Annex 111

JUSTITIA ET PACE
INSTITUT DE DROIT INTERNATIONAL

Session de La Haye – 1875

Devoirs internationaux des Etats neutres : Règles de Washington

(Rapporteur : M. Caspar Bluntschli)

I. L'Etat neutre désireux de demeurer en paix et amitié avec les belligérants et de jouir des droits de la neutralité, a le devoir de s'abstenir de prendre à la guerre une part quelconque, par la prestation de secours militaires à l'un des belligérants ou à tous les deux, et de veiller à ce que son territoire ne serve pas de centre d'organisation ou de point de départ à des expéditions hostiles contre l'un d'eux ou contre tous les deux.

II. En conséquence, l'Etat neutre ne peut mettre, d'une manière quelconque, à la disposition d'aucun des Etats belligérants, ni leur vendre ses vaisseaux de guerre ou vaisseaux de transport militaire, non plus que le matériel de ses arsenaux ou de ses magasins militaires, en vue de l'aider à poursuivre la guerre. En outre, l'Etat neutre est tenu de veiller à ce que d'autres personnes ne mettent des vaisseaux de guerre à la disposition d'aucun des Etats belligérants, dans ses ports ou dans les parties de mer qui dépendent de sa juridiction.

III. Lorsque l'Etat neutre a connaissance d'entreprises ou d'actes de ce genre, incompatibles avec la neutralité, il est tenu de prendre les mesures nécessaires pour les empêcher, et de poursuivre comme responsables les individus qui violent les devoirs de la neutralité.

IV. De même, l'Etat neutre ne doit ni permettre ni souffrir que l'un des belligérants fasse de ses ports ou de ses eaux la base d'opérations navales contre l'autre, ou que les vaisseaux de transport militaire se servent de ses ports ou de ses eaux, pour renouveler ou augmenter leurs approvisionnements militaires ou leurs armes, ou pour recruter des hommes.

V. Le seul fait matériel d'un acte hostile commis sur le territoire neutre ne suffit pas pour rendre responsable l'Etat neutre. Pour qu'on puisse admettre qu'il a violé son devoir, il faut la preuve soit d'une intention hostile (*dolus*), soit d'une négligence manifeste *(culpa).*

VI. La puissance lésée par une violation des devoirs de neutralité n'a le droit de considérer la neutralité comme éteinte, et de recourir aux armes pour se défendre contre l'Etat qui l'a violée, que dans les cas graves et urgents, et seulement pendant la durée de la guerre.

Dans les cas peu graves ou non urgents, ou lorsque la guerre est terminée, des contestations de ce genre appartiennent exclusivement à la procédure arbitrale.

VII. Le tribunal arbitral prononce *ex bono et aequo* sur les dommages et intérêts que l'Etat neutre doit, par suite de sa responsabilité, payer à l'Etat lésé, soit pour lui-même, soit pour ses ressortissants.

*

(30 août 1875)

Annex 112

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

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

30 April 1990

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PART III

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

Decision of 30 April 1990

Affaire concernant les problèmes nés entre la Nouvelle-Zélande et la France relatifs à l'interprétation ou à l'application de deux accords conclus le 9 juillet 1986, lesquels concernaient les problèmes découlant de l'affaire du *Rainbow Warrior*

Sentence du 30 avril 1990

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*

30 APRIL 1990

Violation of a treaty obligation by a treaty partner—Requirement of good faith to seek consent of the other treaty partner before deviating from the treaty obligation —Requirement of mutual consent of treaty partners—Obligation to act in good faith —Requirement of providing full information in a timely manner to the other treaty partner—Requirement of not impeding a party's efforts to verify the information submitted by the other party—Requirement of allowing the other party a reasonable opportunity to reach an informed decision.

Relationship between the requirement of mutual consent and unilateral acts of treaty partners—Invocation of internal law as a justification for non-performance of treaty obligations—Change of circumstances as a reason for non-compliance with treaty obligations—Circumstances justifying the continuous breach of a treaty obligation—Cessation of a wrongful act.

Customary sources for determining applicable rules and principles of international law—Interpretation of treaties—The law of international responsibility—Circumstances precluding illegality of an otherwise wrongful act (*force majeure*, fortuitous event, distress, state of necessity)—Relationship between breach of a treaty and the law of international responsibility—Law applicable to the determination of the effects of a breach of a treaty.

Tempus commissi delictu—Duration of a treaty obligation—Existence of damage as a prerequisite for relief—Types of damage (material, economic, legal, moral, political) —Appropriate remedies (*restitutio in integrum*, satisfaction in the form of a declaration of cessation of the wrongful act and declaration of obligation)—Reparation in the form of an indemnity for non-material damages.

Eduardo Jiménez de Aréchaga, Chairman
Sir Kenneth Keith,
Prof. Jean-Denis Bredin, Members
Registrar: Michael F. Hoellering
Assistant Registrar: Philippe P. Chalandon

* The Award was rendered in English and French.

I. AGREEMENT TO ARBITRATE

1. On 9 July 1986 the Governments of France and of New Zealand concluded in Paris by an Exchange of Letters* an Agreement submitting to arbitration any dispute concerning the interpretation or application of two other Agreements concluded on the same date, which related to the problems arising from the *Rainbow Warrior* affair.

The text of the letter sent by the Prime Minister of France and accepted by the New Zealand Government runs as follows:

> I have the honour to refer to the two Agreements concluded today in the light of the ruling of the Secretary-General of the United Nations.
>
> On the basis of that ruling, I have the honour further to propose that any dispute concerning the interpretation or application of either of these two Agreements which it has not been possible to resolve through the diplomatic channel shall, at the request of either of our two Governments, be submitted to an Arbitral Tribunal under the following conditions:
>
> (*a*) each Government shall designate a member of the Tribunal within 30 days of the date of the delivery by either Government to the other of a written request for arbitration of the dispute, and the two Governments shall, within 60 days of that date, appoint a third member of the Tribunal who shall be its Chairman;
>
> (*b*) if, within the times prescribed, either Government fails to designate a member of the Tribunal or the third member is not agreed the Secretary-General of the United Nations shall be requested to make the necessary appointment after consultations with the two Governments by choosing the member or members of the Tribunal;
>
> (*c*) a majority of the members of the Tribunal shall constitute a quorum and all decisions shall be made by a majority vote;
>
> (*d*) the decisions of the Tribunal, including all rulings concerning its constitution, procedure and jurisdiction, shall be binding on the two Governments.
>
> If the foregoing is acceptable to the Government of New Zealand, I would propose that the present letter and your response to it to that effect should constitute an agreement between our two Governments with effect from today's date.

2. On 14 February 1989 the Parties concluded in New York the following Supplementary Agreement relating to the present Arbitral Tribunal:

> The Government of New Zealand and the Government of the French Republic
>
> RECALLING the three Agreements concluded by Exchanges of Letters of 9 July 1986 following the ruling of the Secretary-General of the United Nations relating to the Rainbow Warrior affair;
>
> RECALLING FURTHER that the third Agreement establishes an arbitral procedure for the settlement of any dispute concerning the interpretation or application of either of the first two Agreements which it has not been possible to settle through the diplomatic channel;
>
> NOTING that the Government of New Zealand by diplomatic Note of 22 September 1988 requested that this procedure be used to settle such a dispute;
>
> NOTING ALSO that in accordance with the third Agreement an Arbitral Tribunal has been constituted comprising:
>
> Dr. Eduardo Jiménez de Aréchaga, Chairman of the Tribunal, appointed by the two Governments;

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* For the exchange of letters see United Nations, *Reports of International Arbitral Awards*, vol. XIX, pp. 216-221.

Sir Kenneth Keith, designated by the Government of New Zealand,

Mr. Jean-Denis Bredin, designated by the Government of the French Republic;

BEARING IN MIND the provisions of the third Agreement;

BELIEVING it desirable to supplement those provisions of the third Agreement relating to the functioning and procedures of the Tribunal;

HAVE AGREED AS FOLLOWS:

Article 1

1. Subject to paragraphs 2, 3, and 4 of this Article, the composition of the Tribunal shall remain unchanged throughout the period in which it is exercising its functions.

2. In the event that either the arbitrator designated by the Government of New Zealand or the arbitrator designated by the Government of the French Republic is, for any reason, unable or unwilling to act as such, the vacancy may be filled by the Government which designated that arbitrator.

3. The proceedings of the Tribunal shall be suspended during a period of twenty days from the date on which the Tribunal has acknowledged such a vacancy. If at the end of that period the arbitrator has not been replaced by the Government which designated him the proceedings of the Tribunal shall nonetheless resume.

4. In the event that the Chairman of the Tribunal is, for any reason, unable or unwilling to act as such, he shall be replaced by agreement between the two Governments. If the two Governments are unable to agree within a period of forty days from the date on which the Tribunal has acknowledged such a vacancy, the Secretary-General of the United Nations shall be requested to make the necessary appointment after consultation with the two Governments. The proceedings of the Tribunal shall be suspended until such time as the vacancy has been filled.

Article 2

The decisions of the Tribunal shall be made on the basis of the Agreements concluded between the Government of New Zealand and the Government of the French Republic by Exchanges of Letters on 9 July 1986, this Agreement and the applicable rules and principles of international law.

Article 3

1. Each Government shall, within fourteen days of the entry into force of this Agreement, appoint an Agent for the purposes of the arbitration and shall communicate the name and address of its Agent to the other Government and to the Chairman of the Tribunal.

2. Each Agent may appoint a deputy or deputies. The names and addresses of such deputies shall also be communicated to the other Government and to the Chairman of the Tribunal.

Article 4

1. The Tribunal shall meet at New York at such days and times as it may determine after consultation with the Agents.

2. The Tribunal after consultation with the Agents shall designate a Registrar and may engage such staff and secure such services and equipment as it deems necessary.

Article 5

1. The procedure shall consist of two parts: written and oral.

2. The written pleadings shall consist of:

(*a*) A Memorial, which shall be submitted by the Government of New Zealand to the Registrar of the Tribunal and to the French Agent within eight weeks after entry into force of this Agreement;

(*b*) A Counter-Memorial, which shall be submitted by the Government of the French Republic to the Registrar of the Tribunal and the New Zealand Agent within eight weeks after the date of receipt by the French Agent of the New Zealand Memorial;

(*c*) A Reply, which shall be submitted by the Government of New Zealand to the Registrar of the Tribunal and the French Agent within four weeks after the date of receipt by the New Zealand Agent of the French Counter-Memorial;

(*d*) A Rejoinder, which shall be submitted by the Government of the French Republic to the Registrar of the Tribunal and the New Zealand Agent within four weeks after the date of receipt by the French Agent of the New Zealand Reply;

(*e*) Such other written material as the Tribunal may determine to be necessary.

3. The Registrar shall notify the two Agents of the address for deposit of written pleadings and other written material.

4. Each document shall be communicated in six copies.

5. The Tribunal may extend the above time limits at the request of either Government.

6. The oral hearings shall follow the written proceedings after an interval of not less than two weeks.

7. Each Government shall be represented at the oral hearings by its Agent or deputy Agent and such counsel and experts as it deems necessary for this purpose.

Article 6

Each Government shall present its written pleadings and oral submissions to the Tribunal in English or in French. All decisions of the Tribunal shall be delivered in both languages. Verbatim records of the oral proceedings shall be produced each day in the language in which each statement was delivered. The Tribunal shall arrange for such translation and interpretation services as may be necessary and shall keep a verbatim record of all oral proceedings in English and French.

Article 7

1. On completion of the proceedings, the Tribunal shall render its Award as soon as possible and shall forward a copy of the Award, signed by the Chairman and the Registrar of the Tribunal, to the two Agents.

2. The Award shall state in full the reasons for the conclusions reached.

Article 8

The identity of the Agents and counsel of the two Governments, as well as the whole of the Tribunal's Award, may be made public. The Tribunal may also decide, after consultation with the two Agents and giving full weight to the views of each, to make public the written pleadings and the records of the oral hearings.

Article 9

Any dispute between the two Governments as to the interpretation of the Award may, at the request of either Government, be referred to the Tribunal for clarification within three months after the date of receipt of the Award by its Agent.

Article 10

The present Agreement shall enter into force on the date of signature.

II. SUMMARY OF THE PROCEEDINGS

3. In accordance with Article 3 of the Supplementary Agreement, each Government communicated to the Chairman of the Tribunal the name and address of its Agent.

The Agent appointed by New Zealand is Mr. Christopher David Beeby, Deputy Secretary, Ministry of External Relations and Trade, New Zealand.

The Agent appointed by France is Mr. Jean-Pierre Puissochet, Counselor of State, Director of Legal Affairs, Ministry of Foreign Affairs, France.

4. On 8 May 1989, the Tribunal met in New York and appointed Michael F. Hoellering as Registrar, and Philippe P. Chalandon as Assistant Registrar.

5. The two Governments filed their written pleadings within the agreed time limits.

On 5 April 1989 the Government of New Zealand submitted a Memorial with Annexes.

On 1 June 1989 the Government of France submitted a Counter-Memorial with Annexes.

On 30 June 1989 and on 27 July 1989 respectively, the parties submitted their Reply with further Annexes and a Rejoinder.

6. With the written stage of the proceedings concluded the Tribunal, following consultations with the Agents of both Parties, fixed the date of the opening of oral proceedings for 31 October 1989. Oral proceedings were held in New York from 31 October to 3 November 1989. The following persons attended:

For New Zealand:

Rt. Hon. D. R. Lange, Attorney General, as Leader of the Delegation,

Mr. C. D. Beeby, Deputy Secretary, Ministry of External Relations and Trade, as Agent and Counsel,

Professor D. W. Bowett, Q.C., Whewell Professor of International Law, University of Cambridge, as Counsel,

Mr. C. R. Keating, Assistant Secretary, Ministry of External Relations and Trade, as Counsel,

Mr. D. J. McKay, Counsellor, Ministry of External Relations and Trade, as Counsel,

Ms. J. A. Lake, Legal Consultant, Ministry of External Relations and Trade, as Counsel;

For France:

Mr. Jean-Pierre Puissochet, Counselor of State, Director of Legal Affairs, Ministry of Foreign Affairs, as Agent and Counsel,

Mr. Prosper Weil, Professor of the Paris University of Law, Economics and Social Sciences, as Counsel,

Mrs. Brigitte Stern, Professor of the University of Paris X at Nanterre, as Counsel,

Mr. Vincent Coussirat-Coustère, Professor of the University of Lille II, as Counsel,

Mrs. Marie-Reine d'Haussy, Assistant Director, Legal Department, Ministry of Foreign Affairs, as Counsel,

Mr. François Alabrune, Secretary, Legal Department, Ministry of Foreign Affairs, as Counsel,

Mr. Jean-Paul Esquirol, Controller-General of the Army, as Expert,

Mr. Jean-Paul Algret, Lieutenant Colonel, as Expert,

Professor Charles Laverdant, Member of the Academy of Medicine, as Expert.

The oral proceedings were recorded in conformity with Article 6 of the Supplementary Agreement.

III. Final submissions of the parties

7. The final submissions of the parties are as follows:

For New Zealand, in the Memorial:

144. In conclusion, New Zealand respectfully requests the Tribunal to grant the following relief:

(*a*) A declaration that the French Republic:

(i) breached its obligations to New Zealand by failing to seek in good faith the consent of New Zealand to the removal of Major Mafart and Captain Prieur from the island of Hao;

(ii) breached its obligations to New Zealand by the removal of Major Mafart and Captain Prieur from the island of Hao;

(iii) is in breach of its obligations to New Zealand by the continuous absence of Major Mafart and Captain Prieur from the island of Hao;

(iv) is under an obligation to return Major Mafart and Captain Prieur promptly to the island of Hao for the balance of their three year periods in accordance with the conditions of the First Agreement;

(*b*) An order that the French Republic shall promptly return Major Mafart and Captain Prieur to the island of Hao for the balance of their three year periods in accordance with the conditions of the First Agreement.

For France, in the Counter-Memorial:

Conclusion

For all the reasons set out in the foregoing chapters, the Government of the French Republic respectfully requests that the Arbitral Tribunal reject the requests of New Zealand.

For New Zealand, in the Reply:

Conclusion

In its Counter-Memorial France has failed to establish any reason, whether by reference to law or fact, why New Zealand should not be granted the relief it seeks.

Accordingly, New Zealand respectfully maintains its request for a declaration and an order for specific performance, as set out in paragraph 144 of its Memorial.

For France, in the Rejoinder:

Conclusion

For all the reasons set out in the foregoing chapters, the Government of the French Republic once again respectfully requests that the Arbitral Tribunal reject the requests of New Zealand.

Oral conclusions:

For New Zealand:

Mr. President, I have made it clear that New Zealand sees no reason to make any modification of its request to this Tribunal for a declaration and order as set out in paragraph 144 of the New Zealand Memorial.

For France:

Its Agent reaffirmed its earlier ". . . conclusions whose main thrust is to encourage you to reject the entire New Zealand request".

IV. THE FACTS

The 1986 Ruling and Agreements

8. On 10 July 1985, a civilian vessel, the *Rainbow Warrior*, not flying the New Zealand flag, was sunk at its moorings in Auckland Harbour, New Zealand, as a result of extensive damage caused by two high-explosive devices. One person, a Netherlands citizen, Mr. Fernando Pereira, was killed as a result of this action: he drowned when the ship sank.

9. On 12 July 1985, two agents of the French Directorate General of External Security (D.G.S.E.) were interviewed by the New Zealand Police and subsequently arrested and prosecuted. On 4 November 1985, they pleaded guilty in the District Court in Auckland, New Zealand, to charges of manslaughter and wilful damage to a ship by means of an explosive. On 22 November 1985, the two agents, Alain Mafart and Dominique Prieur, were sentenced by the Chief Justice of New Zealand to a term of 10 years imprisonment.

10. On 22 September 1985, the Prime Minister of France issued a communiqué confirming that the *Rainbow Warrior* had been sunk by agents of the D.G.S.E. under orders. On the same day, the French Minister for External Affairs indicated to the Prime Minister of New Zealand that France was ready to undertake reparations for the consequences of that action.

11. Bilateral efforts to resolve the differences that had arisen subsequently between New Zealand and France were undertaken over a period of several months. In June 1986, following an appeal by Prime Minister Lubbers of the Netherlands, the two Governments formally approached the Secretary-General of the United Nations and referred to him all the problems between them arising from the *Rainbow Warrior* affair for a binding Ruling.

12. On 6 July 1986, the Secretary-General of the United Nations issued the following:

Ruling

The issues that I need to consider are limited in number. I set out below my ruling on them, which takes account of all the information available to me. My ruling is as follows:

1. *Apology*

New Zealand seeks an apology. France is prepared to give one. My ruling is that the Prime Minister of France should convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to international law, on the "Rainbow Warrior" by French service agents which took place on 10 July 1985.

2. *Compensation*

New Zealand seeks compensation for the wrong done to it, and France is ready to pay some compensation. The two sides, however, are some distance apart on quantum. New Zealand has said that the figure should not be less than US Dollars 9 million, France that it should not be more than US Dollars 4 million. My ruling is that the French Government should pay the sum of US Dollars 7 million to the Government of New Zealand as compensation for all the damage it has suffered.

3. *The two French service agents*

It is on this issue that the two Governments plainly had the greatest difficulty in their attempts to negotiate a solution to the whole issue on a bilateral basis before they took the decision to refer the matter to me.

The French Government seeks the immediate return of the two officers. It underlines that their imprisonment in New Zealand is not justified, taking into account in particular the fact that they acted under military orders and that France is ready to give an apology and to pay compensation to New Zealand for the damage suffered.

The New Zealand position is that the sinking of the "Rainbow Warrior" involved not only a breach of international law, but also the commission of a serious crime in New Zealand for which the two officers received a lengthy sentence from a New Zealand court. The New Zealand side states that their release to freedom would undermine the integrity of the New Zealand judicial system. In the course of bilateral negotiations with France, New Zealand was ready to explore possibilities for the prisoners serving their sentences outside New Zealand.

But it has been, and remains, essential to the New Zealand position that there should be no release to freedom, that any transfer should be to custody, and that there should be a means of verifying that.

The French response to that is that there is no basis either in international law or in French law on which the two could serve out any portion of their New Zealand sentence in France, and that they could not be subjected to new criminal proceedings after a transfer into French hands.

On this point, if I am to fulfil my mandate adequately, I must find a solution in respect of the two officers which both respects and reconciles these conflicting positions.

My ruling is as follows:

(*a*) The Government of New Zealand should transfer Major Alain Mafart and Captain Dominique Prieur to the French military authorities. Immediately thereafter, Major Mafart and Captain Prieur should be transferred to a French military facility on an isolated island outside of Europe for a period of three years.

(*b*) They should be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They should be isolated during

their assignment on the island from persons other than military or associated personnel and immediate family and friends. They should be prohibited from any contact with the press or other media whether in person or in writing or in any other manner. These conditions should be strictly complied with and appropriate action should be taken under the rules governing military discipline to enforce them.

(*c*) The French Government should every three months convey to the New Zealand Government and to the Secretary-General of the United Nations, through diplomatic channels, full reports on the situation of Major Mafart and Captain Prieur in terms of the two preceding paragraphs in order to allow the New Zealand Government to be sure that they are being implemented.

(*d*) If the New Zealand Government so requests, a visit to the French military facility in question may be made, by mutual agreement between the two Governments, by an agreed third party.

(*e*) I have sought information on French military facilities outside Europe. On the basis of that information, I believe that the transfer of Major Mafart and Captain Prieur to the French military facility on the isolated island of Hao in French Polynesia would best facilitate the enforcement of the conditions which I have laid down in paragraphs (*a*) to (*d*) above. My ruling is that this should be their destination immediately after their transfer.

4. *Trade issues*

The New Zealand Government has taken the position that trade issues have been imported into the affair as a result of French action, either taken or in prospect. The French Government denies that, but it has indicated that it is willing to give some undertakings relating to trade, as sought by the New Zealand Government. I therefore rule that France should:

(*a*) Not oppose continuing imports of New Zealand butter into the United Kingdom in 1987 and 1988 at levels proposed by the Commission of the European Communities insofar as these do not exceed those mentioned in document COM (83) 574 of 6 October 1983, that is to say, 77.000 tonnes in 1987 and 75.000 tonnes in 1988; and

(*b*) Not take measures that might impair the implementation of the Agreement between New Zealand and the European Economic Community on Trade in Mutton, Lamb and Goatmeat which entered into force on 20 October 1980 (as complemented by the Exchange of Letters of 12 July 1984).

5. *Arbitration*

The New Zealand Government has argued that a mechanism should exist to ensure that any differences that may arise about the implementation of the agreements concluded as a result of my ruling can be referred for binding decision to an arbitral tribunal. The Government of France is not averse to that. My ruling is that an agreement to that effect should be concluded and provide that any dispute concerning the interpretation or application of the other agreements, which it has not been possible to resolve through the diplomatic channel, shall, at the request of either of the two Governments, be submitted to an arbitral tribunal. (The ruling then made the specific proposals for arbitration which were later incorporated in the Agreement set out in para. 1 of this Award.)

6. The two Governments should conclude and bring into force as soon as possible binding agreements incorporating all of the above rulings. These agreements should provide that the undertaking relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur should be implemented at the latest on 25 July 1986.

7. On one matter I find no need to make a ruling. New Zealand, in its written statement of position, has expressed concern regarding compensation for the family of the individual whose life was lost in the incident and for Greenpeace. The French statement of position contains an account of the compensation arrangements that

have been made; I understand that those assurances constitute the response that New Zealand was seeking".

*
* *

13. In accordance with paragraph 6 of the Ruling, the French and New Zealand Governments concluded in Paris, on 9 July 1986, by Exchanges of Letters, three Agreements which incorporated the provisions of the Ruling. The first of these Agreements, which relates to the situation of the two French officers, runs as follows:

On 19 June 1986, wishing to maintain the close and friendly relations which have traditionally existed between New Zealand and France, our two Governments agreed to refer all of the problems between them arising from the Rainbow Warrior affair to the Secretary-General of the United Nations for a binding Ruling. In the light of that Ruling, made available on 7 July 1986, I have the honour to propose the following:

The Prime Minister of France will convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to international law, on the Rainbow Warrior by French service agents which took place in Auckland on 10 July 1985. Furthermore, the French Government will pay the sum of US$ 7 million to the Government of New Zealand as compensation for all the damage which it has suffered.

The Government of New Zealand will transfer Major Alain Mafart and Captain Dominique Prieur to the French military authorities. Immediately thereafter, Major Mafart and Captain Prieur will be transferred to a French military facility on the island of Hao for a period of not less than three years.

They will be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They will be isolated, during their assignment in Hao, from persons other than military or associated personnel and immediate family and friends. They will be prohibited from any contact with the press or other media, whether in person, in writing or in any other manner. These conditions will be strictly complied with and appropriate action will be taken under the rules governing military discipline to enforce them.

