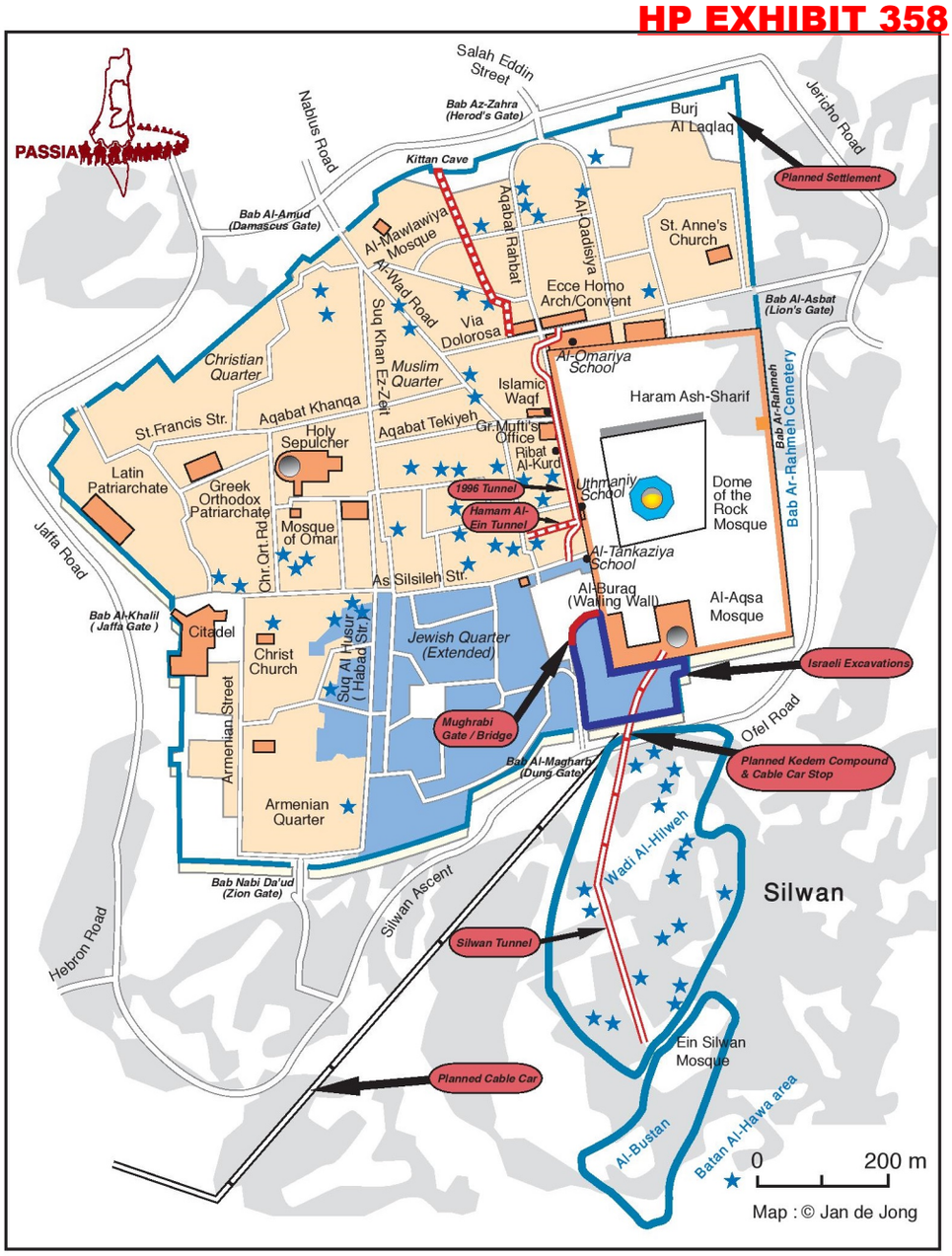
# HP EXHIBIT 357

## Placeholder

## Please see file labelled:

## 357. BBC News video concerning attacks on Christians in Jerusalem

HP EXHIBIT 358

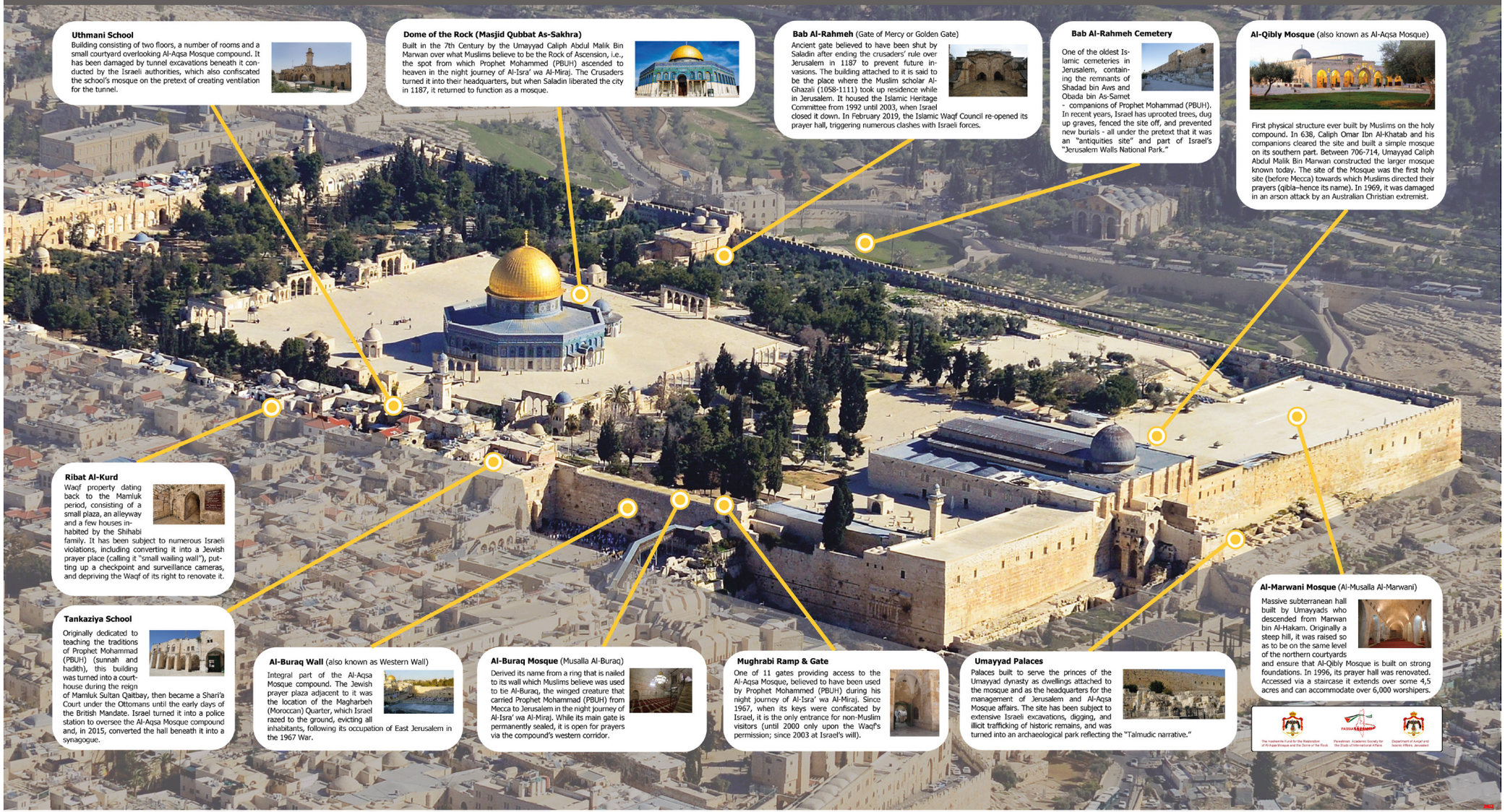



3401

HP EXHIBIT 359

# Al-Aqsa Mosque /Al-Haram Ash-Sharif

Located in the southeast corner of the Old City of Jerusalem, Al-Aqsa Mosque comprises the entire area of Al-Haram Ash-Sharif within the walls of the compound (144 dunums/144,000 m2). The earliest structure dates back to Caliph Omar Bin Al-Khatab's peaceful capture of Jerusalem in 638, since when the site has been under continuous Muslim administration, except for the period of the Crusaders' rule in the 12th Century. All structures listed here are integral parts of the Islamic Waqf, i.e., property and its revenues donated under Islamic law to the public for charitable or religious purposes (plural: awqaf)., or holding, in perpetuity. The Islamic Waqf in Jeruslem is subjected to a range of Israeli violations, including denying it its historic right and responsibility to administer the holy site in violation of the historical, religious status quo and international humanitarian law, preventing the its regulation of non-Muslim entry to the compound through the Mughrabi Gate, thereby significantly increasing the number, size, and provocative incursions of Jewish extremists who call for Jewish worship at the site, destruction of its Muslim shrines and the marginalization or even elimination of a Muslim role and presence there; and partially unauthorized tunneling and digging next to and beneath the compound, which is causing damages to many properties – including the Awqaf Administration offices, Manjakiyyah School, Ribat Al-Kurd, the Uthmani and Al-Tankaziya Schools, and Palestinian homes.



**Uthmani School**

Building consisting of two floors, a number of rooms and a small courtyard overlooking Al-Aqsa Mosque compound. It has been damaged by tunnel excavations beneath it conducted by the Israeli authorities, which also confiscated the school's mosque on the pretext of creating ventilation for the tunnel.