The French Government will every three months convey to the New Zealand Government and to the Secretary-General of the United Nations, through diplomatic channels, full reports on the situation of Major Mafart and Captain Prieur in terms of the two preceding paragraphs in order to allow the New Zealand Government to be sure that these paragraphs are being implemented as agreed.

If the New Zealand Government so requests, a visit to the facility on Hao may be made, by mutual agreement between the two Governments, by an agreed third party.

The undertakings relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur will be implemented not later than 25 July 1986.

14. In accordance with the Ruling and the First Agreement, officers Mafart and Prieur were transferred from New Zealand to a French military facility on the island of Hao on 23 July 1986, and the other obligations undertaken in para. 2 of the Agreement were implemented.

The Case of Major Mafart

15. On 7 December 1987 the French Ministry of Defence was advised by the commander of the Hao military base that the condition

of Major Mafart's health required examinations and immediate care, which could not be carried out locally. The Minister of Defence then decided to send a medical team to the site. This team was led by a principal Army doctor, Dr. Maurel, from the Val-de-Grace Hospital in Paris.

16. On 10 December 1987 (Hao date), Dr. Maurel sent the Ministry of Defence a message, received in Paris on Friday 11 December, stating that Major Mafart "poses the etiological and therapeutic problem of stabbing abdominal pains in a patient with a history of similar, and still unlabeled, problems. The results of today's examination indicate the need for explorations in a highly specialized environment. His condition justifies an emergency return to a hospital in mainland France. Absent any formal notice from you to the contrary, I propose that this evacuation take place by the Sunday 13 December 1987 aircraft".

17. On 11 December 1987, a Friday, the Minister of Defence conveyed Dr. Maurel's message to the Minister of Foreign Affairs, adding that he planned to proceed with officer Mafart's health-related repatriation. He also asked the Minister of Foreign Affairs to "contact the New Zealand Government through the procedures stipulated in the agreement signed with that Government".

18. On 11 December 1987, at 6.59 p.m. (Paris time; it was 6.59 a.m. on Saturday 12 December in Wellington) the Minister of Foreign Affairs sent the French Ambassador in Wellington a telegram asking him to immediately give the New Zealand authorities a verbal note containing all the information that the French Government had just received (Dr. Maurel's medical opinion was attached to this note). The French Government, referring to the 1986 Agreement, asked "the New Zealand Government to consent to Major Mafart's urgent health-related transfer to a hospital in mainland France".

The French Ambassador was instructed to stress the fact that the only means of transport immediately available between Hao and Paris was the military aircraft leaving Hao Sunday morning. The Ambassador was asked to add that "the state of Major Mafart's health absolutely required that he be examined without delay in a highly specialized medical facility which exists neither in Hao nor in Papeete".

19. On 12 December 1987, between 10 a.m. and 11 a.m. (Wellington time) the French Ambassador contacted a senior official of the New Zealand Ministry of Foreign Affairs, communicating the above message.

20. About 4 hours later, between 2.00 and 3.00 on the afternoon of Saturday, 12 December 1987, the New Zealand Government answered the preceding communication by note verbale which stated that "in order to enable the request to be examined with the care it deserves, the New Zealand Government will require a New Zealand assessment to be made of Major Mafart's medical condition. Accordingly, urgent arrangements are now being made for a suitably qualified New Zealand military doctor to fly on a New Zealand military aircraft to Hao for this purpose". The note added that "the Ministry seeks urgent confirmation that the French authorities will give the necessary clearance for a

military flight to Hao for this purpose. Details of the proposed flight will be given to the Embassy as soon as possible".

In transmitting the preceding note verbale to his Government the French Ambassador added that the New Zealand Senior official who handed him the note inquired whether the departure date scheduled for Major Mafart's evacuation, that is, 13 December at 4.00 a.m., was in fact the Hao date. If so, this would correspond to the New Zealand date of Monday 14 December.

21. On 12 December 1987 the French Ambassador in Wellington advised the French Ministry of Foreign Affairs that he was given the following information relating to the projected visit to Hao of a New Zealand military doctor arriving by Air Force plane:

Type of aircraft	P3 ORION
Registration	New Zealand 6204
Flight number	N.P. 0999
Pilot	Lieutenant B. R. Clark
Crew	12 members
Passengers	1 doctor and 1 interpreter
Depart Auckland	Sunday 13 December 7.00 a.m. (New Zealand date and time)
Arrive Hao	Saturday 12 December 4.00 p.m. (French Polynesia date and time)
Call sign	Kiwi 999
Facilities requested	Fuel 35,000 pounds Avtur.

22. On 12 December 1987 at 5.11 p.m. (Paris time), equivalent to 5.11 a.m. on 13 December 1987 (Wellington time), the Ministry of Foreign Affairs sent by telegram to the French Ambassador in Wellington the response to be delivered to the New Zealand authorities. Due to the time shift, this response was received in Wellington early on Sunday morning 13 December 1987, some sixteen hours after the New Zealand proposal in para. 20 above.

The French authorities indicated that, to their great regret, they were unable to

> authorize a New Zealand aircraft to make a stop on the Hao military base. Indeed, for imperative reasons of national security, access to this base is strictly regulated and is prohibited to foreign aircraft. This is the reason why Major Mafart and Major Prieur were transported to the Hao base in July 1986 by a French military aircraft, which had come to pick them up at the Wallis airport, to which they had been transported from New Zealand by a New Zealand military plane.

The French authorities added that "the French Government agrees to allow Major Mafart to be examined, as soon he arrives in mainland France, by a physician designated by New Zealand. If applicable, it would be willing to consider covering the cost of sending a New Zealand physician to France, if this solution was preferred by the New Zealand Government".

23. On 13 December, the French Ambassador advised that the New Zealand Prime Minister could not accept the French proposal

but advanced new proposals, taking into account the impossibility of landing at Hao. According to the New Zealand Memorial, the New Zealand Government put forward two alternatives: that a New Zealand medical doctor be flown to Papeete, Tahiti, by a New Zealand military aircraft, and then onward to Hao by French military aircraft; or, if France preferred, that the New Zealand medical doctor be flown to Papeete by a commercial flight and then onward to Hao by French military aircraft.

The French Ambassador in Wellington advised his Government somewhat differently: "Mr. Lange proposes the following: New Zealand dispatches a military doctor to Papeete as soon as possible by commercial airline. The French party undertakes to transport him to Hao so that he can perform his medical assignment there. After being brought back to Papeete, he returns to New Zealand to submit his conclusions to the New Zealand authorities".

24. On 14 December (Wellington time), the French Ambassador sent the following note to the New Zealand Ministry of Foreign Affairs:

> A—The New Zealand request to have Major Mafart examined by a New Zealand physician who would go to Hao, via Papeete, then return to Auckland to report to his Government, who would then make their decision known, would delay the French officer's health-related transfer to mainland France by an excessive period of time that could be as long as several days, given the available transport opportunities. The French authorities feel that this additional delay is absolutely incompatible with the urgency, stressed by the doctor who examined Major Mafart, of transporting the Major to a highly specialized medical facility in mainland France.
>
> B—In carrying out their duty to protect the health of their agents, the French authorities, in this case of *force majeure*, are forced to proceed, without any further delay, with the French officer's health-related repatriation. Major Mafart will leave Hao on Sunday 13 December at 2.00 (local time) on board a military plane that will arrive in Paris on Monday 14 December at about 10.00 (local time) after a technical stop in Pointe-à-Pitre.
>
> C—The French authorities reiterate that they are willing to allow Major Mafart to be examined by a physician chosen by New Zealand, as soon as he arrives in Paris, and that they are even willing to cover the cost of sending a physician from New Zealand for this purpose, if this solution is preferred by the New Zealand Government.
>
> D—All measures have been taken to insure the confidentiality of the entire operation and to see to it that it remains secret, in any event until Major Mafart can be examined in mainland France by the physician designated by the New Zealand authorities".

25. On 14 December 1987 at 9.30 (Paris time), Officer Mafart arrived in Paris. He was taken to the Val-de-Grace Hospital where he was examined and treated by Professor Daly, head of the Val-de-Grace medical clinic, a professor of medicine and a specialist in gastroenterology.

26. A note delivered on 14 December 1987 from the New Zealand Embassy to the French Ministry of Foreign Affairs stated:

> New Zealand views with considerable concern, and wishes to record its serious objection to the unilateral action taken, in the absence of New Zealand consent, to transfer Major Alain Mafart to France on Sunday 13 December 1987.

New Zealand regards this action as a serious breach of both the letter and the spirit of the obligations undertaken pursuant to the Ruling of 6 July 1986 by the Secretary-General of the United Nations.

The first approach to the New Zealand Government about a possible medical evacuation of Mafart was made by the Ambassador of France in New Zealand at approximately 10.00 a.m. New Zealand time on Saturday 12 December. From that moment the New Zealand side has acted with great sensitivity to the humanitarian considerations involved and has worked hard, in a sympathetic and pragmatic way, to ensure that both medical requirements and requirements of principle were left in balance.

Within four hours of the receipt of the French request a proposal had been approved by the New Zealand Prime Minister and conveyed to the Ambassador of France which would have enabled examination in Hao of Mafart by a New Zealand doctor the following afternoon.

That proposal was rejected by the French side after 16 hours delay on the basis that it was undesirable that a New Zealand aircraft should land at Hao. New Zealand then immediately offered to transport its doctor to Tahiti, with France providing onward transportation to Hao. That proposal could also have been accomplished in a similar time frame had it not been for the delay on the part of the French authorities.

New Zealand reserves its right to submit the question of Mafart's transfer from Hao to arbitration in accordance with the agreed procedures set out in the Exchange of Letters of 9 July 1986. Nevertheless the New Zealand Government is willing to work constructively with the French Government to reach a resolution of the matter and, to this end, New Zealand awaits the French response to the proposals made today in a separate communication to the Prime Minister of France from the Prime Minister of New Zealand.

27. The letter from the Prime Minister of New Zealand to the Prime Minister of France, dated 14 December 1987, read as follows:

I have been advised that, without the consent of the New Zealand Government, Major Mafart was taken some hours ago by French military aircraft from Hao for medical examination in metropolitan France.

My purpose in writing to you is not to deal with the legality of the action which has been taken—that is clear and will be the subject of a note from the New Zealand Embassy to the Quai d'Orsay—but to explore with you the best means of dealing with the situation which this unilateral action has created.

Your authorities have advised us that a New Zealand doctor may examine Mafart on his arrival in Paris; and arrangements are now being made to enable this to be done. I would of course expect that our doctor's examination of Major Mafart will confirm a medical condition requiring urgent specialist examination. Should our doctor's examination of Major Mafart confirm the need for urgent specialist attention then I suggest that we might proceed on the basis of an agreement as follows:

(*a*) compliance with the Exchange of Letters of 9 July 1986, by the return of Major Mafart to Hao, will be restored as soon as his medical condition permits and he will be so returned even if further maintenance treatment is required which could be continued on Hao;

(*b*) the conditions contained in the Exchange of Letters of July 1986 relating to Major Mafart's isolation, including the prohibition of any contact with the press or other media whether in person, in writing or in any other manner will continue to apply during such time as Major Mafart is in metropolitan France;

(*c*) the French authorities will transmit regularly to the New Zealand Government medical reports on Major Mafart's condition and, if requested, will undertake consultations with a designated New Zealand doctor and permit subsequent examinations;

(*d*) in the event of disagreement between our two Governments that Major Mafart's medical condition is such as to permit his return to Hao, the issue will be referred to the Secretary-General of the United Nations for his decision;

In the event that our doctor's examination does not confirm a medical condition requiring urgent specialist attention then he shall be returned forthwith to Hao and in the event that there is disagreement as to that then the provisions of (*d*) shall apply.

I should be grateful for your urgent confirmation that this proposal is acceptable to you.

I think I should add that when Major Mafart is returned to Hao I intend, pursuant to the Exchange of Letters of 9 July 1986, to request the agreement of your Government to a visit to Hao by a representative of the Secretary-General of the United Nations. I should also note, in this regard, that in view of the essential role played by the Secretary-General in this matter, I have thought it proper to advise him of these developments.

I hope that Major Mafart's health will improve.

28. On 14 December 1987 New Zealand sent a doctor to examine Alain Mafart. At 4.00 p.m. (Paris time) officer Mafart was examined by Dr. R. S. Croxson, a national of New Zealand, residing in London. Dr. Croxson, with the cooperation of French authorities and medical doctors, was able to conduct a substantial physical examination of officer Mafart, becoming acquainted with all his health records, in consultation with the French doctors.

Dr. Croxson's report to the New Zealand authorities of 14 December 1987 concerning his examination of Major Mafart read as follows:

Questions Dr. Croxson was asked to address:

(*a*) whether Mafart has a condition which, in your opinion, required specialist investigation not likely to be available in the presumably limited military facilities on Hao;

(*b*) whether in your opinion the symptoms and conditions were such as to justify an emergency evacuation;

(*c*) an account of the nature of the specialist investigations to be undertaken, including the likely length of time for the investigation;

(*d*) your opinion, if any, on whether or when he would be fit to be returned to Hao;

(*e*) whether in your opinion the patient may be simply a malingerer.

Conclusions from Dr. Croxson's report on Major Mafart, 14 December 1987:

(*a*) I believe Mafart needed detailed investigations which were not available on Hao;

(*b*) Although Dr. Maurel appeared impressed by the severity of his pain and symptoms, when I asked if he thought Mafart might need an emergency operation he hesitated and I had the feeling he did not really feel at this stage that immediate surgery was going to be required but was more impressed by the recurring nature of the symptoms. I think it is therefore highly arguable whether an emergency evacuation as opposed to a planned urgent evacuation was necessary;

(*c*) 2-3 weeks;

(*d*) when investigations and observations are completed (possibly 3-4 weeks), as the doctors may wish to keep him under observation to witness a further attack should their investigations not disclose any other significant abnormalities;

(*e*) all the medical facts are very consistent and I do not think he is a malingerer.

29. On 18 December 1987 Dr. Croxson submitted a second report, which read as follows:

Opinion

The further sequencing and investigations would sound appropriate for somebody with such a longstanding story of recurrent abdominal pain and distension from probable adhesions. The investigations would normally take a further one to two weeks. I do not think that they are being excessively slow on their investigations, but are pursuing them in a fairly logical manner. Perhaps the investigations could be compressed over five or six days rather than the planned two weeks, although I did not take this point up with Professor Daly. Professor Daly offered to discuss by telephone with me the further results on Monday 4 January at the same time.

I did not tape record my conversation with Professor Daly, and I think I was a little limited in not having French interpretation. Nonetheless the results of the investigations and the planned sequencing really do sound quite appropriate. Given the long history, I suspect most clinicians would like to witness an episode of severe pain and abdominal distension. I did not raise the question again of exploratory surgery, nor did Professor Daly indicate to me that there was any question of this at the present time.

Professor Daly indicated that he had read my full medical report and agreed that it was a totally accurate picture of his (Professor Daly's) medical facts as outlined to me. We did not discuss the acute management of Mafart as it appeared to Dr. Maurel when he arrived at Hao on 10 December.

30. On 19 December 1987 the Ministry of Foreign Affairs of the French Republic addressed a formal note to the New Zealand Embassy, answering the 14 December formal note in the following terms:

The French Government thinks that Major MAFART's transfer to Paris on December 13 to undergo emergency medical examinations and the care necessitated by his condition cannot be analyzed as a failure to meet the obligations under the agreement resulting from the Exchanges of Letters on 9 July 1986 between France and New Zealand, following the intervention of the Secretary-General of the United Nations.

On 11 December, when it appeared imperative to have Major MAFART undergo medical examinations as soon as possible in a highly specialized environment, the New Zealand Ministry of Foreign Affairs was contacted in order to secure the New Zealand authorities' consent to the French officer's transfer to Paris by military flight departing Hao on 14 December. The New Zealand authorities then made their consent contingent upon a doctor's examination of Major MAFART on Hao and, for this purpose, proposed that the required physician be transported to the French military base by a New Zealand military plane. But, as the New Zealand authorities were moreover aware, given the nature of the Hao base, foreign aircraft were excluded from landing there. In this connection, the French Ministry of Foreign Affairs recalls that, when Major MAFART and Captain PRIEUR were transported from New Zealand to Hao, this impossibility was made known and resulted in their being forced to change planes at the Wallis airport.

The solution of having a New Zealand physician come to the Papeete airport and be transferred from that city to Hao by a French plane was also examined. But it was immediately ascertained that, given the technical possibilities and the fact that the doctor would have to return via the same arrangements, so that he could report to his Government, the result of this procedure would have been that no decision could be made for several days.

Under these conditions, the only solution, in the spirit of the Agreement of 9 July 1986 and of the conversations that led up to it, was to evacuate Major MAFART and permit the physician designated by New Zealand to ascertain his state of health as soon as he arrived in Paris. The French Government is happy to point out, in this

regard, that the New Zealand authorities accepted this solution and dispatched Dr. CROXSON to Paris for this purpose.

It noted with satisfaction the very positive appraisal that the New Zealand Government gave of the frankness, candor and full cooperation that Dr. CROXSON enjoyed while carrying out his assignment.

It observes that the conclusions of the report written by this doctor, which were conveyed to it on 16 December by the New Zealand Embassy in Paris, concur with those of the French physicians and show that there were perfect grounds for the decision to transport Major MAFART to a highly specialized facility existing only in mainland France.

The French Government shares the desire expressed by the New Zealand Government, in its note, to participate constructively in the examination of this matter, about which the Prime Minister will send a message to the Prime Minister of New Zealand under separate cover.

31. On 23 December 1987 the Prime Minister of France addressed the following letter to the Prime Minister of New Zealand:

The emergency conditions under which Major MAFART had to be returned to France to undergo medical examinations, which you asked about in your letter of 14 December, must, as you yourself indicate, be examined between us in order to analyze the main elements of the situation.

It is certainly not necessary to recall the details of the circumstances of this transfer, which, I am sure, you are perfectly familiar with. It was following the dispatch of a French military doctor, alerted by the Ministry of Defence, that the necessity became apparent on 11 December of having Major MAFART examined as soon as possible in a highly specialized environment, which could not be found on French territory except in Paris. Through our Ministries of Foreign Affairs, contacts were immediately made for the purpose of obtaining your country's consent, in accordance with the Agreement concluded on 9 July 1986 by the Exchanges of Letters following the intervention of the Secretary-General of the United Nations, which themselves resulted from secret conversations between our two Governments. Your representatives then indicated their desire to be permitted to have Major MAFART examined by a New Zealand physician. However, it was quickly ascertained that this was not possible by direct landing of a New Zealand airplane on the island of Hao, which is a military base closed to foreign aircraft. You will also recall that the transfer of Major MAFART and Captain PRIEUR from New Zealand to Hao had required a change of planes in Wallis, for the same reason.

It also became clear that the solution that your representatives immediately proposed, which consisted of flying a doctor from New Zealand to Papeete, then from Papeete to Hao, by French military plane, and returning this doctor via the same route so that he could report to his Government, would have required a delay of several days, which seemed contrary to the imperative interests of Major MAFART's health.

Under these conditions, the only remaining solution was to defer, until his arrival in Paris, Major MAFART's examination by a doctor of your choosing, which was done. In this regard, I noted the very positive appraisal that you and your staff gave to the quality of the cooperation that Dr. CROXSON enjoyed from the French doctors. The reception given to your compatriot, his access to all the necessary documents, and the in-depth examination of Major MAFART, which he was able to do, showed the spirit of openness that we bring to this matter.

Moreover, as you undoubtedly recall, the eventuality of illness, and, in the case of Captain PRIEUR, of pregnancy, were precisely the conditions that led to the stipulation, in the July 1986 Agreement, of the possibility of leaving the island. This emerges from the secret negotiations of our two Governments, conducted, on respective sides, by Mr. BEEBY and Mr. GUILLAUME, which prepared the way for the intervention of the United Nations Secretary-General, and of which we have kept a very accurate transcript. Dr. CROXSON, at your request, drew up a medical report,

the conclusions of which, not being covered by medical confidentiality, were conveyed to the Ministry of Foreign Affairs by your Embassy in Paris. This report shows that Major MAFART was in need of substantial medical examinations which could not be done in Hao and which were to last several weeks. In response to a question that you asked him, Dr. CROXSON added that Major MAFART was by no means a malingerer and that he was indeed ill.

Thus, all the circumstances of this affair confirm my feeling that we have acted with moderation and discretion and that we should now await the results of the examinations underway in order to be able to appraise the state of Major MAFART's health with better knowledge of the facts.

Such are the indisputable facts, verified by individuals that you designated. You will understand that, under these conditions, I was surprised by the public accusations that you immediately made against this officer and against the French authorities, whereas I had proposed that this operation be kept confidential and that the fact themselves showed the correctness of the decision that I made.

However, I have just learned that you feel, after a new examination of all of the elements of this affair, that there was no longer any point to the intervention of the Secretary-General of the United Nations, to which you alluded to in your letter. This way of seeing things corresponds to the attitude that I personally adopted by refusing to engage in a polemic. Indeed, I am convinced that our two countries today should endeavor to turn the page and resume a constructive relationship, in keeping with the long tradition of friendship between our two nations.

32. On 23 December 1987 the Embassy of New Zealand answered the two communications in paragraphs 30 and 31 above by the following note:

The New Zealand Embassy presents its compliments to the Ministry of Foreign Affairs and has the honour to convey, on instruction, the following response to certain of the assertions contained in the Ministry's Note of 19 December 1987 and the letter to the Prime Minister of New Zealand from the Prime Minister of France delivered in Wellington on 23 December.

New Zealand rejects the view advanced by the French side that the transfer of Major Mafart from Hao was in accordance with the ruling of the United Nations Secretary-General and the Exchanges of Letters of 9 July 1986 between New Zealand and France.

On a point of fact, the sequence of dates set out in the Ministry's Note is inaccurate. New Zealand was advised of Mafart's condition late in the morning of 12 December (New Zealand time). About midnight on 13 December (New Zealand time)—about 39 hours later—advice was given by the French Ambassador in Wellington (and also by the Quai d'Orsay to the New Zealand Embassy) that he had already been removed from Hao.

The request for consent was presented as a humanitarian emergency. New Zealand responded promptly and sympathetically offering to send a New Zealand doctor for an on the spot examination so that, if the medical condition of Mafart justified it, consent could be given within the time frame requested by the French authorities. The quickest option involved a flight direct to Hao. It was a matter for the French authorities to judge whether their position about clearances for foreign aircraft at Hao was of greater importance to them than what was said to be a serious medical emergency. The long delay in responding and the terms of that response called in question the veracity of the so-called emergency.

It is manifestly incorrect to state that the New Zealand side, when confronted with this response from France, suggested an option that would have prevented a decision for several days. The French Ambassador in Wellington was told that the doctor could be transported immediately to Papeete by New Zealand military aircraft (or alternatively, if the French side preferred, civilian aircraft options could be explored) for onward transport to Hao by French military aircraft.

There is no basis in fact for the extraordinary statement that the New Zealand doctor would have had to return to New Zealand to make a report before a decision could be made.

New Zealand formally disputes the suggestion that the decision to evacuate Major Mafart was in accord with the spirit of the Agreement or the Secretary-General's Ruling or any preliminary discussions. It was, on its face, a clear breach of both the letter and the spirit of the Ruling and the Exchanges of Letters—a breach which called in question the credibility of France's commitment to honor undertakings in this matter. There is not and was never at any stage of the discussions between France and New Zealand, an agreement or understanding that New Zealand would automatically agree to a request for medical evacuation. The relevant clause in the Agreement means precisely what it says.

New Zealand also rejects the suggestion that its decision to accept the offer to send a New Zealand doctor to Paris to examine Major Mafart can or could be construed as acceptance by the New Zealand authorities of the evacuation of Mafart without New Zealand consent. That suggestion has no basis in fact and is wholly at variance with the terms of the Embassy's Note 1987/103 of 14 December 1987 which recorded New Zealand's serious objection to the unilateral action taken by France.

New Zealand reiterates that its proposals put forward on 12 and 13 December were made in good faith. New Zealand was not refusing consent but seeking clarification. That could have been accommodated in a number of ways and very quickly. The objective evidence now available confirms that there was in fact no emergency and no justification for the French authorities setting a deadline of the kind that they did. Furthermore, New Zealand could have been advised of the situation considerably earlier. It is also clear beyond any doubt that had there in fact been a genuine emergency, New Zealand's requests for clarification (which were entirely reasonable and appropriate) could have been met within the time frame proposed had France been willing to work positively and constructively to that end. Responsibility for the delay in obtaining New Zealand consent lies at France's door.

33. On the same day, 23 December 1987, the Prime Minister of New Zealand answered the Prime Minister of France in the following terms:

Thank you for your letter which I have received today. I appreciate the sentiments you have expressed about the need to restore and maintain the cordial relations between New Zealand and France. I must say, however, that the fact that you have not in your response addressed the substantive issues that were contained in my letter of 14 December, is a matter of grave concern to me and my Government.

If we are to turn a page as you suggest, then what we need is a satisfactory assurance that as soon as the medical investigations of Major Mafart have been completed and he has undergone any treatment which can only be given in Paris, he will be returned to Hao.

Our medical advice is that these investigations will be completed shortly. I must say to you that, in the absence of a satisfactory response by 30 December to the proposals set out in my earlier letter, we will have no choice but to conclude that France is unwilling to comply with its legal obligations. In that event we will feel compelled to invoke the arbitration provisions of the Secretary-General's Ruling and the Agreement of 9 July 1986.

Let me also say that at no stage have we indicated that there was no role for the United Nations Secretary-General in seeking to resolve this matter. To the contrary, I specifically mentioned this role in my letter and in various public statements. I have discussed the situation with him and we have kept him fully informed and will continue to do so. He has also, as you know, taken various initiatives of his own.

Finally, there are a number of points in your letter (which are also mentioned in recent discussion between our officials) which I do not accept. I have asked the New Zealand Embassy in Paris to convey our views on these matters to the Quai d'Orsay.

I have also asked our Embassy to set in motion a request for a visit to Hao by a third party in accordance with the Ruling and the Agreement of 9 July 1986.

34. On 30 December 1987 the French Ministry of Foreign Affairs sent a note to the New Zealand Embassy answering the New Zealand communications in paras. 32 and 33 above, in the following terms:

The Ministry of Foreign Affairs was surprised by the sharp tone of the referenced documents and therefore feels it is a good idea to respond so as to enable a better understanding of the French Government's point of view.

The Ministry of Foreign Affairs recalls that Major Mafart is currently still undergoing medical examinations, the necessity of which has been acknowledged by both the French doctors and Dr. Croxson. These examinations will not be completed until early January; Dr. Croxson has also indicated that he was on vacation until 4 January. So, today, no one can say what the doctors' conclusions will be.

The Ministry of Foreign Affairs is surprised that, under these conditions of fact, the New Zealand authorities could have doubted the French intentions in connection with respecting the July 1986 Agreement; it goes without saying that Major Mafart will return to Hao when the state of his health permits.

It emphasizes that, on the second and third points brought up in Mr. Lange's letter of 14 December (isolation of Major Mafart, specifically from the press and the media, plus disclosure of medical reports, as well as examinations by a New Zealand doctor), New Zealand has received from the beginning, and will continue to receive, full satisfaction.

A discussion of possible recourse to the Secretary-General of the United Nations in the event of a disagreement between the two Governments over the possibility of returning Major Mafart to Hao, given the state of his health, seems pointless, for the reasons indicated above. However, if the question did arise, the French Government would have the greatest apprehensions about appealing to the Secretary-General of the UN to resolve any dispute over the evaluation of the officer's health. Firstly, this is not the procedure stipulated in the Agreement of 9 July 1986, which in this case expressly provides for settlement by arbitration; secondly, just as the intervention of the high authority represented by the Secretary-General was necessary to solve all the problems born of the Rainbow Warrior incident, so it may seem out of proportion with the limited issue here involved, should it arise.

As for the conditions under which the decision to return Major Mafart to France was made because of the state of his health, the Ministry of Foreign Affairs rejects the New Zealand assertion that the refusal to let a New Zealand airplane land on Hao in itself gives rise to doubt as to the emergency nature of Major Mafart's evacuation. As it has already had occasion to point out, the impossibility of allowing a foreign aircraft to land on Hao is absolute and was well known to New Zealand.

The Ministry of Foreign Affairs notes that New Zealand maintains that there is no factual basis for the statement that the New Zealand doctor who would have been taken to Hao on a French means of transportation after a connection in Papeete would have had to return by the same route to New Zealand in order to report to his Government before a decision could be made. However, it points out that this information was conveyed to it from Wellington by the French Ambassador immediately following the telephone conversation which took place on Sunday 13 December at about 1.00 p.m. between the Ambassador and Mr. Beeby.

It does not share the opinion expressed in note No. 1987/107 as to the spirit of the Agreement resulting from the Exchange of Letters on 9 July 1986. Although leaving the island requires the consent of both Governments, and although this consent should, insofar as circumstances permit, be prior, it remains that the provision in question here was inserted with precisely the possibility of an illness in mind and that, in this case, approval could not be reasonably refused.

The Ministry of Foreign Affairs does not see any need to quibble, at this stage, over the meaning of New Zealand's agreement to send a doctor to Paris and, on this point, refers purely and simply to this doctor's findings, which, in its eyes, corroborate the French doctors' appraisals of the nature of the ailments that Major Mafart is suffering from.

The New Zealand Government has requested the application of the provision of the Agreement of 9 July 1986 which stipulates that "If the New Zealand Government so requests, a visit to the Hao military installation may, by common agreement between the two Governments, be made by an approved third party." Referring to the remarks made by the New Zealand Charge d'Affaires when the note of 24 December was submitted, it is the understanding of the Ministry of Foreign Affairs that the purpose of the request would be to verify the presence of Captain Prieur on Hao. In this regard, it gives the Government of New Zealand the most formal assurance. However, if the New Zealand Government intends to persist in its request, the French Government will agree to it in principle in order to avoid any erroneous interpretation. However, the Ministry of Foreign Affairs does feel that, in this case, there would be no grounds for asking the Secretary-General of the United Nations to designate a representative to make this visit. Indeed, it points out that, as is confirmed by the secret conversations that led up to it, the Exchange of Letters of 9 July 1986 provides that the visit must be made by a third party approved by common agreement between the two Governments. If a visit must take place, France proposes that it be entrusted to Dr. T. Maoate, Vice Prime Minister and Minister of Health of the Cook Islands, given the geographical proximity and the historical ties between the Cook Islands and New Zealand. Dr. Maoate could be transported by a French military airplane either from Papeete or directly from the Cook Islands. In the absence of specific clauses in the Agreement of 9 July 1986, the cost of this mission should be paid by the requesting Government.

35. On 4 January 1988 a third report from Dr. Croxson transcribed what Professor Daly, the doctor in charge of Mafart, proposed to do as follows:

1. To supervise Major Mafart closely and in particular to witness if possible a major crisis at which time he would have a surgical consultation available.

2. To this end Major Mafart must remain close to his department near the hospital. Professor Daly would wish to review him should any new crisis appear and would be seeing him regularly at least once weekly for the next three to four weeks, and in his opinion Mafart should not return to Hao until the diagnosis and plan of treatment is more certain.

3. He feels that Mafart is very tired after the many investigations and explorations and is anxious in view of the diagnosis still not being settled, and he feels that some degree of "convalescence" for about three to four weeks is necessary.

4. He feels that perhaps exploratory surgery might be necessary, but again emphasized that he is not keen on blind laparotomy in view of the danger of new adhesions. I understand that he is proposing to discharge Mafart later this week and to review him once weekly.

Professor Daly and I agreed that this was a difficult clinical problem. Professor Daly also indicated that he would contact me in the event of any major crisis appearing in the next few days, and unless something further developed I would communicate with him next Monday, 11 January.

Professor Croxson concluded:

Professor Daly's point about observing him for a longer period, particularly to try and witness a major episode when one would have a surgical opinion, is a very orthodox and appropriate clinical management.

36. On 5 January 1988 the Embassy of New Zealand conveyed to the French Ministry of Foreign Affairs the following response to the Ministry's note of 30 December 1987:

> Without addressing all of the points contained in the Ministry's note and while reserving New Zealand's legal position and, in particular, its right to commence arbitration proceedings, the explicit assurance that Major Mafart will return to Hao when his health permits is very welcome. Furthermore the assurance given with respect to Captain Prieur is also welcomed, and it is hoped that these two assurances, together with the ongoing cooperation at the medical level, will provide a basis for resolving the remaining issues between France and New Zealand.

37. On 11 January 1988 a fourth report from Dr. Croxson was produced. In this report, Dr. Croxson advised that "no clear abnormality has been demonstrated on the previous investigations", adding that "the plan is to examine him again in one week's time or earlier should crisis develop".

38. On 18 January 1988 Dr. Croxson advised that in a telephone conversation with Professor Daly the French Professor told him that "the situation had not altered clinically since last week", that "he has no final firm diagnosis" and that the final report would be available on 27 January 1988.

39. On 21 January 1988 the New Zealand Embassy, being advised that Professor Daly would be preparing a final report on 27 January, expressed the wish to have Major Mafart re-examined by their medical advisor, Dr. Croxson, assisted by a specialist, Dr. Christopher Mallinson, a gastroenterologist practicing in the United Kingdom. This request was agreed to by the French authorities and their examination took place on 25 January 1988.

40. On 28 January 1988 Professor Daly advised that:

> Major Alain MAFART was hospitalized on 14 December 1987 at the VAL-de-GRACE hospital where he underwent in-depth radiological, biological and clinical tests. Given the need for close, specialized medical observation and on the basis of the standards of fitness governing military personnel, he must be considered as unfit to serve overseas for an indefinite period.
>
> *Prospects—Medical Decision*:
>
> 1. Given the current uncertainties of the diagnosis, it does not seem warranted to propose an exploratory laparotomy right away for this abdominal ailment.
>
> 2. Depending on the subsequent clinical development, various additional tests can be considered:
>
> —barium enema
>
> —Wirsungography and pancreas function
>
> —Mesenteric arteriography
>
> These points have been discussed with Professor MALLINSON and Dr. CROXSON.
>
> 3. So, close observation is called for in order to forestall a more acute crisis, which is liable to entail a surgical procedure, or to schedule the aforementioned explorations.
>
> 4. So, Major MAFART must be kept in mainland France insofar as this observation can be done only in a modern, well-equipped hospital center.
>
> Because of these exigencies, and pursuant to the standards of fitness governing French military personnel, he is declared unfit to serve overseas for an indefinite period.

41. On 5 February 1988 the Ministry of Foreign Affairs conveyed Professor Daly's report to the New Zealand Embassy, adding that the Ministry "feels that, given the medical conclusions that it has been given, it is not possible at present for Major Mafart to return to the island of Hao. Hence, it is planned that Major Mafart will receive a military assignment in mainland France in which he will continue to be subject to the clauses resulting from the Exchange of Letters of 6 July 1986, specifically as regards contact with the press and other communication media".

42. On 12 February 1988 Dr. Croxson submitted his fifth report, stating, *inter alia*, that:

> Dr. Mallinson, consultant gastroenterologist, and myself examined Major Mafart in the Val-de-Grace hospital on Monday 25 January in the presence of and with the assistance of Professor Daly and Dr. Laverdant . . . we reviewed all the investigations, x-rays, laboratory studies which had been carried out . . .
>
> Major Mafart has remained well, since his last report on 18 January, with no major episodes of pain or abdominal distension. He has been eating a light and varied diet and living in a house within the hospital confines . . . He did not appear depressed; his pulse, blood pressure and temperature were normal . . .

The report concluded as follows:

> I believe the investigations have proceeded at a very slow pace and could well have been compressed within one to two weeks. There was no evidence produced to show that Major Mafart had an impending obstruction at the time he was evacuated from Hao and certainly if he had, he should have been airlifted to the nearest general surgical center, which we believe exists in Tahiti. It would have been dangerous to have flown him to Paris.
>
> We do not believe that he needs to remain in the confines of a major hospital center for the indefinite future but that he could be returned to Hao now, continue life as normal, rest during minor attacks and obtain treatment from the military medical facilities in Hao if the attacks were of a more severe nature comparable to the satisfactory management of the two previous attacks in July and December which were carried out at Hao.
>
> In the unlikely event that a major crisis with acute irreversible obstruction did occur, and we emphasize that none have appeared in the last 22 years, surgical treatment in Tahiti would be the logical appropriate and safest management. We do not feel that mesenteric angiography nor an ERCP are essential investigations in his management; if they were they could have been carried out by now.

43. On 18 February 1988, the New Zealand Embassy addressed a note to the French Ministry of Foreign Affairs recalling the position of the New Zealand Government:

> the unilateral removal of Major Mafart from Hao without the consent of the New Zealand Government constituted a violation of France's obligations to New Zealand under the Ruling of July 1986 by the United Nations Secretary-General and the Agreement of 9 July 1986 between New Zealand and France.

The note added:

> The medical reports available to both parties fully support the New Zealand position, which is corroborated by other evidence. There was no medical situation requiring emergency evacuation and the alternative proposals suggested by New Zealand for medical examination prior to giving consent to his departure were reasonable.
>
> Despite the existence of this dispute regarding France's application of the Ruling and the Agreement, and while fully reserving its legal position at every

step, New Zealand has, because of the humanitarian characteristics of the situation, cooperated fully with the French programme of medical examination of Major Mafart.

However, the extended nature of these medical examinations has been a matter of concern to the New Zealand Government and, according to the medical reports, also to Major Mafart himself. Dr. Croxson's reports indicate that they have been unnecessarily extended . . . Dr. Croxson's advice, supported by Dr. Mallinson, is that there is no medical reason for Major Mafart's return to Hao to be any further delayed. The position of the Ministry . . . that Major Mafart is unfit for military service overseas is noted. But in New Zealand's view that is not relevant to the question of compliance with France's obligations to New Zealand under the Agreement. The issue is whether compliance should now be restored. Dr. Croxson's advice is unequivocal. Major Mafart is medically fit to return to Hao. The nature of the assignment, if any, given to him in that place is not an issue.

44. On 21 July 1988 Dr. Croxson presented a final report on Major Mafart that states:

No change in Major Mafart's condition since last examination, 25 January 1988. No major episodes of severe abdominal pain, abdominal distension and none requiring hospitalization or special investigation. My conclusions of my report of 12 February 1988 remain and indeed are strengthened by this further period of five months of observations.

45. According to the French Counter-Memorial Alain Mafart, who was evacuated in December 1987 for health reasons, was declared "repatriated for health reasons" on 11 March 1988. After a temporary assignment at the Head Office of the Nuclear Experimentation Center, he was assigned on 1 September 1988 to the War College in Paris, after passing the entrance examination, for which he had taken the written part in Hao and the oral part in Paris. On 1 October 1988, he was promoted to the rank of Lieutenant Colonel.

Mr. Bos' Visit to Hao

46. On 28 March 1988 an agreed third party, a Netherlands official, designated by the two Governments for the purpose, visited Hao. Mr. Adriaan Bos submitted on 5 April 1988 a report indicating that he had had an interview with Captain Dominique Prieur, and that her military function on Hao is that of officier conseil and officier adjoint. In the former capacity she performs certain social functions, while in the latter she deputizes for the Commander of the base in carrying out certain duties. A few months after arrival on Hao, on 22 July 1986, she was joined by her husband, who is also an officer.

Mr. Bos advised that "there are approximately 17 officers on Hao. Tours of duty on Hao are normally limited to one year". Mr. Bos added that "Dominique Prieur and her husband have access to the normal recreational facilities at the base. As regards contact with her family, Dominique Prieur said that her mother had visited her twice and her parents-in-law once".

The Case of Captain Prieur

47. The French Counter-Memorial states that on 3 May 1988, the French Ministry of Foreign Affairs received a medical report indicating

that Dominique Prieur was 6 weeks pregnant. The report stated that this pregnancy should be treated with special care for several reasons: Mrs. Prieur was almost 39 years old; her gynecological history; the fact that this would be her first child. It also indicated that the medical facilities existing on Hao were unable to provide the necessary medical examinations and the care required by Mrs. Prieur's condition.

48. On the same day, 3 May 1988, the New Zealand Ambassador in Paris was advised of the above information and answered that she would inform her Government. The New Zealand Ambassador noted that she "agrees that the medical facilities existing on Hao are clearly inappropriate, but it was her understanding that Papeete did have all the relevant necessary equipment".

49. The next day, 4 May 1988, the New Zealand Government answered the French Ministry of Foreign Affairs, stating:

> While New Zealand's consent is required in terms of the 1986 Agreement, this is not a case where, if the medical situation justifies it, consent would be unreasonably withheld.
>
> The New Zealand Government would like, on the basis of medical consultation, to determine the nature of any special treatment that Captain Prieur might need and the place where the necessary tests and on-going treatment could be carried out if the facilities at Hao are not adequate.
>
> As a first step to coming to an agreement on this basis, the New Zealand authorities are making arrangements for a New Zealand military doctor with the requisite qualifications to fly on the first available flight to Papeete for onward flight to Hao.

The answer added that Dr. Brenner, a civilian consultant to the Royal New Zealand Navy, qualified in obstetrics and gynecology, was standing by to travel to Papeete on that day, 4 May.

50. The French Ministry of Foreign Affairs, on the same day, 4 May, "agreed to the dispatching of Dr. Bernard Brenner to Hao as soon as possible", adding that "this solution was suitable to us and that all the arrangements would be made for the New Zealand doctor's trip to Papeete and his transfer to Hao, definitely on the morning of 5 May".

51. On 5 May 1988, the New Zealand Ministry of Foreign Affairs informed the French Ambassador to New Zealand "that, due to the continuing UTA strike, Dr. Brenner and his interpreter are forced to delay their arrival in Papeete, which they will reach by Air New Zealand. Leaving Auckland on Friday, 6 May at 8.40 p.m., they will arrive in Papeete the same day at 3.25 a.m. (Papeete time). If extreme urgency so requires, a connection to Papeete by military plane could be envisaged".

52. On 5 May 1988 at 11.00 a.m. (French time), the New Zealand Ambassador in Paris was told that the French Government had been informed of a "new development", namely, that Dominique Prieur's father, hospitalized for treatment of a cancer, was dying. The French Government informed the Ambassador that "for obvious humanitarian reasons" Dominique Prieur had to see her father before his death. It was proposed "bearing in mind the previous conversations regarding Mrs. Prieur's pregnancy" that either Dr. Brenner, the New Zealand doctor, leave Auckland within three or four hours on a special flight

for Papeete, whence a military aircraft would take him to Hao, or that Mrs. Prieur leave Hao immediately for Paris, where she would be examined by the New Zealand doctor.

In response to questions communicated via telephone by the New Zealand Ambassador, it was then stated that the Minister of Defence was ready to agree that Dr. Brenner be transported directly from Auckland to Hao by a New Zealand aircraft.

53. According to Annex 47 of the French Counter-Memorial, the New Zealand Ambassador replied on 5 May 1988 that the New Zealand Prime Minister could not be reached but that "while waiting for the Prime Minister's decision, the solution of sending a New Zealand military aircraft to Hao was under study. It was, however, clear that the aircraft could not leave Auckland within the 3 or 4 hour time limit requested by the French Government. A departure would have to be planned instead for Friday morning (New Zealand time)". French authorities then noted that "inasmuch as the New Zealand aircraft would head directly for Hao, its departure from Auckland could be delayed until Friday morning at 7.30 a.m. (New Zealand time). This was the latest possible deadline beyond which Dominique Prieur would run the risk of arriving in Paris too late to see her father alive".

54. On 5 May 1988 at 9.30 p.m. (Paris time), the New Zealand Ambassador in France informed the French Minister of Foreign Affairs of the following:

A. It was not possible to ready a New Zealand military aircraft to leave for Hao "within the time limit set by France".

B. Mr. Lange was not willing to agree to the departure of Mrs. Prieur from Hao for the reason invoked the same morning by the French Government (the state of health of the interested party's father).

C. The response and offer that New Zealand had made regarding Mrs. Prieur's pregnancy were still valid.

D. New Zealand would not give any guarantee of confidentiality regarding the state of health of Mrs. Prieur's father.

E. New Zealand agreed to send a doctor on Friday morning to verify the state of health of Mrs. Prieur's father.

55. On 5 May 1988 at 10.30 p.m. (French time), the following response was given to the New Zealand Ambassador:

A. The French Government considers it impossible, for obvious humanitarian reasons, to keep Mrs. Prieur on Hao while her father is dying in Paris. The French officer will therefore depart immediately for Paris.

B. We agree that a New Zealand doctor may contact the doctors treating Dominique Prieur's father and, if those doctors agree to it, may examine the patient.

C. Our offer of a medical examination of Mrs. Prieur, upon her return to metropolitan France, by a doctor chosen by New Zealand, remains valid.

56. On 6 May 1988 a telegram sent by the French Minister of Foreign Affairs to the French Ambassador at Wellington confirmed that Mrs. Prieur had left on board the special flight on Thursday, 5 May at 11.30 p.m. (Paris time), and that she was expected in Paris on 6 May in the evening.

57. On 10 May 1988 the New Zealand Embassy presented the following note to the French Ministry of Foreign Affairs referring to the discussions which took place on 3, 4 and 5 May 1988 between the Cabinet of the Minister of Foreign Affairs and the Embassy concerning Captain Dominique Prieur:

> The Government of New Zealand feels obliged to place on record at this time its concern about the actions of the former French Government with respect to France's obligations to New Zealand under international law in connection with the Agreement following from the Ruling of 6 July 1986 by the Secretary-General of the United Nations and incorporated in the Exchange of Letters between France and New Zealand of 9 July 1986. New Zealand must protest these actions in the strongest possible terms.
>
> In this connection New Zealand must also recall the previous violations of those solemn undertakings when Major Mafart was removed from Hao in December 1987 without New Zealand's consent and when, contrary to the clear medical indications of adequate fitness, French authorities refused to restore compliance. New Zealand has sought to retain a cooperative relationship with France, including the activation of a medical team to visit Hao last week to examine Captain Prieur. Last week's unilateral acts by the former French Government constitute a further serious violation of legal obligations under the Agreement concluded under the auspices of the United Nations Secretary-General and give rise to a further legal dispute between France and New Zealand.
>
> Prior to the events of last week New Zealand had publicly committed itself to seeking to resolve these problems through the diplomatic channel. It remains New Zealand's very strong wish to restore a climate of mutual confidence in its relations with France, and, accordingly, New Zealand continues to be willing to seek a settlement under which France would voluntarily return Major Mafart and Captain Prieur to Hao. An agreement whereby both officers could undergo specialist medical treatment in Tahiti, if that became necessary, and subject to appropriate conditions, could be envisaged.
>
> The alternative approach is that the actions of the former French Government in this matter should be subject to independent review in accordance with the arbitration agreement between France and New Zealand. New Zealand awaits the response of the new French administration.

58. On 16 May 1988 the father of Captain Prieur died.

59. On 21 July 1988 Dr. Croxson examined both Major Mafart and Captain Prieur and advised as to the latter as follows:

> The investigations and examinations by the French medical attendants and my clinical examination would all be consistent with an approximately 18-week pregnancy which is proceeding uneventfully. Results of the amniocentesis to exclude important chromosome abnormalities are awaited. No special arrangements for later pregnancy or delivery are planned, and I formed the opinion that management would be conducted on usual clinical criteria for a 39-year-old, fit, healthy woman in her first pregnancy.

60. According to the French Counter-Memorial, Dominique Prieur was assigned to the Head Office of the Nuclear Experimentation Center in Villacoublay. She was on leave until 7 November 1988, corresponding to military furlough that she had not taken previously. She then received twenty-two weeks maternity leave, pursuant to French labor law. She gave birth to her child on 15 December 1988.

61. On 22 September 1988 the New Zealand Government presented a note to the French Ministry of Foreign Affairs and referring to its notes of 18 February and 10 May 1988 (paras. 43 and 57) stated:

Extensive efforts have been made in the intervening months to resolve this dispute through the diplomatic channel. The Government of New Zealand greatly regrets the fact that constructive proposals to this end which it advanced on 10 August 1988 met no satisfactory response from the French Government. The New Zealand Government is therefore forced to the conclusion that all reasonable efforts to resolve this dispute have been exhausted. The Embassy is therefore instructed to advise that the Government of New Zealand hereby requests, in accordance with the Ruling of the Secretary-General of the United Nations and the Agreement of 9 July 1986 between New Zealand and France, that the dispute be submitted to an arbitral tribunal.

V. DISCUSSION

The Contentions of the Parties

62. New Zealand contends that France has committed six separate breaches of the international obligations it assumed under Clauses 3 to 7 of the First Agreement of 9 July 1986, three in respect of each agent. New Zealand submits that, taken chronologically, these breaches of obligations were: first, France's failure to seek in good faith its consent to the removal of the two agents from Hao; second, the removal of the two agents without New Zealand's consent; and, third, the continued failure to return the two agents to Hao.

63. With respect to the first breach, New Zealand maintains that the mutual consent provision carried with it three subsidiary obligations to act in good faith, namely, to give full information in a timely manner about circumstances in which consent was to be sought; not to impede New Zealand's efforts to verify this information; and, finally, to give its Government a reasonable opportunity to reach an informed decision.