**Dome of the Rock (Masjid Qubbat As-Sakhra)**

Built in the 7th Century by the Umayyad Caliph Abdul Malik Bin Marwan over what Muslims believe to be the Rock of Ascension, i.e., the spot from which Prophet Mohammed (PBUH) ascended to heaven in the night journey of Al-Isra' wa Al-Miraj. The Crusaders turned it into their headquarters, but when Saladin liberated the city in 1187, it returned to function as a mosque.



**Bab Al-Rahmeh** (Gate of Mercy or Golden Gate)

Ancient gate believed to have been shut by Saladin after ending the crusaders' rule over Jerusalem in 1187 to prevent future invasions. The building attached to it is said to be the place where the Muslim scholar Al-Ghazali (1058-1111) took up residence while in Jerusalem. It housed the Islamic Heritage Committee from 1992 until 2003, when Israel closed it down. In February 2019, the Islamic Waqf Council re-opened its prayer hall, triggering numerous clashes with Israeli forces.



**Bab Al-Rahmeh Cemetery**

One of the oldest Islamic cemeteries in Jerusalem, containing the remnants of Shadad bin Aws and Obada bin As-Samet - companions of Prophet Mohammad (PBUH). In recent years, Israel has uprooted trees, dug up graves, fenced the site off, and prevented new burials - all under the pretext that it was an "antiquities site" and part of Israel's "Jerusalem Walls National Park."



**Al-Qibly Mosque** (also known as Al-Aqsa Mosque)



First physical structure ever built by Muslims on the holy compound. In 638, Caliph Omar Ibn Al-Khatab and his companions cleared the site and built a simple mosque on its southern part. Between 706-714, Umayyad Caliph Abdul Malik Bin Marwan constructed the larger mosque known today. The site of the Mosque was the first holy site (before Mecca) towards which Muslims directed their prayers (qibla–hence its name). In 1969, it was damaged in an arson attack by an Australian Christian extremist.

**Ribat Al-Kurd**

Waqf property dating back to the Mamluk period, consisting of a small plaza, an alleyway and a few houses inhabited by the Shihabi family. It has been subject to numerous Israeli violations, including converting it into a Jewish prayer place (calling it "small wailing wall"), putting up a checkpoint and surveillance cameras, and depriving the Waqf of its right to renovate it.



**Tankaziya School**

Originally dedicated to teaching the traditions of Prophet Mohammad (PBUH) (sunnah and hadith), this building was turned into a courthouse during the reign of Mamluk Sultan Qaitbay, then became a Shari'a Court under the Ottomans until the early days of the British Mandate. Israel turned it into a police station to oversee the Al-Aqsa Mosque compound and, in 2015, converted the hall beneath it into a synagogue.



**Al-Buraq Wall** (also known as Western Wall)

Integral part of the Al-Aqsa Mosque compound. The Jewish prayer plaza adjacent to it was the location of the Magharbeh (Moroccan) Quarter, which Israel razed to the ground, evicting all inhabitants, following its occupation of East Jerusalem in the 1967 War.



**Al-Buraq Mosque** (Musalla Al-Buraq)

Derived its name from a ring that is nailed to its wall which Muslims believe was used to tie Al-Buraq, the winged creature that carried Prophet Mohammad (PBUH) from Mecca to Jerusalem in the night journey of Al-Isra' wa Al-Miraj. While its main gate is permanently sealed, it is open for prayers via the compound's western corridor.



**Mughrabi Ramp & Gate**

One of 11 gates providing access to the Al-Aqsa Mosque, believed to have been used by Prophet Mohammed (PBUH) during his night journey of Al-Isra' wa Al-Miraj. Since 1967, when its keys were confiscated by Israel, it is the only entrance for non-Muslim visitors (until 2000 only upon the Waqf's permission; since 2003 at Israel's will).



**Umayyad Palaces**

Palaces built to serve the princes of the Umayyad dynasty as dwellings attached to the mosque and as the headquarters for the management of Jerusalem and Al-Aqsa Mosque affairs. The site has been subject to extensive Israeli excavations, digging, and illicit trafficking of historic remains, and was turned into an archaeological park reflecting the "Talmudic narrative."



**Al-Marwani Mosque** (Al-Musalla Al-Marwani)

Massive subterranean hall built by Umayyads who descended from Marwan bin Al-Hakam. Originally a steep hill, it was raised so as to be on the same level of the northern courtyards and ensure that Al-Qibly Mosque is built on strong foundations. In 1996, its prayer hall was renovated. Accessed via a staircase it extends over some 4,5 acres and can accommodate over 6,000 worshipers.



The Hashemite Fund for the Restoration of Al-Aqsa Mosque and the Dome of the Rock

Palestinian Academic Society for the Study of International Affairs

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