New Zealand alleges that when Major Mafart was hospitalized in Hao in July 1987 its Government was not informed that a medical problem had arisen, nor was it advised in December that a medical doctor had been sent from France. The information furnished had no detailed description of the medical history and no explanation of the necessity for an air journey in excess of 20 hours to Paris, as against a flight of a little more than an hour to the excellent facilities in Papeete.

New Zealand further states that its proposal for an immediate medical examination in Hao by a New Zealand doctor encountered difficulties and obstructions such as the invoked absolute impossibility for a foreign military aircraft to land at Hao. It lays stress on the fact that the alleged impossibility was not absolute, as shown by the fact that a United States military aircraft had landed there previously, and, six months later, in the case of Captain Prieur, permission for landing in Hao was granted.

New Zealand also submits that in the case of Major Mafart reasonable time was not given, in fact less than 48 hours, to reach an informed decision and in the case of Captain Prieur France failed to seek New Zealand's consent in good faith, for consent was never, in fact, sought on either the grounds of her pregnancy or on the grounds of her father's illness. It states that while it was preparing to examine the alleged need for special treatment of the pregnancy and where it might be carried out,

just three days before Presidential elections in France, the New Zealand Government was told that the terminal illness of Captain Prieur's father required her immediate removal.

64. The second set of breaches which New Zealand asserts is the removal of the two agents from Hao without New Zealand consent. New Zealand points out that France has acknowledged in these proceedings that it removed the two agents without New Zealand's consent; thus, the French Republic has admitted a *prima facie* breach and the only question is whether it can legally justify that breach.

New Zealand contends that the mutual consent provision allows the departure from Hao when and only when both Governments were agreed that circumstances justified that departure. It also considers that in making such decisions both Governments are obliged to act in good faith. The provision reads that the two agents "will be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments". The words "for any reason" and the words "except with mutual consent", in New Zealand's view, cannot be dismissed as superfluous but have a function and a meaning, expressly excluding any unilateral right to remove either agent. Any removal, for any reason, it argues, required the consent of New Zealand; moreover, the word "prohibited" emphasized the strictness of the regime established and the complete unacceptability of any exceptions to it.

65. The third set of breaches, according to New Zealand, consists in France's failure to return the agents: in the case of Major Mafart, France invokes, *inter alia*, French military law to excuse the continuous breach of the obligation to return him to Hao, alleging that he is not fit for military service overseas. However, New Zealand observes that Major Mafart is fit enough to attend the War College, and points out that it is not asking that he go overseas in active service or fight a war: a certificate by a French medical doctor that in terms of French military law Major Mafart is unfit for service overseas has no bearing on the question whether he should be in Hao. Anyway, it adds, Major Mafart can be placed under any necessary medical supervision in Hao and good medical support facilities exist nearby in Tahiti.

Recalling Article 27 of the Vienna Convention on the Law of Treaties, New Zealand asserts that it is not open to France nor to any other State to invoke the provisions of its own internal law as a justification for non-performance of its treaty obligations.

As to Captain Prieur, removed from Hao because of the illness of her father, France has stated that after his death, she was placed on maternity leave pursuant to the French military code and therefore could not be sent back to Hao as long as her pregnancy continued; subsequent to the birth, France has asserted that she can not be sent back with a baby.

New Zealand finds that these reasons fail to justify the continuous breach resulting from the fact that Captain Prieur has not been sent back to Hao.

It points out that whether Captain Prieur wishes to take the child to Hao is irrelevant; there are many children on the island, which has a

civilian population of some 1,100 people. Just as the First Agreement allowed Captain Prieur's husband to live with her in Hao, it will allow her husband and child to accompany her or not, as she chooses.

New Zealand adds that there are countless examples in the South Pacific involving teachers, missionaries, administrators and others, where European families with small children have lived in small atoll communities less civilized than those on Hao.

66. For its part, the French Republic maintains that the clause prohibiting the two agents from leaving the island except with the consent of the two Governments is intended for one of the two following possibilities: either a special situation, particularly illness, or, as in the case of Captain Prieur, pregnancy, which would render their remaining on the island inconceivable, or a joint desire by the two Governments to shorten the total length of their stay. It stresses that, both in December 1987, for Major Mafart, and in May 1988, for Captain Prieur, the first possibility was involved.

France acknowledges that it did not obtain New Zealand's prior consent, but it nevertheless seems to France that, bearing in mind the reason that made the transfer to Paris necessary, and the very special circumstances under which that transfer was made, its action bore no stain of illegality under the 1986 Agreement and the rules and principles of international law.

It believes, moreover, that legitimate reasons have prevented the return of the officers in question to their island, and that in any case, the obligation to return can have no existence after 22 July 1989, the expiration date of the 1986 Agreement.

67. In the case of Major Mafart, the French Republic recalls that on 7 December 1987, the Ministry of Defence received from the commander of the base at Hao a message indicating that Major Mafart's state of health required immediate examinations and care that could not be provided on the atoll.

A principal Army physician, Dr. Maurel, was dispatched to the site and his report indicated that Major Mafart's condition necessitated "explorations in a highly specialized environment" and therefore "emergency repatriation to a hospital in mainland France". The French Republic adds that its authorities made every possible effort, during that weekend, bearing in mind the difficulties in communication between the two capitals, to obtain New Zealand's consent within the time available to the repatriation of Major Mafart for health reasons; to that end, the *note verbale* presented by the French Ambassador in Wellington on Saturday morning contained all the information that Paris had, and Dr. Maurel's message was attached.

As for the denial of access to the base of a New Zealand aircraft, the French Republic asserts that New Zealand knew about the prohibition because the transfer of officers in July 1986 was organized according to this rule; moreover, the description of the flight in question, with a crew of 12 members, seemed like a provocation. But at the same time, in order to respond to New Zealand's concerns, it was proposed that a doctor

designated by the latter should examine Major Mafart upon his arrival in Paris. In addition, there was a misunderstanding regarding the place from which the doctor sent by New Zealand to Hao should make his report: the information that French authorities had was that this doctor was to return to New Zealand to present his conclusions. This would have had the effect of delaying Major Mafart's departure by several days. Under these conditions, the French Republic adds, the French authorities made the decision for an immediate repatriation for reasons of health, notwithstanding the terms of the Agreement.

68. As for Major Mafart's stay in mainland France, he arrived in Paris on 14 December and was immediately hospitalized. He remained in the hospital until 6 January 1988, being subject to medical supervision within the hospital confines.

The French Republic stresses that the New Zealand doctor sent to verify the agent's state of health, Dr. Croxson, examined him on the day of his arrival in Paris and submitted a report in the form of responses to a series of questions, concluding that the condition of the party in question necessitated specialized examinations which could not be carried out in Hao and that the officer was not a malingerer. As for the emergency evacuation, Dr. Croxson's response reflects doubt about the degree of emergency and not about the existence of an emergency.

The French Republic also points out that Dr. Croxson was kept regularly informed about the officer's state of health, and that he examined him again on several occasions, being accompanied, on 25 January, by a British gastroenterologist, Dr. Mallinson. On 27 January, Professor Daly issued his final report on Major Mafart, in which, in accordance with the rules of fitness governing French military personnel, "Major Mafart was declared unfit to serve overseas for an indeterminate period".

Dr. Croxson's report of 16 February, written with Dr. Mallinson's assistance, reaches a contrary conclusion, asserting that Major Mafart could return to Hao. But in the face of this difference of opinion, France maintains that the military status of the two officers, with all the consequences that entails, particularly as regards the exclusive competence of the French military physicians and the conclusiveness of their opinion, is one of the essential elements of the 1986 Agreement. France states that the French authorities consequently were not in a position to return Mafart to Hao.

69. As for Captain Prieur, France explains that on 3 May 1988 the Ministry of Foreign Affairs received a report indicating that Mrs. Prieur was six weeks pregnant, that it was a risky pregnancy, and that the facilities on Hao would not permit the carrying out of the necessary examinations and care. The New Zealand response said that this was not a case in which, if the medical situation justified it, the consent of New Zealand would be unreasonably refused and proposed that a New Zealand doctor take the first available flight to Papeete and be transported from there by a French aircraft, making his report from Hao. But since the airline was on strike Dr. Brenner's voyage would be delayed 30 hours. Then, on 5 May, it was learned in Paris, the French

Republic adds, that Mrs. Prieur's father was dying, which gave the situation a dramatic urgency because it was necessary, for obvious humanitarian reasons, that Mrs. Prieur see her father again before he died. To bring about this last meeting, the French authorities proposed certain solutions, one of which was that Dr. Brenner be transported directly to Hao by a New Zealand military aircraft. But information was received from New Zealand to the effect that a New Zealand military aircraft could not take off until the morning of 6 May. The French authorities replied that, inasmuch as this aircraft would go directly to Hao, its departure from Auckland could be delayed until Thursday morning at 7.30, Wellington time. After that deadline, Dominique Prieur would risk arriving too late to see her father alive. The New Zealand authorities then indicated that it was impossible to get a New Zealand military aircraft ready within the stated time.

On 5 May, one hour after the response from the New Zealand Government was received, the French Government informed New Zealand that it considered it impossible to keep Mrs. Prieur on Hao while her father was dying in Paris and that she was departing immediately for France.

70. As regards Captain Prieur's stay in mainland France, the French Republic maintains that, having returned to France to be present for her father's last moments, she was obliged to remain there throughout her pregnancy, and after the birth of her child on 15 December 1988, obvious humanitarian considerations prevented her being returned either with or without her child.

71. In summary, it results from the foregoing that New Zealand contends that the removal of the two agents from the island of Hao without its consent, the circumstances of those removals and the continued failure of France to return them to Hao are breaches of the international obligations contained in the First Agreement.

The French Government, on its part, does not contest the fact that the provisions of the Agreement have not been literally honored, since the two officers' return to mainland France was not preceded by New Zealand's formal agreement, and they did not remain on the island of Hao for the three-year period that had been agreed. It believes nevertheless that because circumstances of extreme urgency were involved, its actions do not constitute internationally wrongful acts.

The Applicable Law

72. The first question that the Tribunal must determine is the law applicable to the conduct of the Parties.

According to Article 2 of the Supplementary Agreement of 14 February 1989:

> The decisions of the Tribunal shall be taken on the basis of the Agreements concluded between the Government of New Zealand and the Government of the French Republic by Exchange of Letters of 9 July 1986, this Agreement and the applicable rules and principles of international law.

This provision refers to two sources of international law: the conventional source, represented by certain bilateral agreements concluded between the Parties, and the customary source, constituted by the "applicable rules and principles of international law".

The customary source, in turn, comprises two important branches of general international law: the Law of Treaties, codified in the 1969 Vienna Convention, and the Law of State Responsibility, in process of codification by the International Law Commission.

The Parties disagree on the question of which of these two branches should be given primacy or emphasis in the determination of the primary obligations of France.

While New Zealand emphasizes the terms of the 1986 Agreement and related aspects of the Law of Treaties, France relies much more on the Law of State Responsibility. So far as remedies are concerned both are in broad agreement that the main law applicable is the Law of State Responsibility.

73. In this respect, New Zealand contests three French legal propositions which it describes as bad law. The first one is that the Treaty of 9 July 1986 must be read subject to the customary Law of State Responsibility; thus France is trying to shift the question at issue out of the Law of Treaties, as codified in the Vienna Convention of 1969.

New Zealand contends that the question at issue must be decided in accordance with the Law of Treaties, because the treaty governs and the reference to customary international law may be made only if there were a need (1) to clarify some ambiguity in the treaty, (2) to fill an evident gap, or (3) to invalidate a treaty provision by reference to a rule of *jus cogens* in customary international law. But, it adds, there is otherwise no basis upon which a clear treaty obligation can be altered by reference to customary international law.

A second French proposition contested by New Zealand is that Article 2 of the Supplementary Agreement of 14 February 1989 refers to the rules and principles of international law and thus, France argues, requires the Tribunal to refer to the Law of International Responsibility. New Zealand contends that Article 2 makes clear that the Tribunal is to decide in accordance with the Agreements, so the Treaty of 9 July 1986 governs and, consequently, customary international law applies only to the extent it is applicable as a source supplementary to the Treaty; not to change the treaty obligation but only to resolve an ambiguity in the treaty language or to fill some gap, which does not exist since the text is crystal clear. Thus, New Zealand takes the position that the Law of Treaties is the law relevant to this case.

Finally, New Zealand contests a third French proposition by which France relies upon the general concept of circumstances excluding illegality, as derived from the work of the International Law Commission on State Responsibility, contending that those circumstances arise in this case because there were determining factors beyond France's control, such as humanitarian reasons of extreme urgency making the action necessary. New Zealand asserts that a State party to a treaty, and

seeking to excuse its own non-performance, is not entitled to set aside the specific grounds for termination or suspension of a treaty, enumerated in the 1969 Vienna Convention, and rely instead on grounds relevant to general State responsibility. New Zealand adduces that it is not a credible proposition to admit that the Vienna Convention identifies and defines a number of lawful excuses for non-performance—such as supervening impossibility of performance; a fundamental change of circumstances; the emergence of a new rule of *jus cogens*—and yet contend that there may be other excuses, such as *force majeure* or distress, derived from the customary Law of State Responsibility. Consequently, New Zealand asserts that the excuse of *force majeure*, invoked by France, does not conform to the grounds for termination or suspension recognized by the Law of Treaties in Article 61 of the Vienna Convention, which requires absolute impossibility of performing the treaty as the grounds for terminating or withdrawing from it.

74. France, for its part, points out that New Zealand's request calls into question France's international responsibility towards New Zealand and that everything in this request is characteristic of a suit for responsibility; therefore, it is entirely natural to apply the Law of Responsibility. The French Republic maintains that the Law of Treaties does not govern the breach of treaty obligations and that the rules concerning the consequences of a "breach of treaty" should be sought not in the Law of Treaties, but exclusively in the Law of Responsibility. France further states that within the Law of International Responsibility, "breach of treaty" does not enjoy any special status and that the breach of a treaty obligation falls under exactly the same legal regime as the violation of any other international obligation. In this connection, France points out that the Vienna Convention on the Law of Treaties is constantly at pains to exclude or reserve questions of responsibility, and that the sole provision concerning the consequences of the breach of a treaty is that of Article 60, entitled "Termination of a treaty or suspension of its application as a result of breach", but the provisions of this Article are not applicable in this instance. But even in this case, the French Republic adds, the State that is the victim of the breach is not deprived of its right to claim reparation under the general Law of Responsibility. France points out, furthermore, that the origin of an obligation in breach has no impact either on the international wrongfulness of an act nor on the regime of international responsibility applicable to such an act; this approach is explained in Article 17 of the draft of the International Law Commission on State Responsibility.

In particular, the French Republic adds, citing the report of the International Law Commission, the reasons which may be invoked to justify the non-execution of a treaty are a part of the general subject matter of the international responsibility of States.

The French Republic does admit, in this connection, that it is the Law of Treaties that makes it possible to determine the content and scope of the obligations assumed by France, but, even supposing that France had breached certain of these obligations, this breach would not entail any repercussion stemming from the Law of Treaties. On the

contrary, it is exclusively within the framework of the Law on International Responsibility that the effects of a possible breach by France of its treaty obligations must be determined and it is within the context of the Law of Responsibility that the reasons and justificatory facts adduced by France must be assessed. Consequently, the French Republic further states, it is up to the Tribunal to decide whether the circumstances under which France was led to take the contested decisions are of such a nature as to exonerate it of responsibility, and this assessment must be made within the context of the Law of Responsibility and not solely in the light of Article 61 of the 1969 Vienna Convention.

75. The answer to the issue discussed in the two preceding paragraphs is that, for the decision of the present case, both the customary Law of Treaties and the customary Law of State Responsibility are relevant and applicable.

The customary Law of Treaties, as codified in the Vienna Convention, proclaimed in Article 26, under the title "*Pacta sunt servanda*" that

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This fundamental provision is applicable to the determination whether there have been violations of that principle, and in particular, whether material breaches of treaty obligations have been committed.

Moreover, certain specific provisions of customary law in the Vienna Convention are relevant in this case, such as Article 60, which gives a precise definition of the concept of a material breach of a treaty, and Article 70, which deals with the legal consequences of the expiry of a treaty.

On the other hand, the legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary Law of State Responsibility.

The reason is that the general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation. The particular treaty itself might of course limit or extend the general Law of State Responsibility, for instance by establishing a system of remedies for it.

The Permanent Court proclaimed this fundamental principle in the Chorzow Factory (Jurisdiction) case, stating:

> 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 (P.C.I.J., Series A, Nos. 9, 21 (1927)).

And the present Court has said:

> It is clear that refusal to fulfill a treaty obligation involves international responsibility (Peace Treaties (second phase) 1950, *ICJ Reports*, 221, 228).

The conclusion to be reached on this issue is that, without prejudice to the terms of the agreement which the Parties signed and the applicability of certain important provisions of the Vienna Convention on the Law of Treaties, the existence in this case of circumstances excluding wrongfulness as well as the questions of appropriate remedies, should be answered in the context and in the light of the customary Law of State Responsibility.

Circumstances Precluding Wrongfulness

76. Under the title "Circumstances Precluding Wrongfulness" the International Law Commission proposed in Articles 29 to 35 a set of rules which include three provisions, on *force majeure* and fortuitous event (Article 31), distress (Article 32), and state of necessity (Article 33), which may be relevant to the decision on this case.

As to *force majeure*, it was invoked in the French note of 14 December 1987, where, referring to the removal of Major Mafart, the French authorities stated that "*in this case of force majeure*" (emphasis added), they "are compelled to proceed without further delay with the repatriation of the French officer for health reasons".

In the oral proceedings, counsel for France declared that France "did not invoke *force majeure* as far as the Law of Responsibility is concerned". However, the Agent for France was not so categorical in excluding *force majeure*, because he stated: "It is substantively incorrect to claim that France has invoked *force majeure* exclusively. Our written submissions indisputably show that we have referred to the whole theory of special circumstances that exclude or 'attenuate' illegality".

Consequently, the invocation of "*force majeure*" has not been totally excluded. It is therefore necessary to consider whether it is applicable to the present case.

77. Article 31 (1) of the ILC draft reads:

> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

In the light of this provision, there are several reasons for excluding the applicability of the excuse of *force majeure* in this case. As pointed out in the report of the International Law Commission, Article 31 refers to "a situation facing the subject taking the action, which leads it, as it were, *despite itself*, to act in a manner not in conformity with the requirements of an international obligation incumbent on it" (Ybk.ILC, 1979, vol. II, para. 2, p. 122, emphasis in the original). *Force majeure* is "generally invoked to justify *involuntary*, or at least unintentional conduct", it refers "to an irresistible force or an unforeseen external event

against which it has no remedy and which makes it 'materially impossible' for it to act in conformity with the obligation", since "no person is required to do the impossible" (*Ibid.*, p. 123, para. 4).

The report of the International Law Commission insists on the strict meaning of Article 31, in the following terms:

> the wording of paragraph 1 emphasizes, by the use of the adjective "irresistible" qualifying the word "force", that there must, in the case in point, be a constraint which the State was unable to avoid or to oppose by its own means . . . The event must be an act which occurs and produces its effect without the State being able to do anything which might rectify the event or might avert its consequences. The adverb "materially" preceding the word "impossible" is intended to show that, for the purposes of the article, it would not suffice for the "irresistible force" or the "unforeseen external event" to have made it *very difficult* for the State to act in conformity with the obligation . . . the Commission has sought to emphasize that the State must not have had any option in that regard (Ybk. cit., p. 133, para. 40, emphasis in the original).

In conclusion, 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 absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*. Consequently, this excuse is of no relevance in the present case.

78. Article 32 of the Articles drafted by the International Law Commission deals with another circumstance which may preclude wrongfulness in international law, namely, that of the "distress" of the author of the conduct which constitutes the act of State whose wrongfulness is in question.

Article 32 (1) reads as follows:

> 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 conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

The commentary of the International Law Commission explains that " 'distress' means a situation of extreme peril in which the organ of the State which adopts that conduct has, at that particular moment, no means of saving himself or persons entrusted to his care other than to act in a manner not in conformity with the requirements of the obligation in question" (Ybk. cit., 1979, p. 133, para. 1).

The report adds that in international practice distress, as a circumstance capable of precluding the wrongfulness of an otherwise wrongful act of the State, "has been invoked and recognized primarily in cases involving the violation of a frontier of another State, particularly its airspace and its sea—for example, when the captain of a State vessel in distress seeks refuge from storm in a foreign port without authorization, or when the pilot of a State aircraft lands without authorization on foreign soil to avoid an otherwise inevitable disaster" (*Ibid.*, p. 134, para. 4). Yet the Commission found that "the ratio of the actual principle suggests that it is applicable, if only by analogy, to other comparable cases" (*Ibid.*, p. 135, para. 8).

The report points out the difference between this ground for precluding wrongfulness and that of *force majeure*: "in these circumstances, the State organ admittedly has a choice, even if it is only between conduct not in conformity with an international obligation and conduct which is in conformity with the obligation but involves a sacrifice that it is unreasonable to demand" (Ybk. cit., p. 122, para. 3). But "this choice is not a 'real choice' or 'free choice' as to the decision to be taken, since the person acting on behalf of the State knows that if he adopts the conduct required by the international obligation, he, and the persons entrusted to his care, will almost inevitably perish. In such circumstances, the 'possibility' of acting in conformity with the international obligation is therefore only apparent. In practice it is nullified by the situation of extreme peril which, as we have just said, characterizes situations of distress" (Ybk. cit., p. 133, para. 2).

The report adds that the situation of distress "may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned. The protection of something other than life, particularly where the physical integrity of a person is still involved, may admittedly represent an interest that is capable of severely restricting an individual's freedom of decision and induce him to act in a manner that is justifiable, although not in conformity with an international obligation of the State" (*Ibid.*, p. 135, para. 10). Thus, this circumstance may also apply to safeguard other essential rights of human beings such as the physical integrity of a person.

The report also distinguishes with precision the ground of justification of Article 32 from the controversial doctrine of the state of necessity dealt with in Article 33. Under Article 32, on distress, what is "involved is situations of necessity" with respect to the actual person of the State organs or of persons entrusted to his care, "and not any real 'necessity' of the State".

On the other hand, Article 33, which allegedly authorizes a State to take unlawful action invoking a state of necessity, refers to situations of grave and imminent danger to the State as such and to its vital interests.

This distinction between the two grounds justifies the general acceptance of Article 32 and at the same time the controversial character of the proposal in Article 33 on state of necessity.

It has been stated in this connection that there is

> no general principle allowing the defence of necessity. There are particular rules of international law making allowance for varying degrees of necessity, but these cases have a meaning and a scope entirely outside the traditional doctrine of state of necessity. Thus, for instance, vessels in distress are allowed to seek refuge in a foreign port, even if it is closed . . .; in the case of famine in a country, a foreign ship proceeding to another port may be detained and its cargo expropriated . . . In these cases—in which adequate compensation must be paid—it is not the doctrine of the state of necessity which provides the foundation of the particular rules, but humanitarian considerations, which do not apply to the State as a body politic but are designed to protect essential rights of human beings in a situation of distress. (*Manual of Public International Law*, ed. Soerensen, p. 543.)

The question therefore is to determine whether the circumstances of distress in a case of extreme urgency involving elementary human-

itarian considerations affecting the acting organs of the State may exclude wrongfulness in this case.

79. In accordance with the previous legal considerations, three conditions would be required to justify the conduct followed by France in respect to Major Mafart and Captain Prieur:

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.

The Case of Major Mafart

80. The New Zealand reaction to the French initiative for the removal of Major Mafart appears to have been conducted in conformity with the above considerations.

The decision to send urgently a medical doctor to Hao in order to verify the existence of the invoked ground of serious risk to life clearly implied that if the alleged conditions were confirmed, then the requested consent would be forthcoming.

Unfortunately, it proved impossible to proceed with that verification while Major Mafart was still on the island. The rule forbidding foreign aircraft from landing in Hao prevented the prompt arrival of a New Zealand medical doctor in a military airplane and accompanied by a large crew. In these circumstances, the maintenance of the pre-existing interdiction of foreign landing cannot be considered as unfounded nor as deliberately designed to impede the New Zealand authorities from verifying the facts or frustrate their efforts to that end. Likewise, difficulties of communication and interpretation of statements made in different languages may explain the misunderstanding as to how and from where the New Zealand doctor would report his conclusions. The parties blame each other for the failure to carry out the verification in Hao, but there were many factors, not the fault of any party, nor questioning their good faith, which prevented the carrying out of that verification in the short time available. The problem arose during a weekend; communications had to be exchanged between Paris and Wellington, with half a day "time difference" between the two cities; various departments were involved, etc. Consequently, the conclusion must be reached that none of the parties is to blame for the failure in carrying out the very difficult task of verifying *in situ* Major Mafart's health during that weekend.

81. The sending of Dr. Croxson to examine Major Mafart the same day of the arrival of the latter in Paris had the same implication indicated above, namely, that if the alleged conditions of urgency jus-

tifying the evacuation were verified, consent would very likely have been given to what was until then a unilateral removal. The reservation made by New Zealand in the formal diplomatic note of 23 December 1987 rejecting the suggestion that its decision to accept the offer to send a New Zealand doctor to Paris to examine Major Mafart could be construed as acceptance of the evacuation only applied to any implication resulting from the sending of Dr. Croxson; it is obvious that the acceptance of that French offer, by itself, could not imply consent to the removal.

But, on the other hand, having accepted the offer to verify whether Major Mafart had required an urgent sanitary evacuation, subsequent consent to that measure would necessarily be implied, unless there was an immediate and formal denial by New Zealand of the existence of the medical conditions which had determined Major Mafart's urgent removal, accompanied by a formal request by New Zealand authorities for his immediate return to Hao, or at least to Papeete. And this did not occur.

On the contrary, Dr. Croxson's first report, of 14 December 1987, accepts that Major Mafart needed "detailed investigations which were not available in Hao" and his answer to the crucial question of whether there was justification for the emergency evacuation is equivocal. He apparently assumes that the only reason for the repatriation was the need for immediate surgery, which was not the case, and he introduces a distinction between emergency evacuation and planned urgent evacuation, but in both alternatives justifying the sanitary evacuation which had been accomplished.

82. It was not until 12 February 1988 when Dr. Croxson, then accompanied by Professor Mallinson, stated: "there was no evidence produced to show that Major Mafart had an impending obstruction at the time he was evacuated from Hao and certainly, if he had, he should have been airlifted to the nearest surgical center which we believe exists in Tahiti. It would have been dangerous to have flown him to Paris". But this was post-facto wisdom: too late to counteract the implications of his previous reports, and the tolerance of the continuation of the treatment for almost two months.

83. This sixth report, dated 12 February 1988, on the other hand, evidences that there was by that time a clear obligation of the French authorities to return Major Mafart to Hao, by reason of the disappearance of the urgent medical emergency which had determined his evacuation. This report, together with the absence of other medical reports showing the recurrence of the symptoms which determined the evacuation, demonstrates that Major Mafart should have been returned to Hao at least on 12 February 1988, and that failure to do so constituted a breach by the French Government of its obligations under the First Agreement. This breach is not justified by the decision of the French authorities to retain Major Mafart in metropolitan France on the ground that he was "unfit to serve overseas".

84. This decision was based on a medical report by Professor Daly. Taking into account the reliance that both parties give to medical

reports concerning the state of health of Major Mafart, both in respect of his removal from Hao and his permanence in France, it becomes necessary to analyze the points of agreement and disagreement of the various medical reports filed in the proceedings and pronounce on the differences which exist between them.

The various medical reports by Dr. Croxson and Professor Daly coincide in finding that after several weeks of investigation and exploration no firm diagnosis had been reached and no clear abnormalities had been demonstrated. It is also stated in Dr. Croxson's fifth report that in January 1988 Major Mafart had been discharged from the hospital and was living in a house within the hospital confines, being subject to weekly supervision by Professor Daly. Dr. Croxson also states in that same report that during his visit with Professor Mallinson on 25 January 1988 he verified that "Mafart has remained well since his last report of 18 January, with no major episodes of pain or abdominal distension". A final report by Dr. Croxson on 21 July 1988, after a 5-month period of observation, indicates "no change in Major Mafart's clinical condition since last examination. No major episodes of severe abdominal pain, abdominal distension and none requiring hospitalization or special investigations".

There are no medical reports of French origin questioning or contradicting these assertions of fact; this final report of Dr. Croxson, communicated to the French authorities, has also been presented as an Annex to the French Counter-Memorial.

85. It is against this background that Professor Daly's report declaring Major Mafart "unfit for overseas service" must be examined. In support of his conclusion Professor Daly states that in the case of Major Mafart "close supervision is necessary" and consequently "he must remain in mainland France inasmuch as this follow up can be carried out only in a modern and well-equipped Hospital Center". Professor Daly invokes two grounds in support of his assertion that "close supervision is necessary": this must be done, according to him, with the object of 1) "intercepting an even more acute crisis, which may require surgery" or 2) "planning the above-mentioned explorations".

86. The first ground, the need for surgery, had been discarded by all medical experts as an inappropriate answer to the two crises experienced by Major Mafart, both in Hao, in July 1987 and again in December 1987. Dr. Croxson and Professor Mallinson concurred in the view that the only indication for "surgery would be an acute and irreversible obstruction", adding that "there have been no signs to suggest complete obstruction".

This assertion was not questioned or contradicted by other medical reports.

Since such an intervention may be performed in any normally equipped surgical center, there is no medical justification to retain Major Mafart in metropolitan France for the remote and unlikely event that he would suffer, for the first time in his life, an acute and irreversible obstruction.

87. The second medical reason invoked in Professor Daly's report was the need to "plan the above-mentioned explorations". This sentence refers to the fact that he indicates in his final report that "a number of additional investigations could be contemplated", adding that "these points have been discussed with Professor Mallinson and Dr. Croxson". But the latter pointed out in their report that while they agreed with a "barium-enema X-ray" (which obviously may be performed in any hospital), they had observed that "we do not feel that mesenteric angiography nor an ERCP are essential investigations in (Mafart's) management; if they were they could have been carried out by now". This observation, not contested in any other medical report, is the conclusive answer to the second ground invoked by Professor Daly.

In consequence, there was no medical justification to retain Major Mafart in metropolitan France instead of returning him to Hao in compliance with the First Agreement.

88. The other ground leading Professor Daly to declare Major Mafart "unfit to serve overseas for an undetermined period" was of a legal and not of a medical character: the need to apply the "rules of fitness governing French military personnel".

There is no reason to doubt that Professor Daly in his report and the French authorities in refusing on this ground the return of Major Mafart to Hao were applying the French norms on the subject of physical aptitude for service overseas and in general the French military regulations and statutes.

But compliance with the First Agreement was not dependent on the fact that Major Mafart should have been able to render active service in the military base at the island of Hao. Under the special obligations which the First Agreement imposed on him he was not required to render any military service at all. All that was required from him was to be re-transferred to Hao and remain there until the expiration of the term established in the First Agreement, without any contact with the press and other media. His transfer to Hao was not of a regular military character; it was not an assignment subject to the normal conditions or requirements of a French military posting. Lack of aptitude to serve actively in military service beyond the confines of metropolitan France does not imply lack of aptitude to be re-transferred to Hao and remain there for the required term. It has not been contended, nor even suggested, that the climate or the environment in Hao could affect adversely Major Mafart's health nor that the food available in the island could be the cause of the troubles to his health.

Both parties recognized that the return of Major Mafart to Hao depended mainly on his state of health. Thus, the French Ministry of Foreign Affairs in its note of 30 December 1987 to the New Zealand Embassy referring to France's respect for the 1986 Agreement had said that Major Mafart will return to Hao when his state of health allowed.

Consequently, there was no valid ground for Major Mafart continuing to remain in metropolitan France and the conclusion is unavoidable that this omission constitutes a material breach by the French Government of the First Agreement.

For the foregoing reasons the Tribunal:

— by a majority declares that the French Republic did not breach its obligations to New Zealand by removing Major Mafart from the island of Hao on 13 December 1987;

— declares that the French Republic committed a material and continuing breach of its obligation to New Zealand by failing to order the return of Major Mafart to the island of Hao as from 12 February 1988.

The Case of Captain Prieur

89. As to the situation of Captain Prieur, the French authorities advised the New Zealand Government, on 3 May 1988, that she was pregnant, adding that a medical report indicated that "this pregnancy should be treated with special care . . ." The advice added that "the medical facilities on Hao are not equipped to carry out the necessary medical examinations and to give Mrs. Prieur the care required by her condition".

90. The New Zealand authorities answered this communication on 4 May 1988, stating that "while New Zealand's consent is required in terms of the 1986 Agreement, this is not a case where, if the medical situation justifies it, consent would be unreasonably withheld". This communication added that the New Zealand Government "would like, on the basis of medical consultation, to determine the nature of any special treatment that Captain Prieur might need and the place where the necessary tests and ongoing treatment could be carried out if the facilities at Hao are not adequate". For this purpose "as a first step to coming to an agreement on this basis", the New Zealand authorities advised that they were "making arrangements for a New Zealand doctor with the requisite qualifications to fly on the first available flight to Papeete for onward flight to Hao by French military transport". The nominated doctor was Dr. Bernard Brenner, qualified in obstetrics and gynecology.

91. On 4 May 1988 the French authorities gave their "agreement for sending to Hao, as soon as possible, Doctor Bernard Brenner. The latter would first be taken to Papeete by airliner or by a New Zealand military aircraft, and from there he would be transported to Hao by a French military aircraft" (see para. 50).

However, industrial action by French airline pilots caused the postponement of these plans by one day, until 6 May 1988.

In the interim, on 5 May 1988, the New Zealand Ambassador in Paris was informed "by the Office of the Minister of Foreign Affairs" of a "new element", namely, that "Dominique Prieur's father, who is at the Begin Hospital for treatment of a cancer, is dying", and "his condition is considered critical by the doctors". The French authorities added that: "we believed that, for obvious reasons of a humanitarian nature, it was essential that Dominique Prieur be able to see her father before his death". They advised of several solutions that were conceivable (see para. 52).

92. It has been stated in paras. 53 to 56 above that:

The New Zealand Ambassador responded on 5 May that while awaiting the Prime Minister's decision, the solution of sending a New Zealand military aircraft was being studied;

The French authorities had indicated that the departure from Auckland could not be delayed beyond 7.30 a.m. Friday (New Zealand time), "the final deadline" after which France would be running the risk that Dominique Prieur would arrive in Paris too late to see her father alive;

The New Zealand authorities informed the French Government on 5 May 1988 at 9.30 p.m. that they were not ready to give their consent for the reason invoked but that the offer made because of Mrs. Prieur's pregnancy remained valid;

In their response on 5 May at 10.30 p.m., the French authorities stated that the French Government considered it impossible "for obvious humanitarian reasons" to keep Mrs. Prieur on Hao, and that the officer was therefore leaving immediately for Paris;

The French authorities confirmed on 6 May that Mrs. Prieur had left Hao by a special flight on Thursday at 11.30 p.m. (Paris time) and was expected in Paris at the end of the evening on that day (6 May).

93. The facts above, which are not disputed, show that New Zealand would not oppose Captain Prieur's departure, if that became necessary because of special care which might be required by her pregnancy. They also indicate that France and New Zealand agreed that Captain Prieur would be examined by Dr. Brenner, a New Zealand physician, before returning to Paris. Only because of the strike by the U.T.A. airline, the examination that was to take place in Hao on Thursday 5 May had to be postponed until Friday 6 May, since Dr. Brenner would be arriving in Papeete at 3.25 p.m. local time, via Air New Zealand. As the French Republic acknowledges in its Counter-Memorial, "It seemed that we were moving towards a satisfactory solution; New Zealand's approval of Mrs. Prieur's departure seemed probable". Reconciliation of respect for the Agreement of 9 July 1986 and the humanitarian concerns due to the particular circumstances of Mrs. Prieur's pregnancy thus seemed to have been achieved.

94. On the other hand, it appears that during the day of 5 May the French Government suddenly decided to present the New Zealand Government with the *fait accompli* of Captain Prieur's hasty return for a new reason, the health of Mrs. Prieur's father, who was seriously ill, hospitalized for cancer. Indisputably the health of Mrs. Prieur's father, who unfortunately would die on 16 May, and the concern for allowing Mrs. Prieur to visit her dying father constitute humanitarian reasons worthy of consideration by both Governments under the 1986 Agreement. But the events of 5 May (French date) prove that the French Republic did not make efforts in good faith to obtain New Zealand's consent. First of all, it must be remembered that France and New Zealand agreed that Captain Prieur would be examined in Hao on 6 May, which would allow her to return to France immediately. For France, in this case, it was only a question of gaining 24 or 36 hours. Of course, the

health of Mrs Prieur's father, who had been hospitalized for several months, could serve as grounds for such acute and sudden urgency; but, in this case, New Zealand would have had to be informed very precisely and completely, and not be presented with a decision that had already been made.

However, when the French Republic notified the Ambassador of New Zealand on 5 May at 11.00 a.m. (French time), the latter was merely told that Mrs. Dominique Prieur's father, hospitalized for cancer treatment, was dying. Of course, it was explained that the New Zealand Government could verify "the validity of this information" using a physician of its choice, but the telegram the French Minister of Foreign Affairs sent to the Embassy of France in Wellington on 5 May 1988 clearly stated that the decision to repatriate was final. And this singular announcement was addressed to New Zealand: "After all, New Zealand should understand that it would be incomprehensible for both French and New Zealand opinion for the New Zealand Government to stand in the way of allowing Mrs. Prieur to see her father on his death bed . . ." Thus, New Zealand was really not asked for its approval, as compliance with France's obligations required, even under extremely urgent circumstances; it was indeed demanded so firmly that it was bound to provoke a strong reaction from New Zealand.

95. The events that followed confirm that the French Government's decision had already been made and that it produced a foreseeable reaction. Indeed, at 9.30 p.m. (French time) on 5 May, the Ambassador of New Zealand in Paris announced that the New Zealand Government was not prepared to approve Mrs. Prieur's departure from Hao, for the reason given that very morning by the French Government. But the New Zealand Government explained that the "response and New Zealand's offer concerning the consequences of Mrs. Prieur's pregnancy were still valid". France, therefore, could have expected the procedure agreed upon by reason of Mrs. Prieur's pregnancy to be respected. Quite on the contrary, the French Government informed the New Zealand Ambassador at 10.30 p.m. that "the French officer is thus leaving immediately for Paris", and Mrs. Prieur actually left Hao on board a special flight at 11.30 p.m. (Paris time). It would be very unlikely that the special flight leaving Hao at 11.30 p.m. had not been planned and organized before 10.30 p.m., when the French decision was intimated, and even before 9.30 p.m., the time of New Zealand's response. Indeed, the totality of facts prove that, as of the morning of Thursday, 5 May, France had decided that Captain Prieur would leave Hao during the day, with or without New Zealand's approval.

96. Pondering the reasons for the haste of France, New Zealand contended that Captain Prieur's "removal took place against the backdrop of French presidential elections in which the Prime Minister was a candidate" and New Zealand pointed out that Captain Prieur's departure and arrival in Paris had been widely publicized in France. During the oral proceedings, New Zealand produced the text of an interview given on 27 September 1989 by the Prime Minister at the relevant time, explaining the following on the subject of the "Turenge couple": "I take

responsibility for the decision that was made, and could not imagine how these two officers could be abandoned after having obeyed the highest authorities of the State. Because it was the last days of my Government, I decided to bring Mrs. Prieur, who was pregnant, back from the Pacific atoll where she was stationed. Had I failed to do so, she would surely still be there today". New Zealand alleges that the French Government acted in this way for reasons quite different from the motive or pretext invoked. The Tribunal need not search for the French Government's motives, nor examine the hypotheses alleged by New Zealand. It only observes that, during the day of 5 May 1988, France did not seek New Zealand's approval in good faith for Captain Prieur's sudden departure; and accordingly, that the return of Captain Prieur, who left Hao on Thursday, 5 May at 11.30 p.m. (French time) and arrived in Paris on Friday, 6 May, thus constituted a violation of the obligations under the 1986 Agreement.

This violation seems even more regrettable because, as of 12 February 1988, France had been in a state of continuing violation of its obligations concerning Major Mafart, as stated above, which normally should have resulted in special care concerning compliance with the Agreement in Captain Prieur's case.

97. Moreover, France continued to fall short of its obligations by keeping Captain Prieur in Paris after the unfortunate death of her father on 16 May 1988. No medical report supports or demonstrates the original claim by French authorities to the effect that Captain Prieur's pregnancy required "particular care" and demonstrating that "the medical facilities on Hao are not equipped to carry out the necessary medical examinations and to give Mrs. Prieur the care required by her condition". There is no evidence either which demonstrates that the facilities in Papeete, originally suggested by the New Zealand Ambassador in Paris, were also inadequate: on the contrary, positive evidence has been presented by New Zealand as to their adequacy and sophistication.

The only medical report in the files concerning Captain Prieur's health is one from Dr. Croxson, dated 21 July 1988, which appears to discard the necessity of "particular care" for a pregnancy which is "proceeding uneventfully". This medical report adds that "no special arrangements for later pregnancy or delivery are planned, and I formed the opinion that management would be conducted on usual clinical criteria for a 39-year-old, fit, healthy woman in her first pregnancy".

So, the record provides no justification for the failure to return Captain Prieur to Hao some time after the death of her father.

98. The fact that "pregnancy in itself normally constitutes a contra-indication for overseas appointment" is not a valid explanation, because the return to Hao was not an assignment to service, or "an assignment" or military posting, for the reasons already indicated in the case of Major Mafart.

Likewise, the fact that Captain Prieur benefited, under French regulations, from "military leave which she had not taken previously", as well as "the maternity and nursing leaves established by French law" may be measures provided by French military laws or regulations.

But in this case, as in that of Major Mafart, French military laws or regulations do not constitute the limit of the obligations of France or of the consequential rights deriving for New Zealand from those obligations. The French rules "governing military discipline" are referred to in the fourth paragraph of the First Agreement not as the limit of New Zealand rights, but as the means of enforcing the stipulated conditions and ensuring that they "will be strictly complied with". Moreover, French military laws or regulations can never be invoked to justify the breach of a treaty. As the French Counter-Memorial properly stated: "the principle according to which the existence of a domestic regulation can never be an excuse for not complying with an international obligation is well established, and France subscribes to it completely".

99. In summary, the circumstances of distress, of extreme urgency and the humanitarian considerations invoked by France may have been circumstances excluding responsibility for the unilateral removal of Major Mafart without obtaining New Zealand's consent, but clearly 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 and a breach of a material character.

100. According to Articles 60 (3) (*b*) of the Vienna Convention on the Law of Treaties, a material breach of a treaty consists in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty".

The main object or purpose of the obligations assumed by France in Clauses 3 to 7 of the First Agreement was to ensure that the two agents, Major Mafart and Captain Prieur, were transferred to the island of Hao and remained there for a period of not less than three years, being subject to the special regime stipulated in the Exchange of Letters.

To achieve this object or purpose, the third and fourth paragraphs of the First Agreement provide that New Zealand will transfer the two agents to the French military authorities and these authorities will immediately transfer them to a French military facility in Hao. The prohibition "from leaving the island for any reason without the mutual consent of the two Governments" was the means to guarantee the fulfilment of the fundamental obligation assumed by France: to keep the agents in Hao and submit them to the special regime of isolation and restriction of contacts described in the fourth paragraph of the Exchange of Letters.

The facts show that the essential object or purpose of the First Agreement was not fulfilled, since the two agents left the island before the expiry of the three-year period.

This leads the Tribunal to conclude that there have been material breaches by France of its international obligations.

101. In its codification of the Law of State Responsibility, the International Law Commission has made another classification of the different types of breaches, taking into account the time factor as an

ingredient of the obligation. It is based on the determination of what is described as *tempus commissi delictu*, that is to say, the duration or continuation in time of the breach. Thus the Commission distinguishes the breach which does not extend in time, or instantaneous breach, defined in Article 24 of the draft, from the breach having a continuing character or extending in time. In the latter case, according to paragraph 1 of Article 25, "the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation".

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.

For the foregoing reasons the Tribunal:

— declares that the French Republic committed a material breach of its obligations to New Zealand by not endeavouring in good faith to obtain on 5 May 1988 New Zealand's consent to Captain Prieur's leaving the island of Hao;

— declares that as a consequence the French Republic committed a material breach of its obligations by removing Captain Prieur from the island of Hao on 5 and 6 May 1988;

— declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Captain Prieur to the island of Hao.

Duration of the Obligations

102. The Parties in this case are in complete disagreement with respect to the duration of the obligations assumed by France in paragraphs 3 to 7 of the First Agreement.

New Zealand contends that the obligation in the Exchange of Letters envisaged that in the normal course of events both agents would remain on Hao for a continuous period of three years. It points out that the First Agreement does not set an expiry date for the three-year term but rather describes the term as being for "a period of not less than three years". According to the New Zealand Government, this is clearly not a fixed period ending on a predetermined date. "The three-year period, in its context, clearly means the period of time to be spent by Major Mafart and Captain Prieur on Hao rather than a continuous or fixed time span. In the event of an interruption to the three-year period, the obligation assumed by France to ensure that either or both agents serve the balance of the three years would remain". Consequently, concludes the Government of New Zealand, "France is under an ongoing obligation to return Major Mafart and Captain Prieur to Hao to serve out the balance of their three-year confinement".

103. For its part, the French Government answers: "it is true that the 1986 Agreement does not fix the exact date of expiry of the specific regime that it sets up for the two agents. But neither does it fix the exact date that this regime will take effect". The reason, adds the French Government, is that in paragraph 7 of the First Agreement, it is provided that the undertakings relating to "the transfer of Major Mafart and Captain Prieur will be implemented not later than 25 July 1986". Consequently, adduces the French Government, "it is quite obviously the effective date of transfer to Hao which should constitute the *dies a quo* and thus determine the *dies ad quem* . . . The obligation assumed by France to post the two officers to Hao and to subject them there to a regime that restricts some of their freedoms was planned by the parties to last for three years beginning on the day the transfer to Hao became effective; this transfer having taken place on 22 July 1986, the three-year period allotted for the obligatory stay on Hao and its attendant obligations" expired three years after, that is to say, on 22 July 1989.

The French Government adds in the Reply that "a period is quite precisely a continuous and fixed interval of time" and "even if no exact expiry date was expressly stated in advance, this date necessarily follows from the determination of both a time period and the *dies a quo*". The French Government remarks, moreover, that there is no rule of international law extending the length of an obligation by reason of its breach.

104. It results from paragraph 7 of the Agreement of 9 July 1986 that both parties agreed that "the undertakings relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur" should be implemented as soon as possible. For that purpose, they fixed a completion date of not later than 25 July 1986. In respect of the two agents, the date of their delivery to French military authorities was 22 July 1986, thus bringing to an end their prison term in New Zealand. In order to avoid any gap or interval, paragraph 3 of the Agreement required that the two agents should be transferred to a French military base "immediately thereafter" their delivery. There is no question therefore that the special regimen stipulated and the undertakings assumed by the French Government began to operate uninterruptedly on 22 July 1986. It follows that such a special regime, intended to last for a minimum period of three years, expired on 22 July 1989. It would be contrary to the principles concerning treaty interpretation to reach a more extensive construction of the provisions which thus established a limited duration to the special undertakings assumed by France.

105. The characterization of the breach as one extending or continuing in time, in accordance with Article 25 of the draft on State Responsibility (see para. 101), confirms the previous conclusion concerning the duration of the relevant obligations by France under the First Agreement.

According to Article 25, "the time of commission of the breach" extends over the entire period during which the unlawful act continues to take place. France committed a continuous breach of its obligations,

without any interruption or suspension, during the whole period when the two agents remained in Paris in breach of the Agreement.

If the breach was a continuous one, as established in paragraph 101 above, that means that the violated obligation also had to be running continuously and without interruption. The "time of commission of the breach" constituted an uninterrupted period, which was not and could not be intermittent, divided into fractions or subject to intervals. Since it had begun on 22 July 1986, it had to end on 22 July 1989, at the expiry of the three years stipulated.

Thus, while France continues to be liable for the breaches which occurred before 22 July 1989, it cannot be said today that France is *now* in breach of its international obligations.

106. This does not mean that the French Government is exempt from responsibility on account of the previous breaches of its obligations, committed while these obligations were in force.

Article 70 (1) of the Vienna Convention on the Law of Treaties provides that:

> the termination of a treaty under its provisions . . .
>
> (*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its determination.

Referring to claims based on the previous infringement of a treaty which had since expired, Lord McNair stated:

> such claims acquire an existence independent of the treaty whose breach gave rise to them (*ICJ Reports*, 1952, p. 63).

In this case it is undisputed that the breaches of obligation incurred by the French Government discussed in paragraphs 88 and 101 of the Award—the failure to return Major Mafart and the removal of and failure to return Captain Prieur—were committed at a time when the obligations assumed in the First Agreement were still in force.

Consequently, the claims advanced by New Zealand have an existence independent of the expiration of the First Agreement and entitle New Zealand to obtain adequate relief for these breaches.

For the foregoing reasons the Tribunal:

— by a majority declares that the obligations of the French Republic requiring the stay of Major Mafart and Captain Prieur on the island of Hao ended on 22 July 1989.

Existence of Damage

107. Before examining the question of adequate relief for the aggrieved State, it is necessary to deal with a fundamental objection which has been raised by the French Government. The French Government opposes the New Zealand claim for relief on the ground that such a claim "completely ignores a central element, the damage", since it does not indicate that "the slightest damage has been suffered, even moral damage".

And, the French Republic adds, in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation.

108. New Zealand gives a two-fold answer to the French objection: first, it contends that it has been confirmed by the International Law Commission draft on State Responsibility that damage is not a precondition of liability or responsibility and second, that in any event, New Zealand has suffered in this case legal and moral damage. New Zealand asserts that it is not claiming material damage in the sense of physical or direct injury to persons or property resulting in an identifiable economic loss, but it is claiming legal damage by reason of having been victim of a violation of its treaty rights, even if there is no question of a material or pecuniary loss. Moreover, New Zealand claims moral damage since in this case there is not a purely technical breach of a treaty, but a breach causing deep offence to the honour, dignity and prestige of the State. New Zealand points out that the affront it suffered by the premature release of the two agents in breach of the treaty revived all the feelings of outrage which had resulted from the *Rainbow Warrior* incident.

109. In the oral proceedings, France made it clear that it had never said, as New Zealand had once maintained, that only material or economic damage is taken into consideration by international law. It added that there exist other damages, including moral and even legal damage. In light of this statement, New Zealand remarked in the hearings that France recognized in principle that there can be legal or moral damage, and that material loss is not the only form of damage in this case. Consequently, the doctrinal controversy between the parties over whether damage is or is not a precondition to responsibility became moot, so long as there was legal or moral damage in this case. Accordingly, both parties agree that

> in inter-State relations, the concept of damage does not possess an exclusive material or patrimonial character. 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 (cf. Soerensen, *Manual* cit., p. 534).

110. In the present case the Tribunal must find that the infringement of the special regime designed by the Secretary-General to reconcile the conflicting views of the Parties has provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage. This damage is 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.

The Appropriate Remedies

On the Request for an "Order" to the French Republic to Return its Agents to Hao

111. It follows from the foregoing findings that New Zealand is entitled to appropriate remedies. It claims certain declarations, to the effect that France has breached the First Agreement.

But New Zealand seeks as well an order for the return of the agents. It asserts in its Memorial, under the title "*Restitutio in integrum*" that "in the circumstances currently before the Tribunal, such a declaration is not, in itself, a true remedy. And the same is true for any order, or declaration of 'cessation' of the breach. For what is required to restore the position of full compliance with the First Agreement is *positive* action by France, i.e., positive steps to return Major Mafart and Captain Prieur to Hao and to keep them for the minimum of three years required by the First Agreement".

New Zealand therefore claims what it calls *restitutio*, in the form of an order for specific performance. In its formal request in its Memorial it seeks an order "that the French Republic shall promptly return Major Mafart and Captain Prieur to the island of Hao for the balance of their three-year periods in accordance with the conditions of the First Agreement". It does not at that stage use the label or title of *restitutio* or specific performance.

New Zealand points out that any other remedy would be inappropriate in this case. While France suggests that the appropriate remedy for non-material damage is satisfaction in the form of a declaration, New Zealand states that a mere declaration that France was in breach would be simply a statement of the obvious, and would not be satisfactory at all for New Zealand. A declaration of the respective rights and duties of the parties, contends New Zealand, would be an appropriate remedy in those cases where it is clear that once the judicial declaration is made, the Parties will conform their conduct to it, but it is not an appropriate remedy in this case because it is clear that France will not return the two agents to Hao unless specifically ordered to do so.

As to cessation, New Zealand contends that an order to that effect will suffice in those cases where the breach consists not of active conduct which is unlawful but of failing to act in a lawful manner; if one wants a party to desist from certain action cessation would be appropriate, but not if one wants a party to act positively.

Finally, as to reparation in the form of an indemnity, New Zealand contends that, at least in cases of treaty breach, what a claimant State seeks is not pecuniary compensation but actual, specific compliance or performance of the treaty, adding that if the party in breach were not expected to comply with the treaty, but need only pay monetary compensation for the breach, States would in effect be able to buy the privilege of breaching a treaty and the norm *pacta sunt servanda* would cease to have any real meaning. It is for this reason, concludes New Zealand, that where responsibility arises from a fundamental breach of treaty, the remedy of restitution, in the sense of an order for specific performance, is the most appropriate remedy.

112. For its part, the French Republic maintains that adequate reparation for moral or legal damage can only take the form of satisfaction, generally considered as the remedy *par excellence* in cases of non-material damage. Invoking the decisions of the International Court of Justice, France maintains that whenever the damage suffered amounts

to no more than a breach of the law, a declaration by the judge of this breach constitutes appropriate satisfaction.

France points out, moreover, that, rather than *restitutio*, what New Zealand is demanding is the cessation of the denounced behavior, i.e., "a remedy aimed at stopping the illegal behavior and consisting of a demand for execution of the obligation which has still not been carried out", according to the definition of the Special Rapporteur for the International Law Commission on State Responsibility, Professor Arangio-Ruiz.

But, France adds, only illegal behavior that continues up to the day when the problem is posed can be subject to cessation. For cessation to take place, there must be illegal behavior of a continuous nature which persists up to the day when the remedy is applied. Consequently, France adds, this form of reparation presupposes that France's obligation to maintain the agents on Hao is in effect on the day the Tribunal rules. A State cannot be condemned to carry out an obligation by which it is no longer bound: if the obligation is no longer in effect on the day the judge rules, this judge can state that, in the past, when the obligation was in effect, an illegal act was committed. But the judge cannot give a ruling of *restitutio in integrum* or of *specific performance* of the obligation because once the obligation is no longer in effect, the judge does not have the power to revive it.

The French Republic concludes that it would be impossible to force France to put a stop to a situation that has already ceased to exist; the order for execution in kind cannot be granted since there is no longer anything that can be executed in the future.

113. Recent studies on State responsibility undertaken by the Special Rapporteurs of the International Law Commission have led to an analysis in depth of the distinction between an order for the cessation of the unlawful act and *restitutio in integrum*. Professor Riphagen observed that in numerous cases "stopping the breach was involved, rather than reparation or *restitutio in integrum stricto sensu*" (Ybk. I.L.C. 1981, vol. II, Part I, doc. A/CN.4/342, and Add.1-4, para. 76).

The present Special Rapporteur, Professor Arangio-Ruiz, has proposed a distinction between the two remedies (ILC Report to the General Assembly for 1988, para. 538).

In the field of doctrine, Professor Dominicé has rightly observed that "the obligation to bring an illegal situation to an end is not reparation, but a return to the initial obligation", adding that "if one speaks, regarding this type of circumstance, of an obligation to give (in the general sense) *restitutio in integrum*, it does not actually mean reparation. What is required is a return, to the situation demanded by law, the cessation of illegal behavior. The victim State is not claiming a new right, created by the illegal act. It is demanding respect for its rights, as they were before the illegal act, and as they remain" (Observations on the rights of a State that is the victim of an internationally wrongful act. Droit international 2, Institut des Hautes Etudes Internationales, Paris, 1982, p. 1, 27).

The International Law Commission has accepted the insertion of an article separate from the provisions on reparation and dealing with the subject of cessation, thus endorsing the view of the Special Rapporteur Arangio-Ruiz that cessation has inherent properties of its own which distinguish it from reparation (ILC Report to the General Assembly for 1989, para. 259).

Special Rapporteur Arangio-Ruiz has also pointed out that the provision on cessation comprises all unlawful acts extending in time, regardless of whether the conduct of a State is an action or an omission (ILC Report to the General Assembly for 1988, para. 537).

This is right, since there may be cessation consisting in abstaining from certain actions—such as supporting the "contras"—or consisting in positive conduct, such as releasing the U.S. hostages in Teheran.

There is no room, therefore, for the distinction made by New Zealand on this point (see para. 111).

Undoubtedly the order requested by the New Zealand Government for the return of the two agents would really be an order for the cessation of the wrongful omission rather than a *restitutio in integrum*. This characterization of the New Zealand request is relevant to the Tribunal's decision, since in those cases where material restitution of an object is possible, the expiry of a treaty obligation may not be, by itself, an obstacle for ordering restitution.

114. The question which arises is whether an order for the cessation or discontinuance of the wrongful omission may be issued in the present circumstances.

The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, 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.

Obviously, a breach ceases to have a continuing character as soon as the violated rule ceases to be in force.

The recent jurisprudence of the International Court of Justice confirms that an order for the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued. (*The United States Diplomatic and Consular Staff in Teheran Case*, *I.C.J. Reports*, *1979*, p. 21, para. 38 to 41, and 1980, para. 95, No. 1; *The Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, *I.C.J. Reports*, *1984*, p. 187, and 1986, para. 292, p. 149.)

If, on the contrary, the violated primary obligation is no longer in force, naturally an order for the cessation or discontinuance of the wrongful conduct would serve no useful purpose and cannot be issued.

It would be not only unjustified, but above all illogical to issue the order requested by New Zealand, which is really an order for the cessation or discontinuance of a certain French conduct, rather than a *restitutio*. The reason is that this conduct, namely to keep the two agents in Paris, is no longer unlawful, since the international obligation expired on 22 July 1989. Today, France is no longer obliged to return the two agents to Hao and submit them to the special regime.

For the foregoing reasons the Tribunal:

— declares that it cannot accept the request of New Zealand for a declaration and an order that Major Mafart and Captain Prieur return to the island of Hao.

115. On the other hand, the French contention that satisfaction is the only appropriate remedy for non-material damage is also not justified in the circumstances of the present case.

The granting of a form of reparation other than satisfaction has been recognized and admitted in the relations between the parties by the Ruling of the Secretary-General of 9 July 1986, which has been accepted and implemented by both Parties to this case.

In the Memorandum presented to the Secretary-General, the New Zealand Government requested compensation for non-material damage, stating that it was "entitled to compensation for the violation of sovereignty and the affront and insult that that involved".

The French Government opposed this claim, contending that the compensation "could concern only the material damage suffered by New Zealand, the moral damage being compensated by the offer of apologies".

But the Secretary-General did not make any distinction, ruling instead that the French Government "should pay the sum of US dollars 7 million to the Government of New Zealand as *compensation for all the damage it has suffered*" (*Ibid.*, p. 32, emphasis added).

In the Rejoinder in this case, the French Government has admitted that "the Secretary-General granted New Zealand double reparation for moral wrong, i.e., both satisfaction, in the form of an official apology from France, and reparations in the form of damages and interest in the amount of 7 million dollars".

In compliance with the Ruling, both parties agreed in the second paragraph of the First Agreement that "the French Government will pay the sum of US 7 million to the Government of New Zealand as *compensation for all the damage which it has suffered*" (emphasis added).

It clearly results from these terms, as well as from the amount allowed, that the compensation constituted a reparation not just for material damage—such as the cost of the police investigation—but for non-material damage as well, regardless of material injury and independent therefrom. Both parties thus accepted the legitimacy of monetary compensation for non-material damages.

On Monetary Compensation

116. The Tribunal has found that France has committed serious breaches of its obligations to New Zealand. But it has also concluded that no order can be made to give effect to these obligations requiring the agents to return to the island of Hao, because these obligations have already expired. The Tribunal has accordingly considered whether it should add to the declarations it will be making an order for the payment by France of damages.

117. The Tribunal considers that it has power to make an award of monetary compensation for breach of the 1986 Agreement under its jurisdiction to decide "any dispute concerning the interpretation or the application" of the provisions of that Agreement (*Chorzow Factory Case (Jurisdiction)* PCIJ Pubs. Ser A. No. 9, p. 21).

118. The Tribunal next considers that an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving, as here, serious moral and legal damage, even though there is no material damage. As already indicated, the breaches are serious ones, involving major departures from solemn treaty obligations entered into in accordance with a binding ruling of the United Nations Secretary-General. It is true that such orders are unusual but one explanation of that is that these requests are relatively rare, for instance by France in the *Carthage* and *Manouba* cases (1913) (11 UNRIAA 449, 463), and by New Zealand in the 1986 process before the Secretary-General, accepted by France in the First Agreement. Moreover, such orders have been made, for instance in the last case.

119. New Zealand has not however requested the award of monetary compensation—even as a last resort should the Tribunal not make the declarations and orders for the return of the agents. The Tribunal can understand that position in terms of an assessment made by a State of its dignity and its sovereign rights. The fact that New Zealand has not sought an order for compensation also means that France has not addressed this quite distinct remedy in its written pleadings and oral arguments, or even had the opportunity to do so. Further, the Tribunal itself has not had the advantage of the argument of the two Parties on the issues mentioned in paragraphs 117 and 118, or on other relevant matters, such as the amount of damages.

120. For these reasons, and because of the issue mentioned in paragraphs 124 to 126 following, the Tribunal has decided not to make an order for monetary compensation.

On Declarations of Unlawfulness as Satisfaction

121. The Tribunal considers in turn satisfaction by way of declarations of breach. Furthermore, in light of the foregoing considerations, it will make a recommendation to the two Governments.

122. 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 obliga-

tion. 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. The whole matter is valuably and extensively discussed by Professor Arangio-Ruiz in his second report (1989) for the International Law Commission on State Responsibility (A/CN.4/425, paras. 7-19, and Ch. 3, paras. 106-145; see also Ch. 4, paras. 146-161, "Guarantees of Non-Repetition in the Wrongful Act"). He demonstrates wide support in the writing as well as in judicial and State practice of satisfaction as "the special remedy for injury to the State's dignity, honour and prestige" (para. 106).

Satisfaction in this sense can take and has taken various forms. Arangio-Ruiz mentions regrets, punishment of the responsible individuals, safeguards against repetition, the payment of symbolic or nominal damages or of compensation on a broader basis, and a decision of an international tribunal declaring the unlawfulness of the State's conduct (para. 107; see also his draft article 10, A/CN.4/425/Add.1, p. 25).

123. It is to the last of these forms of satisfaction for an international wrong that the Tribunal now turns. The Parties in the present case are agreed that in principle such a declaration of breach could be made—although France denied that it was in breach of its obligations and New Zealand sought as well a declaration and order of return. There is no doubt both that this power exists and that it is seen as a significant sanction. In two related cases brought by France against Italy for unlawful interference with French ships, the Permanent Court of Arbitration, having made an order for the payment of compensation for material loss, stated that:

> in the case in which a Power has failed to meet its obligations . . . to another Power, the statement of that fact, especially in an arbitral award, constitutes in itself a serious sanction (*Carthage* and *Manouba* cases (1913) 11 UNRIAA 449, 463).

Most notable is the judgment of the International Court of Justice in the *Corfu Channel (Merits) Case* (1949 ICJ Reports 4). The Court, having found that the British Navy had acted unlawfully, in the operative part of its decision:

> gives judgment that . . . the United Kingdom Government violated the sovereignty of the People's Republic of Albania, and that this declaration of the Court constitutes in itself appropriate satisfaction.

The Tribunal accordingly decides to make four declarations of material breach of its obligations by France and further decides in compliance with Article 8 of the Agreement of 14 February 1989 to make public the text of its Award.

For the foregoing reasons the Tribunal:

— declares that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand.

Recommendation

124. New Zealand and France have had close and continuing relations since the early days of European exploration of the South Pacific. The relationship has grown more intense and friendly since the beginning of constitutional government in New Zealand exactly 150 years ago. It includes the friendship of many of the citizens of the two countries forged in peace and war, particularly in the two world wars; and, notwithstanding difficulties of great distance, it extends to the full range of cultural, social, economic and political matters.

125. From the time of the acknowledgement by the French Republic of its responsibility for the unlawful attack on the *Rainbow Warrior*, senior members of the Governments of both countries have stressed their wish to re-establish and strengthen those good relations. A critical element in that process is a fair and final settlement of the issues arising from that incident and the later events with which this Award is concerned. So the 1986 Agreements, giving effect to the Secretary-General's Ruling, stress the wish of the two Governments to maintain the close and friendly relations traditionally existing between them. In the hearing before the Tribunal, the Agents of the two Governments emphasized the warming of the relationship, referring for instance to a relevant statement made by Mr. Rocard, the French Prime Minister, during his visit in August 1989 to the South Pacific. Moreover, Mr. Lange, now Attorney-General of New Zealand and from July 1984 to August 1989 Prime Minister, spoke before the Tribunal of the dynamic of reconciliation now operating between the two countries.

126. That important relationship, the nature of the decisions made by the Tribunal, and the earlier discussion of monetary compensation lead the Tribunal to make a recommendation. The recommendation, addressed to the two Governments, is intended to assist them in putting an end to the present unhappy affair.

127. Consequently, the Tribunal recommends to the Government of France and the Government of New Zealand that they set up a fund to promote close and friendly relations between the citizens of the two countries and recommends that the Government of France make an initial contribution equivalent to US Dollars 2 million to that fund.

128. The power of an arbitral tribunal to address recommendations to the parties to a dispute, in addition to the formal finding and obligatory decisions contained in the award, has been recognized in previous arbitral decisions. During the hearings, the New Zealand Attorney-General proposed that the Tribunal make some recommendations. The Agent for France has not challenged in any way the power of the Tribunal to make such recommendations in aid of the resolution of the dispute.

For the foregoing reasons the Tribunal:

— in light of the above decisions, recommends that the Governments of the French Republic and of New Zealand set up a fund to promote close and friendly relations between the citizens of the two countries,

and that the Government of the French Republic make an initial contribution equivalent to US Dollars 2 million to that fund.

VI. DECISION

For these reasons,

THE ARBITRAL TRIBUNAL

1) by a majority declares that the French Republic did not breach its obligation to New Zealand by removing Major Mafart from the island of Hao on 13 December 1987;

2) declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Major Mafart to the island of Hao as from 12 February 1988;

3) declares that the French Republic committed a material breach of its obligations to New Zealand by not endeavouring in good faith to obtain on 5 May 1988 New Zealand's consent to Captain Prieur's leaving the island of Hao;

4) declares that as a consequence the French Republic committed a material breach of its obligations to New Zealand by removing Captain Prieur from the island of Hao on 5 and 6 May 1988;

5) declares that the French Republic committed a material and continuing breach of its obligations to New Zealand by failing to order the return of Captain Prieur to the island of Hao;

6) by a majority declares that the obligations of the French Republic requiring the stay of Major Mafart and Captain Prieur on the island of Hao ended on 22 July 1989;

7) as a consequence declares that it cannot accept the requests of New Zealand for a declaration and an order that Major Mafart and Captain Prieur return to the island of Hao;

8) declares that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand;

9) in the light of the above decisions, recommends that the Governments of the French Republic and of New Zealand set up a fund to promote close and friendly relations between the citizens of the two countries, and that the Government of the French Republic make an initial contribution equivalent to $US 2 million to that fund.

DONE in English and in French in New York, on the 30 April, 1990.

Eduardo JIMÉNEZ DE ARÉCHAGA
President

Michael F. HOELLERING
Registrar

Arbitrator Sir Kenneth Keith appends a separate opinion to the Decision of the Arbitral Tribunal.

Separate opinion of Sir Kenneth Keith

1. As appears from paras. 2 to 5 and 7 to 9 of the Decision of the Tribunal, I agree with major parts of the Award. In particular I agree

— that France committed several serious breaches of the agreement it had entered into in 1986 in accordance with the binding ruling of the United Nations Secretary-General,

— that the Tribunal should declare its condemnation of those breaches in its Award which it also decides to make public, and

— that the parties should be recommended to establish a Fund, France making the first contribution equivalent to $US 2 million, to promote close and friendly relations between the citizens of the 2 countries.

2. To my regret and with great respect to my colleagues, I do however disagree with them on two matters—

— the lawfulness of the removal of Major Mafart from the island of Hao (paras. 80-88 of the Award), and

— the duration of the period the two agents were to stay on the island (paras. 102-106).

I have accordingly prepared this separate opinion giving my reasons for that disagreement.

The removal of Major Mafart

3. The Tribunal holds that France did not act in breach of its obligations in removing Major Mafart from Hao on 14 December 1987. Its reason in essence is that a serious risk to life justified the removal of Major Mafart although New Zealand had not consented. The argument is not based on the obligations established by the agreement itself. New Zealand has not breached its obligations under the agreement to consider in good faith the French request for consent. Indeed in para. 80 the majority say that neither government is to blame for the failure in respect of the verification of Major Mafart's health on Hao in the weekend in question. Rather the argument is founded on the law of state responsibility and in particular on distress as a reason precluding the apparent unlawfulness of the departure of Major Mafart without New Zealand's consent.

4. In the words of the test stated by the International Law Commission, the question is whether the relevant French authorities "had no other means, in a situation of extreme distress, of saving [Major Mafart's] life". The commentary to the draft article suggests that the test, while still very stringent, may be a more relaxed one: so it asks will those at risk "almost inevitably perish" unless the impugned action is taken? And it suggests the widening of the situation of distress beyond the protection of life to the protection of "the physical integrity of a person" (see para. 78 of the Award).

5. On my understanding, such an argument is available in law notwithstanding the apparently absolute language of the 1986 agreement on the basis that that agreement has not excluded the operation of the principle. So the apparently absolute rule found in treaty and customary

international law affirming sovereignty over national airspace is not seen as being breached by the entry of foreign aircraft in distress. Similarly I would agree with counsel for France on the lawfulness of the urgent removal of an agent to Papeete for necessary life-saving surgery there following a shark attack at Hao and allowing no time to get New Zealand's prior consent. All legal systems recognize such exceptions to the strict letter of the law.

6. The principle is established and broadly understood. How does it apply to the facts in this case? There are 2 elements—first the threat to the life or the physical integrity of Major Mafart, and second the action taken to deal with that threat. My disagreement with the majority relates to the second matter and specifically to the timing of that action. I agree that the state of Major Mafart's health as known to the French authorities (including Dr. Maurel) on 14 December 1987 required detailed medical investigations not available on Hao. This was confirmed on the very day of Major Mafart's return to Paris by Dr. Croxson, the physician nominated by the New Zealand Government. Indeed the indications are that had the relevant information been provided to the New Zealand authorities in a timely and adequate manner in advance of the departure they would very likely have consented to medical investigations outside Hao. Such consent would almost certainly have been accompanied by conditions, for instance about the course of the investigations and requiring return to Hao when the investigations were satisfactorily completed.

7. I need not however pursue those matters. As indicated, my particular concern is not with the medical situation and the need for medical tests, but with the timing of the French action taken in apparent breach of the 1986 agreement. The particular medical condition had its origins in surgery 22 years earlier. In July of 1987 Major Mafart was in hospital on Hao. On 7 December 1987 the commander of the base there advised the Minister of Defence in Paris that Major Mafart required tests and treatment which could not be provided there. On 9 December 1987 the Minister dispatched a medical team to Hao. The French authorities did not advise the New Zealand authorities of any of these events occurring in 1987—although each of course could have led in due time to a request for consent to Major Mafart's departure. The three-monthly reports provided by France to New Zealand and the United Nations as required by the agreement also gave no hint of the July hospitalization. Those of 21 July and 21 October 1987 simply said that the earlier situation, involving among other things the officers being in their military positions, continued without change.

8. On Thursday 10 December 1987, Dr. Maurel, the senior Army doctor sent from Paris, reported to the Minister of Defence that his examination indicated the need to examine Major Mafart in a highly specialized environment; his state of health required urgent repatriation to a metropolitan hospital. In the absence of formal advice to the contrary from the Minister, he proposed that the evacuation should be made by the aircraft leaving on Sunday 13 December. On Friday 11 December the Minister of Defence advised his colleague the Minister of

Foreign Affairs of these events and the planned removal and asked that the latter "prendre l'attache" of the New Zealand Government within the framework of the procedure included in the 1986 agreement. It was only at this very late stage, at about 7 p.m. on that Friday (Paris time), that steps were taken to seek New Zealand's consent to the removal. By the time the request was presented to the New Zealand authorities in Wellington between 10 and 11 a.m. on the Saturday morning (Wellington time) a further 3 or 4 hours had passed and the aircraft was due to depart from Hao less than 2 days later.

9. Only 4 hours after receiving the French request, that is between 2 and 3 p.m. on the afternoon of Saturday 12 December, the New Zealand Government responded. It stated that a New Zealand medical assessment had to be made and it proposed that a New Zealand military doctor fly on a New Zealand military aircraft to Hao for that purpose. Later on the Saturday it sought clearances for that flight and it provided the relevant flight information. After the 8-hour flight from Auckland the plane would have been in Hao less than 30 hours after the initial request and fully 12 hours before the proposed departure of the flight from Hao.

10. It was about 16 hours later, on the Sunday morning (Wellington time), that France rejected New Zealand's proposal—at about the time that the New Zealand aircraft would have left. New Zealand made further proposals in the course of that day, the exact content of which is disputed. Whatever their precise detail, the French authorities at no stage sought clarification (for instance of their surprising understanding of one proposal that the doctor would have to return to New Zealand to make his report). Nor did they make any counter-proposals to enable a timely medical assessment to be made by New Zealand as a basis for the decision whether to consent or not to the departure. Indeed, France's first written communication since its request made on the Saturday morning was the note delivered in Wellington on the Monday announcing that "in this case of *force majeure*" the French authorities were forced to act without delay, and that Major Mafart "will leave Hao" on Sunday at 2 a.m. (Hao time). The aircraft had presumably already left when the note was delivered.

11. The long delay of about 7 days between the initial request from Hao and the arrival in Paris and the long arduous flight from Hao to Paris of about 20 hours both indicate that this was not a situation of extreme distress. France did not face an immediate medical emergency. It was not a case comparable to the hypothetical shark attack requiring urgent action and treatment (para. 5 above).

12. New Zealand was obliged to consider in good faith any request for consent made by France. It could not however perform that duty without adequate information and time. No one questions the propriety of its request to undertake a medical assessment—and indeed that was facilitated by the French authorities so far as an assessment in Paris was concerned. But the French authorities did not provide to New Zealand an appropriate opportunity to perform the duty and to make a decision before the proposed departure. So there is no indication in the record of

— why France failed to propose alternative arrangements for a New Zealand medical assessment in Hao or Papeete

— why France could not have delayed the flight from Hao for a short time to facilitate the visit

— why France could not have provided fuller medical information earlier—on a basis of confidence, of course.

13. France, in my view, has not established the need to act in apparent breach of its treaty obligations in the way and especially in the time that it allowed. There was no sufficient urgency. The case was not one of extreme distress threatening Major Mafart's physical integrity. France was in a position to facilitate a proper medical assessment by New Zealand in the performance by New Zealand of its good faith obligations under the agreement. It did not meet its obligations in that respect.

14. In the result, this difference within the Tribunal is of limited consequence since we all agree that France was as from 12 February 1988 in breach of its obligation to order the return of Major Mafart to Hao. Moreover, as indicated, I think it highly likely that a properly supported and presented request for consent would have been acceded to—on terms, of course.

Duration of the obligations

15. As the Award says, the parties are in sharp disagreement about the duration of the obligations, undertaken by France, in respect of the stay by the two agents on the island of Hao. In France's view, the obligations came to an end on 22 July 1989, the third anniversary of the transfer of the two agents to the island. That is so even if their removal from the island and their remaining in metropolitan France were unlawful. According to New Zealand, the agents were to spend a total period of 3 years (at least) on the island—whether the period was continuous or, exceptionally, aggregated from shorter, separate stays.

16. The majority of the Tribunal agrees with the French position. The consequence of the expiry of the obligations in July 1989 is that there can now be no order for the return of the agents to the island. I agree that that is the consequence of that date of expiry. As the Tribunal indicates in para. 114 of the Award, that is a sufficient and compelling reason for refusing to make the order for the return of the agents. Accordingly, I do not find it necessary to come to a conclusion on the issues discussed in para. 113—the characterization of the request either as *restitutio* or as cessation, and the differences between them. Could I simply say that I am not sure, for instance, about the validity of the distinction in theory or in practice. It is notable that the International Court in deciding that the respondent States must take positive steps or refrain from unlawful actions in the *Teheran* and *Nicaraguan* cases did not attach such labels (nor did the applicant states in their formal requests). I now turn to my disagreement with the majority's interpretation of the duration of the obligations.

17. We must of course begin with the 1986 agreement. Under its terms the agents

> will be transferred to a French military facility on the island of Hao *for a period of not less than three years.*
> seront transférés sur une installation militaire française de l'île de Hao, *pour une période minimale de 3 ans.* (emphasis added)

The agents were prohibited from leaving the island for any reason, except with the mutual consent of the two Governments.

18. The Vienna Convention on the Law of Treaties, the parties agree, provides an authoritative statement of the principles of interpretation of treaties. Article 31(1) reads

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

What is the ordinary meaning of the relevant terms? What does the context indicate? And the object and purpose of the agreement? Those questions involve, in the words of Max Huber, a process of *encerclement progressif.*

19. I begin with the *terms* of the agreement. The transfer to the island and the prohibition on departure involve of course an obligation to stay on the island. During that assignment on the island various additional obligations were imposed to ensure the agents' isolation. To return to the critical phrase, these various obligations relating to the stay on the island were *for*, *pour* a period of not less than 3 years. The agreement does *not* say that the agents were to be on the island only *during* a 3-year period, and as a result *for* a shorter period in total than 3 years. Counsel for France put the matter very clearly: one of France's obligations under paragraph 3 of the agreement was to transfer and to maintain the two officers on Hao for 3 years (''l'obligation de transférer et de maintenir pendant trois ans les deux officiers sur l'île de Hao'').

20. While the words ''at least'' ''minimale'' may not make any difference to the ordinary meaning, they certainly give that meaning greater emphasis. That emphasis underlines the importance of this element of the ruling and of the settlement. Moreover, those words, included in the agreement, are an addition to the ruling of the Secretary-General. They are indeed the only such change from the ruling. That one change must have at least that emphatic significance.

21. The *immediate context* provided by other parts of the agreement supports that ordinary meaning of its terms. The agreement places a specific terminal time limit on the obligations imposed on France of apology, and payment, and on the two Governments of transfer. But by contrast it gives no express date for the completion of the obligations relating to being on the island. It is, of course, a date which can be easily calculated since the relevant facts are readily known—either a continuous period of 3 years from the date of transfer, had the two stayed on Hao continuously, or an aggregated period of 3 years if, exceptionally, there was a break in the stay.

22. The *wider context* of the agreement includes, as well, the character of the regime imposed by it. That character is seen in part in its

origins as found in the ruling of the Secretary-General. He was obliged to make a ruling which was equitable and principled (il sera équitable et conforme aux principes pertinents applicables). The parties made frequent references to that ruling in support of their understanding of the meaning of the agreement.

23. At the time of the ruling, agreement, and transfer, the two agents had served less than a year of a 10-year prison term imposed by the Chief Justice of New Zealand following due process of law and pleas of guilty to very serious crimes known to all legal systems. They did not appeal against the sentences, as they were entitled to. They were not eligible to be released on parole until they had served at least 5 years. The French position was that the agents should be immediately released (la libération immédiate); that was, said France, implied by an equitable and principled approach; the agents had acted under orders; and France was willing to apologize and pay compensation to New Zealand (as well as to the private individuals who had suffered from the attack). It was essential to the New Zealand position that there should be no release to freedom, that any transfer should be to custody, and that there should be a means of verifying that. New Zealand could not countenance the release to freedom after a token sentence of persons convicted of serious crimes.

24. As the Governments agree, and the ruling and later agreement indicate, the Secretary-General could not and did not fully adopt the position of either of them—either in respect of the *character* or the *period* of the stay on the isolated island.

25. The *character* of the regime was special. It was neither the New Zealand penal system nor French military service. Rather it was an assignment to an isolated military installation, subject to significant limits on the freedom of the two agents, and especially on their freedom of movement from the island. It is indeed the substantial restrictions on movement which France invokes for its view that it would be impossible or excessively onerous for an order for return to be made, even if it was otherwise appropriate to make it. The weight of the restrictions is briefly reflected in the only comment made by either of the agents about the regime and available to the Tribunal. Captain Prieur told Mr. Adriaan Bos during his inspection visit to Hao on 28 March 1988 that she felt isolated (très isolée) on Hao and was not looking forward (elle appréhendait) to the remainder of her stay which was then due to continue until July 1989. This was so notwithstanding that her husband was living with her on the base and that, as she recalled, she had had visits from her mother and parents-in-law.

26. The *period* of that regime—the stay on the isolated island was to be lengthy, shorter than both the 10 years imposed by the High Court and the 5 year minimum parole period. The period of real constraint on freedom was still going to be significant—a 3-year period in addition to the year that had already been spent in custody in New Zealand before and after conviction. It was not going to be a release to freedom. And yet that is what in real terms the French interpretation of the period could involve since, following a short stay on Hao and an unlawful departure,

the process of attempting with diligence to reach a settlement through diplomatic channels and then, if that attempt were to fail, the setting up and operating of the arbitral process could exhaust all or most of a period expiring in July 1989. That indeed is what has happened in the event. Such an interpretation is not consistent with the *object* of placing a substantial limit on the liberty of the two agents.

27. The terms of the agreement, its context and its object all lead me to the view that the agreement required the agents to be on the island for the full period, whether continuous or aggregated, of 3 years. (It is perhaps unnecessary to make the point that that conclusion is subject to limits which could lawfully and properly be placed on that obligation in accordance with the law of treaties or the law of state responsibility as discussed in paras. 72-79 of the Award.)

28. There are several arguments to the contrary which require consideration. The first is that the extension of obligations beyond the initial 3-year period would result in heavier obligations being placed on the agents. They would be subject not only to isolation on the island for 3 years but also to the obligations relating to limited personal contacts and media silence for the additional period they have been in France. Those obligations would thereby extend to 4 1/2 and 5 years for the two agents.

29. There are two effective answers (at least) to that argument. The first is that, by their terms, the obligations of limited contact and media silence relate only to the time on the island. If France has undertaken or the two parties have agreed that those conditions also applies *off* the island that would be a *new* obligation, separate from the agreement.

30. This is clear from the references to the island in the relevant paragraphs. The third paragraph requires transfer *to the island* for 3 years. The fourth paragraph

(1) prohibits departure *from the island* without consent;

(2) requires isolation *during their assignment in Hao* from persons other than military or associated personnel and immediate family and friends; and

(3) prohibits contact with the press or other media.

It is true that the last prohibition is not expressly limited in a geographic way. But that limit clearly arises from the context.

31. And the limit appears as well from the ruling of the United Nations Secretary-General. That ruling can be used to confirm the meaning gathered from the ordinary meaning of the agreement in context and in the light of its purpose. The Secretary-General set out conditions relating to the two agents in 4 paragraphs—those which appear in paras. 3-6 of the agreement. The second paragraph set out the prohibition on departure, and on personal and media contact, and the first made only a general reference to transfer "to a French military facility on an isolated island outside of Europe". The Secretary-General continued:

> I have sought information on French military facilities outside Europe. On the basis of that information I believe that the transfer of Major Mafart and Captain Prieur *to the French military facility on the isolated island of Hao* in French Polynesia *would best facilitate the enforcement of the conditions* which I have laid down in [the four] paragraphs . . . (emphasis added).

In the Secretary-General's mind, the obligations were integrally tied to the isolated island. The conditions were to be met there. That also appears from the provision for a visit by an agreed third party *to the island*—to determine of course whether the agreement is being complied with *there*.

32. It is true that France, in response to New Zealand's proposal, undertook to apply the conditions relating to the isolation of Major Mafart when he was in Paris. But that undertaking was a special one to deal only with the period during which Major Mafart was in Paris —France in giving it stated that Major Mafart would return to Hao when his health allowed. And it included the conditions which expressly applied *only* on the island. That it was a special additional undertaking peculiar to the circumstances appears as well from the lack of any such arrangement between the two governments for Captain Prieur.

33. The second reason for rejecting the argument based on the "heaviness" of the obligations proceeds on the basis—which I reject—that the isolation obligations are capable of directly applying in metropolitan France. The reason for rejection is that those obligations of isolation which are additional to those arising from geography are in fact slight and are much lighter than the obligations of being on the island —obligations which at relevant times were being unlawfully evaded according to the ruling of the Tribunal. The slightness of the obligations, especially those concerning the press, is evidenced by a valuable note, *Les règles de la discipline militaire*, provided to the Tribunal by the Agent of France. The 1972 law on the statut général des militaires places restrictions on the members of the armed forces compared with other citizens. The exceptions concern

—the expression of philosophical, religious and political beliefs in the context of the service;

—the obligation of discretion (réserve) in all circumstances;

—the requirements of military secrets.

34. It was of course by reference to such law that the obligations under the 1986 agreement were to be enforced. In the light of those obligations and of the general position of senior military officers, the statement by the French Agent that Colonel Mafart *since* July 1989 "*still* leads a life of total discretion" comes as no surprise at all. The French argument gives quite disproportionate weight to the obligations additional to those arising directly from being on Hao (assuming, that is, that the obligations were capable of direct application off the island) as well as from the officers' military status.

35. France also argues that the New Zealand position produces a result which is "manifestly absurd or unreasonable" (using the words of article 32 of the Vienna Convention on the Law of Treaties—that provision of course not being directly applicable here since France does not

use it to invoke supplementary interpretative material which assists its view). That absurdity or unreasonableness, for France, consists of the prolongation of the obligation of being on Hao beyond 3 years. But in the normal case the obligation would not so extend; if it did so extend, it would be for special reasons based on the consent of the two Governments or on *force majeure* or distress. It would be exceptional, and the prolongation would in any event accord with the ordinary meaning of the provisions in context and in the light of their purpose of imposing a real and not merely a token restraint on the liberty of the two officers.

36. France next argues that a *tempus continuum* is inherent in a contractual obligation of a given time period and that the same holds true for an international treaty obligation. The one case which it cites, *Alsing Trading Company Ltd* v. *Greece* (1954) 23 Int. L. Reps 633, it is true, involved a contract for a period of 28 years, but the contract *expressly* stated both its beginning and its expiry dates; accordingly it is of no general assistance in the present case. Moreover, general words have to be given meaning in their particular contexts and by reference to their purpose. And the law, including treaty practice, knows many periods of residence which can each be made up of shorter periods where appropriate to the context and purpose—consider treaties and legislation relating to taxation, benefits, citizenship, and electoral rights.

37. The Tribunal perhaps suggests a further argument for the view that the obligations ended in July 1989 in its statement that "the principles of treaty interpretation" are opposed to a more extensive construction of special undertakings (para. 104). I have of course invoked "the general rule of interpretation" stated in the Vienna Convention. The International Law Commission in elaborating that general rule did not incorporate any "principles". So it thought that it was not necessary to include in the general rule a separate statement of the principle of effective interpretation. It recalled that the International Court had insisted that there are definite limits to the use which may be made of that principle. Rather the Commission, like the Court, emphasized the ordinary meaning of the words in their context and in the light of the agreement's purpose (para. 6 of the commentary to draft articles 27 and 28, *ILC Yearbook 1966*, Vol. II, p. 219).

38. I have already indicated that those matters lead me to the conclusion that the agreement placed on France an obligation to ensure that the two agents spend three years on Hao.

Kenneth KEITH

Annex 113

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

IMMUNITÉS JURIDICTIONNELLES DE L'ÉTAT

(ALLEMAGNE c. ITALIE ; GRÈCE (intervenant))

ARRÊT DU 3 FÉVRIER 2012

2012

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

JURISDICTIONAL IMMUNITIES OF THE STATE

(GERMANY *v.* ITALY : GREECE intervening)

JUDGMENT OF 3 FEBRUARY 2012

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JUDGMENT

Present: *President* OWADA; *Vice-President* TOMKA; *Judges* KOROMA, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE; *Judge* ad hoc GAJA; *Registrar* COUVREUR.

In the case concerning jurisdictional immunities of the State,

between

the Federal Republic of Germany,

represented by

H.E. Ms Susanne Wasum-Rainer, Ambassador, Director-General for Legal Affairs and Legal Adviser, Federal Foreign Office,
H.E. Mr. Heinz-Peter Behr, Ambassador of the Federal Republic of Germany to the Kingdom of the Netherlands,
Mr. Christian Tomuschat, former Member and Chairman of the International Law Commission, Professor emeritus of Public International Law at the Humboldt University of Berlin,

as Agents;

Mr. Andrea Gattini, Professor of Public International Law at the University of Padua,
Mr. Robert Kolb, Professor of Public International Law at the University of Geneva,

as Counsel and Advocates;

Mr. Guido Hildner, Head of the Public International Law Division, Federal Foreign Office,
Mr. Götz Schmidt-Bremme, Head of the International Civil, Trade and Tax Law Division, Federal Foreign Office,
Mr. Felix Neumann, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,
Mr. Gregor Schotten, Federal Foreign Office,
Mr. Klaus Keller, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,
Ms Susanne Achilles, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,
Ms Donate Arz von Straussenburg, Embassy of the Federal Republic of Germany in the Kingdom of the Netherlands,

as Advisers;

Ms Fiona Kaltenborn,

as Assistant,

and

the Italian Republic,

represented by

H.E. Mr. Paolo Pucci di Benisichi, Ambassador and State Counsellor,

as Agent;

Mr. Giacomo Aiello, State Advocate,
H.E. Mr. Franco Giordano, Ambassador of the Italian Republic to the Kingdom of the Netherlands,

as Co-Agents;

Mr. Luigi Condorelli, Professor of International Law, University of Florence,

Mr. Pierre-Marie Dupuy, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, and University of Paris II (Panthéon-Assas),
Mr. Paolo Palchetti, Associate Professor of International Law, University of Macerata,
Mr. Salvatore Zappalà, Professor of International Law, University of Catania, Legal Adviser, Permanent Mission of Italy to the United Nations,

as Counsel and Advocates;

Mr. Giorgio Marrapodi, Minister Plenipotentiary, Head of the Service for Legal Affairs, Ministry of Foreign Affairs,
Mr. Guido Cerboni, Minister Plenipotentiary, Co-ordinator for the countries of Central and Western Europe, Directorate-General for the European Union, Ministry of Foreign Affairs,
Mr. Roberto Bellelli, Legal Adviser, Embassy of Italy in the Kingdom of the Netherlands,
Ms Sarah Negro, First Secretary, Embassy of Italy in the Kingdom of the Netherlands,
Mr. Mel Marquis, Professor of Law, European University Institute, Florence,
Ms Francesca De Vittor, International Law Researcher, University of Macerata,

as Advisers,

with, as State permitted to intervene in the case,

the Hellenic Republic,

represented by

Mr. Stelios Perrakis, Professor of International and European Institutions, Panteion University of Athens,

as Agent;

H.E. Mr. Ioannis Economides, Ambassador of the Hellenic Republic to the Kingdom of the Netherlands,

as Deputy-Agent;

Mr. Antonis Bredimas, Professor of International Law, National and Kapodistrian University of Athens,

as Counsel and Advocate;

Ms Maria-Daniella Marouda, Lecturer in International Law, Panteion University of Athens,

as Counsel,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 23 December 2008, the Federal Republic of Germany (hereinafter "Germany") filed in the Registry of the Court an Application instituting proceedings against the Italian Republic (hereinafter "Italy") in respect of a dispute originating in "violations of obligations under international law" allegedly committed by Italy through its judicial practice "in that it has failed to respect the jurisdictional immunity which . . . Germany enjoys under international law".

As a basis for the jurisdiction of the Court, Germany, in its Application, invoked Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957.

2. Under Article 40, paragraph 2, of the Statute, the Registrar immediately communicated the Application to the Government of Italy; and, pursuant to paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of Italian nationality, Italy exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Giorgio Gaja.

4. By an Order of 29 April 2009, the Court fixed 23 June 2009 as the time-limit for the filing of the Memorial of Germany and 23 December 2009 as the time-limit for the filing of the Counter-Memorial of Italy; those pleadings were duly filed within the time-limits so prescribed. The Counter-Memorial of Italy included a counter-claim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich".

5. By an Order of 6 July 2010, the Court decided that the counter-claim presented by Italy was inadmissible as such under Article 80, paragraph 1, of the Rules of Court. By the same Order, the Court authorized Germany to submit a Reply and Italy to submit a Rejoinder, and fixed 14 October 2010 and 14 January 2011 respectively as the time-limits for the filing of those pleadings; those pleadings were duly filed within the time-limits so prescribed.

6. On 13 January 2011, the Hellenic Republic (hereinafter "Greece") filed in the Registry an Application for permission to intervene in the case pursuant to Article 62 of the Statute. In its Application, Greece indicated that it "[did] not seek to become a party to the case".

7. In accordance with Article 83, paragraph 1, of the Rules of Court, the Registrar, by letters dated 13 January 2011, transmitted certified copies of the Application for permission to intervene to the Government of Germany and the Government of Italy, which were informed that the Court had fixed 1 April 2011 as the time-limit for the submission of their written observations on that Application. The Registrar also transmitted, under paragraph 2 of the same Article, a copy of the Application to the Secretary-General of the United Nations.

8. Germany and Italy each submitted written observations on Greece's Application for permission to intervene within the time-limit thus fixed. The

Registry transmitted to each Party a copy of the other's observations, and copies of the observations of both Parties to Greece.

9. In light of Article 84, paragraph 2, of the Rules of Court, and taking into account the fact that neither Party filed an objection, the Court decided that it was not necessary to hold hearings on the question whether Greece's Application for permission to intervene should be granted. The Court nevertheless decided that Greece should be given an opportunity to comment on the observations of the Parties and that the latter should be allowed to submit additional written observations on the question. The Court fixed 6 May 2011 as the time-limit for the submission by Greece of its own written observations on those of the Parties, and 6 June 2011 as the time-limit for the submission by the Parties of additional observations on Greece's written observations. The observations of Greece and the additional observations of the Parties were submitted within the time-limits thus fixed. The Registry duly transmitted to the Parties a copy of the observations of Greece; it transmitted to each of the Parties a copy of the other's additional observations and to Greece copies of the additional observations of both Parties.

10. By an Order of 4 July 2011, the Court authorized Greece to intervene in the case as a non-party, in so far as this intervention was limited to the decisions of Greek courts which were declared by Italian courts as enforceable in Italy. The Court further fixed the following time-limits for the filing of the written statement and the written observations referred to in Article 85, paragraph 1, of the Rules of Court: 5 August 2011 for the written statement of Greece and 5 September 2011 for the written observations of Germany and Italy on that statement.

11. The written statement of Greece and the written observations of Germany were duly filed within the time-limits so fixed. By a letter dated 1 September 2011, the Agent of Italy indicated that the Italian Republic would not be presenting observations on the written statement of Greece at that stage of the proceedings, but reserved "its position and right to address certain points raised in the written statement, as necessary, in the course of the oral proceedings". The Registry duly transmitted to the Parties a copy of the written statement of Greece; it transmitted to Italy and Greece a copy of the written observations of Germany.

12. Under Article 53, paragraph 2, of its 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. After consulting the Parties and Greece, the Court decided that the same should apply to the written statement of the intervening State and the written observations of Germany on that statement.

13. Public hearings were held from 12 to 16 September 2011, at which the Court heard the oral arguments and replies of:

For Germany: Ms Susanne Wasum-Rainer,
Mr. Christian Tomuschat,
Mr. Andrea Gattini,
Mr. Robert Kolb.

For Italy: Mr. Giacomo Aiello,
Mr. Luigi Condorelli,
Mr. Salvatore Zappalà,
Mr. Paolo Palchetti,
Mr. Pierre-Marie Dupuy.

For Greece: Mr. Stelios Perrakis,
Mr. Antonis Bredimas.

14. At the hearings, questions were put by Members of the Court to the Parties and to Greece, as intervening State, to which replies were given in writing. The Parties submitted written comments on those written replies.

*

15. In its Application, Germany made the following requests:

"Germany prays the Court to adjudge and declare that the Italian Republic:

(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;
(2) by taking measures of constraint against 'Villa Vigoni', German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that

(4) the Italian Republic's international responsibility is engaged;
(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable;
(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above."

16. In the course of the written proceedings the following submissions were presented by the Parties:

On behalf of the Government of Germany,

in the Memorial and in the Reply:

"Germany prays the Court to adjudge and declare that the Italian Republic:

(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945, to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against 'Villa Vigoni', German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that

(4) the Italian Republic's international responsibility is engaged;
(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable;
(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above."

On behalf of the Government of Italy,

in the Counter-Memorial and in the Rejoinder:

"On the basis of the facts and arguments set out [in Italy's Counter-Memorial and Rejoinder], and reserving its right to supplement or amend these Submissions, Italy respectfully requests that the Court adjudge and declare that all the claims of Germany are rejected."

17. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Germany,

"Germany respectfully requests the Court to adjudge and declare that the Italian Republic:

(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II between September 1943 and May 1945 to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against 'Villa Vigoni', German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany respectfully requests the Court to adjudge and declare that:

(4) the Italian Republic's international responsibility is engaged;
(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable; and
(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above."

On behalf of the Government of Italy,

"[F]or the reasons given in [its] written and oral pleadings, [Italy requests] that the Court adjudge and hold the claims of the Applicant to be unfounded. This request is subject to the qualification that . . . Italy has no objection to any decision by the Court obliging Italy to ensure that the mortgage on Villa Vigoni inscribed at the land registry is cancelled."

*

18. At the end of the written statement submitted by it in accordance with Article 85, paragraph 1, of the Rules of Court, Greece stated *inter alia*

"that the effect of the judgment that the ICJ will hand down in this case concerning the jurisdictional immunity of the State will be of major importance to the Italian legal order and certainly to the Greek legal order.

. . . . . .

Further, an ICJ decision on the effects of the principle of jurisdictional immunity of States when faced with a *jus cogens* rule of international law — such as the prohibition on violation of fundamental rules of humanitarian law — will guide the Greek courts in this regard. It will thus have a significant effect on pending and potential lawsuits brought by individuals before those courts."

19. At the end of the oral observations submitted by it with respect to the subject-matter of the intervention in accordance with Article 85, paragraph 3, of the Rules of Court, Greece stated *inter alia*:

"A decision of the International Court of Justice on the effects of the principle of jurisdictional immunity of States when faced with a *jus cogens* rule of international law — such as the prohibition on violation of fundamental rules of humanitarian law — will guide the Greek courts . . . It will thus have a significant effect on pending and potential lawsuits brought by individuals before those courts.

. . . . . .

The Greek Government considers that the effect of the judgment that [the] Court will hand down in this case concerning jurisdictional immunity will be of major importance, primarily to the Italian legal order and certainly to the Greek legal order."

* * *

I. Historical and Factual Background

20. The Court finds it useful at the outset to describe briefly the historical and factual background of the case which is largely uncontested between the Parties.

21. In June 1940, Italy entered the Second World War as an ally of the German Reich. In September 1943, following the removal of Mussolini from power, Italy surrendered to the Allies and, the following month, declared war on Germany. German forces, however, occupied much of Italian territory and, between October 1943 and the end of the War, perpetrated many atrocities against the population of that territory, including massacres of civilians and the deportation of large numbers of civilians for use as forced labour. In addition, German forces took prisoner, both inside Italy and elsewhere in Europe, several hundred thousand members of the Italian armed forces. Most of these prisoners (hereinafter the "Italian military internees") were denied the status of prisoner of war and deported to Germany and German-occupied territories for use as forced labour.

1. The Peace Treaty of 1947

22. On 10 February 1947, in the aftermath of the Second World War, the Allied Powers concluded a Peace Treaty with Italy, regulating, in particular, the legal and economic consequences of the war with Italy. Article 77 of the Peace Treaty reads as follows:

> "1. From the coming into force of the present Treaty property in Germany of Italy and of Italian nationals shall no longer be treated as enemy property and all restrictions based on such treatment shall be removed.
>
> 2. Identifiable property of Italy and of Italian nationals removed by force or duress from Italian territory to Germany by German forces or authorities after September 3, 1943, shall be eligible for restitution.
>
> 3. The restoration and restitution of Italian property in Germany shall be effected in accordance with measures which will be determined by the Powers in occupation of Germany.
>
> 4. Without prejudice to these and to any other dispositions in favour of Italy and Italian nationals by the Powers occupying Germany, Italy waives on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all intergovernmental claims in respect of arrangements entered into in the

course of the war, and all claims for loss or damage arising during the war."

2. The Federal Compensation Law of 1953

23. In 1953, the Federal Republic of Germany adopted the Federal Compensation Law concerning Victims of National Socialist Persecution (*Bundesentschädigungsgesetz* (BEG)) in order to compensate certain categories of victims of Nazi persecution. Many claims by Italian nationals under the Federal Compensation Law were unsuccessful, either because the claimants were not considered victims of national Socialist persecution within the definition of the Federal Compensation Law, or because they had no domicile or permanent residence in Germany, as required by that Law. The Federal Compensation Law was amended in 1965 to cover claims by persons persecuted because of their nationality or their membership in a non-German ethnic group, while requiring that the persons in question had refugee status on 1 October 1953. Even after the Law was amended in 1965, many Italian claimants still did not qualify for compensation because they did not have refugee status on 1 October 1953. Because of the specific terms of the Federal Compensation Law as originally adopted and as amended in 1965, claims brought by victims having foreign nationality were generally dismissed by the German courts.

3. The 1961 Agreements

24. On 2 June 1961, two Agreements were concluded between the Federal Republic of Germany and Italy. The first Agreement, which entered into force on 16 September 1963, concerned the "settlement of certain property-related, economic and financial questions". Under Article 1 of that Agreement, Germany paid compensation to Italy for "outstanding questions of an economic nature". Article 2 of the Agreement provided as follows:

"(1) The Italian Government declares all outstanding claims on the part of the Italian Republic or Italian natural or legal persons against the Federal Republic of Germany or German natural or legal persons to be settled to the extent that they are based on rights and circumstances which arose during the period from 1 September 1939 to 8 May 1945.

(2) The Italian Government shall indemnify the Federal Republic of Germany and German natural or legal persons for any possible judicial proceedings or other legal action by Italian natural or legal persons in relation to the above-mentioned claims."

25. The second Agreement, which entered into force on 31 July 1963, concerned "compensation for Italian nationals subjected to National-Socialist measures of persecution". By virtue of this Agreement, the Federal Republic of Germany undertook to pay compensation to Italian nationals affected by those measures. Under Article 1 of that Agreement, Germany agreed to pay Italy forty million Deutsche marks

> "for the benefit of Italian nationals who, on grounds of their race, faith or ideology were subjected to National-Socialist measures of persecution and who, as a result of those persecution measures, suffered loss of liberty or damage to their health, and for the benefit of the dependents of those who died in consequence of such measures".

Article 3 of that Agreement provided as follows:

> "Without prejudice to any rights of Italian nationals based on German compensation legislation, the payment provided for in Article 1 shall constitute final settlement between the Federal Republic of Germany and the Italian Republic of all questions governed by the present Treaty."

4. Law Establishing the "Remembrance, Responsibility and Future" Foundation

26. On 2 August 2000, a federal law was adopted in Germany, establishing a "Remembrance, Responsibility and Future" Foundation (hereinafter the "2000 Federal Law") to make funds available to individuals who had been subjected to forced labour and "other injustices from the National Socialist period" (Sec. 2, para. 1). The Foundation did not provide money directly to eligible individuals under the 2000 Federal Law but instead to "partner organizations", including the International Organization for Migration in Geneva. Article 11 of the 2000 Federal Law placed certain limits on entitlement to compensation. One effect of this provision was to exclude from the right to compensation those who had had the status of prisoner of war, unless they had been detained in concentration camps or came within other specified categories. The reason given in the official commentary to this provision, which accompanied the draft law, was that prisoners of war "may, according to the rules of international law, be put to work by the detaining power" *[translation by the Registry]* (*Bundestagsdrucksache* 14/3206, 13 April 2000).

Thousands of former Italian military internees, who, as noted above, had been denied the status of prisoner of war by the German Reich (see paragraph 21), applied for compensation under the 2000 Federal Law. In 2001, the German authorities took the view that, under the rules of inter-

national law, the German Reich had not been able unilaterally to change the status of the Italian military internees from prisoners of war to that of civilian workers. Therefore, according to the German authorities, the Italian military internees had never lost their prisoner-of-war status, with the result that they were excluded from the benefits provided under the 2000 Federal Law. On this basis, an overwhelming majority of requests for compensation lodged by Italian military internees was rejected. Attempts by former Italian military internees to challenge that decision and seek redress in the German courts were unsuccessful. In a number of decisions, German courts ruled that the individuals in question were not entitled to compensation under the 2000 Federal Law because they had been prisoners of war. On 28 June 2004, a Chamber of the German Constitutional Court *(Bundesverfassungsgericht)* held that Article 11, paragraph 3, of the 2000 Federal Law, which excluded reparation for prisoners of war, did not violate the right to equality before the law guaranteed by the German Constitution, and that public international law did not establish an individual right to compensation for forced labour.

A group of former Italian military internees filed an application against Germany before the European Court of Human Rights on 20 December 2004. On 4 September 2007, a Chamber of that Court declared that the application was "incompatible *ratione materiae*" with the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms and its protocols and therefore was declared inadmissible (*Associazione Nazionale Reduci and 275 Others* v. *Germany*, decision of 4 September 2007, application No. 45563/04).

5. Proceedings before Italian Courts

A. Cases involving Italian nationals

27. On 23 September 1998, Mr. Luigi Ferrini, an Italian national who had been arrested in August 1944 and deported to Germany, where he was detained and forced to work in a munitions factory until the end of the war, instituted proceedings against the Federal Republic of Germany in the Court of Arezzo *(Tribunale di Arezzo)* in Italy. On 3 November 2000, the Court of Arezzo decided that Mr. Luigi Ferrini's claim was inadmissible because Germany, as a sovereign State, was protected by jurisdictional immunity. By a judgment of 16 November 2001, registered on 14 January 2002, the Court of Appeal of Florence *(Corte di Appello di Firenze)* dismissed the appeal of the claimant on the same grounds. On 11 March 2004, the Italian Court of Cassation *(Corte di Cassazione)* held that Italian courts had jurisdiction over the claims for compensation brought against Germany by Mr. Luigi Ferrini on the ground that immunity does not apply in circumstances in which the act complained of constitutes an international crime (*Ferrini* v. *Federal Republic of Germany*, decision No. 5044/2004 (*Rivista di diritto internazionale*, Vol. 87, 2004, p. 539; *International Law Reports (ILR)*, Vol. 128, p. 658)). The case was

then referred back to the Court of Arezzo, which held in a judgment dated 12 April 2007 that, although it had jurisdiction to entertain the case, the claim to reparation was time-barred. The judgment of the Court of Arezzo was reversed on appeal by the Court of Appeal of Florence, which held in a judgment dated 17 February 2011 that Germany should pay damages to Mr. Luigi Ferrini as well as his case-related legal costs incurred in the course of the judicial proceedings in Italy. In particular, the Court of Appeal of Florence held that jurisdictional immunity is not absolute and cannot be invoked by a State in the face of acts by that State which constitute crimes under international law.

28. Following the *Ferrini* judgment of the Italian Court of Cassation dated 11 March 2004, twelve claimants brought proceedings against Germany in the Court of Turin *(Tribunale di Torino)* on 13 April 2004 in the case concerning *Giovanni Mantelli and Others*. On 28 April 2004, Liberato Maietta filed a case against Germany before the Court of Sciacca *(Tribunale di Sciacca)*. In both cases, which relate to acts of deportation to, and forced labour in, Germany which took place between 1943 and 1945, an interlocutory appeal requesting a declaration of lack of jurisdiction ("regolamento preventivo di giurisdizione") was filed by Germany before the Italian Court of Cassation. By two orders of 29 May 2008 issued in the *Giovanni Mantelli and Others* and the *Liberato Maietta* cases (order No. 14201 (Mantelli), *Foro italiano*, Vol. 134, 2009, I, p. 1568; order No. 14209 (Maietta), *Rivista di diritto internazionale*, Vol. 91, 2008, p. 896), the Italian Court of Cassation confirmed that the Italian courts had jurisdiction over the claims against Germany. A number of similar claims against Germany are currently pending before Italian courts.

29. The Italian Court of Cassation also confirmed the reasoning of the *Ferrini* judgment in a different context in proceedings brought against Mr. Max Josef Milde, a member of the "Hermann Göring" division of the German armed forces, who was charged with participation in massacres committed on 29 June 1944 in Civitella (Val di Chiana), Cornia and San Pancrazio in Italy. The Military Court of La Spezia *(Tribunale Militare di La Spezia)* sentenced Mr. Milde *in absentia* to life imprisonment and ordered Mr. Milde and Germany, jointly and severally, to pay reparation to the successors in title of the victims of the massacre who appeared as civil parties in the proceedings (judgment of 10 October 2006 (registered on 2 February 2007)). Germany appealed to the Military Court of Appeals in Rome *(Corte Militare di Appello di Roma)* against that part of the decision, which condemned it. On 18 December 2007 the Military Court of Appeals dismissed the appeal. In a judgment of 21 October 2008 (registered on 13 January 2009), the Italian Court of Cassation rejected Germany's argument of lack of jurisdiction and confirmed its reasoning in the *Ferrini* judgment that in cases of crimes under international law, the jurisdictional immunity of States should be set aside (*Rivista di diritto internazionale*, Vol. 92, 2009, p. 618).

B. Cases involving Greek nationals

30. On 10 June 1944, during the German occupation of Greece, German armed forces committed a massacre in the Greek village of Distomo, involving many civilians. In 1995, relatives of the victims of the massacre who claimed compensation for loss of life and property commenced proceedings against Germany. The Greek Court of First Instance *(Protodikeio)* of Livadia rendered a judgment in default on 25 September 1997 (and read out in court on 30 October 1997) against Germany and awarded damages to the successors in title of the victims of the massacre. Germany's appeal of that judgment was dismissed by the Hellenic Supreme Court *(Areios Pagos)* on 4 May 2000 (*Prefecture of Voiotia* v. *Federal Republic of Germany*, case No. 11/2000 (*ILR*, Vol. 129, p. 513) (the *Distomo* case)). Article 923 of the Greek Code of Civil Procedure requires authorization from the Minister for Justice to enforce a judgment against a foreign State in Greece. That authorization was requested by the claimants in the *Distomo* case but was not granted. As a result, the judgments against Germany have remained unexecuted in Greece.

31. The claimants in the *Distomo* case brought proceedings against Greece and Germany before the European Court of Human Rights alleging that Germany and Greece had violated Article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of Protocol No. 1 to that Convention by refusing to comply with the decision of the Court of First Instance of Livadia dated 25 September 1997 (as to Germany) and failing to permit execution of that decision (as to Greece). In its decision of 12 December 2002, the European Court of Human Rights, referring to the rule of State immunity, held that the claimants' application was inadmissible (*Kalogeropoulou and Others* v. *Greece and Germany*, application No. 59021/00, decision of 12 December 2002, *ECHR Reports* 2002-X, p. 417; *ILR*, Vol. 129, p. 537).

32. The Greek claimants brought proceedings before the German courts in order to enforce in Germany the judgment rendered on 25 September 1997 by the Greek Court of First Instance of Livadia, as confirmed on 4 May 2000 by the Hellenic Supreme Court. In its judgment of 26 June 2003, the German Federal Supreme Court *(Bundesgerichtshof)* held that those Greek judicial decisions could not be recognized within the German legal order because they had been given in breach of Germany's entitlement to State immunity (*Greek Citizens* v. *Federal Republic of Germany*, case No. III ZR 245/98, *Neue Juristische Wochenschrift (NJW)*, 2003, p. 3488; *ILR*, Vol. 129, p. 556).

33. The Greek claimants then sought to enforce the judgments of the Greek courts in the *Distomo* case in Italy. The Court of Appeal of Florence held in a decision dated 2 May 2005 (registered on 5 May 2005) that the order contained in the judgment of the Hellenic Supreme Court,

imposing an obligation on Germany to reimburse the legal expenses for the judicial proceedings before that Court, was enforceable in Italy. In a decision dated 6 February 2007 (registered on 22 March 2007), the Court of Appeal of Florence rejected the objection raised by Germany against the decision of 2 May 2005 (*Foro italiano*, Vol. 133, 2008, I, p. 1308). The Italian Court of Cassation, in a judgment dated 6 May 2008 (registered on 29 May 2008), confirmed the ruling of the Court of Appeal of Florence (*Rivista di diritto internazionale*, Vol. 92, 2009, p. 594).

34. Concerning the question of reparations to be paid to Greek claimants by Germany, the Court of Appeal of Florence declared, by a decision dated 13 June 2006 (registered on 16 June 2006), that the judgment of the Court of First Instance of Livadia dated 25 September 1997 was enforceable in Italy. In a judgment dated 21 October 2008 (registered on 25 November 2008), the Court of Appeal of Florence rejected the objection by the German Government against the decision of 13 June 2006. The Italian Court of Cassation, in a judgment dated 12 January 2011 (registered on 20 May 2011), confirmed the ruling of the Court of Appeal of Florence.

35. On 7 June 2007, the Greek claimants, pursuant to the decision by the Court of Appeal of Florence of 13 June 2006, registered with the Como provincial office of the Italian Land Registry *(Agenzia del Territorio)* a legal charge *(ipoteca giudiziale)* over Villa Vigoni, a property of the German State near Lake Como. The State Legal Service for the District of Milan *(Avvocatura Distrettuale dello Stato di Milano)*, in a submission dated 6 June 2008 and made before the Court of Como *(Tribunale di Como)*, maintained that the charge should be cancelled. Under Decree-Law No. 63 of 28 April 2010, Law No. 98 of 23 June 2010 and Decree-Law No. 216 of 29 December 2011, the legal charge was suspended pending the decision of the International Court of Justice in the present case.

36. Following the institution of proceedings in the *Distomo* case in 1995, another case was brought against Germany by Greek nationals before Greek courts — referred to as the *Margellos* case — involving claims for compensation for acts committed by German forces in the Greek village of Lidoriki in 1944. In 2001, the Hellenic Supreme Court referred that case to the Special Supreme Court *(Anotato Eidiko Dikastirio)*, which, in accordance with Article 100 of the Constitution of Greece, has jurisdiction in relation to "the settlement of controversies regarding the determination of generally recognized rules of international law" *[translation by the Registry]*, requesting it to decide whether the rules on State immunity covered acts referred to in the *Margellos* case. By a decision of 17 September 2002, the Special Supreme Court found that, in the present state of development of international law, Germany was entitled to State immunity (*Margellos* v. *Federal Republic of Germany*, case No. 6/2002, *ILR*, Vol. 129, p. 525).

II. The Subject-Matter of the Dispute and the Jurisdiction of the Court

37. The submissions presented to the Court by Germany have remained unchanged throughout the proceedings (see paragraphs 15, 16 and 17 above).

Germany requests the Court, in substance, to find that Italy has failed to respect the jurisdictional immunity which Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts, seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War; that Italy has also violated Germany's immunity by taking measures of constraint against Villa Vigoni, German State property situated in Italian territory; and that it has further breached Germany's jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which gave rise to the claims brought before Italian courts. Consequently, the Applicant requests the Court to declare that Italy's international responsibility is engaged and to order the Respondent to take various steps by way of reparation.

38. Italy, for its part, requests the Court to adjudge Germany's claims to be unfounded and therefore to reject them, apart from the submission regarding the measures of constraint taken against Villa Vigoni, on which point the Respondent indicates to the Court that it would have no objection to the latter ordering it to bring the said measures to an end.

In its Counter-Memorial, Italy submitted a counter-claim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich"; this claim was dismissed by the Court's Order of 6 July 2010, on the grounds that it did not fall within the jurisdiction of the Court and was consequently inadmissible under Article 80, paragraph 1, of the Rules of Court (see paragraph 5 above).

*

39. The subject-matter of a dispute brought before the Court is delimited by the claims submitted to it by the parties. In the present case, since there is no longer any counter-claim before the Court and Italy has requested the Court to "adjudge Germany's claims to be unfounded", it is those claims that delimit the subject-matter of the dispute which the Court is called upon to settle. It is in respect of those claims that the Court must determine whether it has jurisdiction to entertain the case.

40. Italy has raised no objection of any kind regarding the jurisdiction of the Court or the admissibility of the Application.

Nevertheless, according to well-established jurisprudence, the Court "must . . . always be satisfied that it has jurisdiction, and must if necessary go into the matter *proprio motu*" (*Appeal relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13).

41. Germany's Application was filed on the basis of the jurisdiction conferred on the Court by Article 1 of the European Convention for the Peaceful Settlement of Disputes, under the terms of which:

> "The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:
>
> *(a)* the interpretation of a treaty;
> *(b)* any question of international law;
> *(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."

42. Article 27, subparagraph *(a)*, of the same Convention limits the scope of that instrument *ratione temporis* by stating that it shall not apply to "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute". The Convention entered into force as between Germany and Italy on 18 April 1961.

43. The claims submitted to the Court by Germany certainly relate to "international legal disputes" within the meaning of Article 1 as cited above, between two States which, as has just been said, were both parties to the Convention on the date when the Application was filed, and indeed continue to be so.

44. The clause in the above-mentioned Article 27 imposing a limitation *ratione temporis* is not applicable to Germany's claims: the dispute which those claims concern does not "relat[e] to facts or situations prior to the entry into force of th[e] Convention as between the parties to the dispute", i.e., prior to 18 April 1961. The "facts or situations" which have given rise to the dispute before the Court are constituted by Italian judicial decisions that denied Germany the jurisdictional immunity which it claimed, and by measures of constraint applied to property belonging to Germany. Those decisions and measures were adopted between 2004 and 2011, thus well after the European Convention for the Peaceful Settlement of Disputes entered into force as between the Parties. It is true that the subject-matter of the disputes to which the judicial proceedings in question relate is reparation for the injury caused by actions of the German armed forces in 1943-1945. Germany's complaint before the Court, however, is not about the treatment of that subject-matter in the judgments of the Italian courts; its complaint is solely that its immunities from jurisdiction and enforcement have been violated. Defined in such

terms, the dispute undoubtedly relates to "facts or situations" occurring entirely after the entry into force of the Convention as between the Parties. Italy has thus rightly not sought to argue that the dispute brought before the Court by Germany falls wholly or partly within the limitation *ratione temporis* under the above-mentioned Article 27. The Court has jurisdiction to deal with the dispute.

45. The Parties, who have not disagreed on the analysis set out above, have on the other hand debated the extent of the Court's jurisdiction in a quite different context, that of some of the arguments put forward by Italy in its defence and relating to the alleged non-performance by Germany of its obligation to make reparation to the Italian and Greek victims of the crimes committed by the German Reich in 1943-1945.

According to Italy, a link exists between the question of Germany's performance of its obligation to make reparation to the victims and that of the jurisdictional immunity which Germany might rely on before the foreign courts to which those victims apply, in the sense that a State which fails to perform its obligation to make reparation to the victims of grave violations of international humanitarian law, and which offers those victims no effective means of claiming the reparation to which they may be entitled, would be deprived of the right to invoke its jurisdictional immunity before the courts of the State of the victims' nationality.

46. Germany has contended that the Court could not rule on such an argument, on the basis that it concerned the question of reparation claims, which relate to facts prior to 18 April 1961. According to Germany, "facts occurring before the date of the entry into force of the European Convention for the Peaceful Settlement of Disputes as between Italy and Germany clearly lie outside the jurisdiction of the Court", and "reparation claims do not fall within the subject-matter of the present dispute and do not form part of the present proceedings". Germany relies in this respect on the Order whereby the Court dismissed Italy's counter-claim, which precisely asked the Court to find that Germany had violated its obligation of reparation owed to Italian victims of war crimes and crimes against humanity committed by the German Reich (see paragraph 38). Germany points out that this dismissal was based on the fact that the said counter-claim fell outside the jurisdiction of the Court, because of the clause imposing a limitation *ratione temporis* in the above-mentioned Article 27 of the European Convention for the Peaceful Settlement of Disputes, the question of reparation claims resulting directly from the acts committed in 1943-1945.

47. Italy has responded to this objection that, while the Order of 6 July 2010 certainly prevents it from pursuing its counter-claim in the present case, it does not on the other hand prevent it from using the arguments on which it based that counter-claim in its defence against Germany's

claims; that the question of the lack of appropriate reparation is, in its view, crucial for resolving the dispute over immunity; and that the Court's jurisdiction to take cognizance of it incidentally is thus indisputable.

48. The Court notes that, since the dismissal of Italy's counter-claim, it no longer has before it any submissions asking it to rule on the question of whether Germany has a duty of reparation towards the Italian victims of the crimes committed by the German Reich and whether it has complied with that obligation in respect of all those victims, or only some of them. The Court is therefore not called upon to rule on those questions.

49. However, in support of its submission that it has not violated Germany's jurisdictional immunity, Italy contends that Germany stands deprived of the right to invoke that immunity in Italian courts before which civil actions have been brought by some of the victims, because of the fact that it has not fully complied with its duty of reparation.

50. The Court must determine whether, as Italy maintains, the failure of a State to perform completely a duty of reparation which it allegedly bears is capable of having an effect, in law, on the existence and scope of that State's jurisdictional immunity before foreign courts. This question is one of law on which the Court must rule in order to determine the customary international law applicable in respect of State immunity for the purposes of the present case.

Should the preceding question be answered in the affirmative, the second question would be whether, in the specific circumstances of the case, taking account in particular of Germany's conduct on the issue of reparation, the Italian courts had sufficient grounds for setting aside Germany's immunity. It is not necessary for the Court to satisfy itself that it has jurisdiction to respond to this second question until it has responded to the first.

The Court considers that, at this stage, no other question arises with regard to the existence or scope of its jurisdiction.

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51. The Court will first address the issues raised by Germany's first submission, namely whether, by exercising jurisdiction over Germany with regard to the claims brought before them by the various Italian claimants, the Italian courts acted in breach of Italy's obligation to accord jurisdictional immunity to Germany. It will then turn, in Section IV, to the measures of constraint adopted in respect of Villa Vigoni and, in Section V, to the decisions of the Italian courts declaring enforceable in Italy the judgments of the Greek courts.

III. Alleged Violation of Germany's Jurisdictional Immunity in the Proceedings Brought by the Italian Claimants

1. The Issues before the Court

52. The Court begins by observing that the proceedings in the Italian courts have their origins in acts perpetrated by German armed forces and other organs of the German Reich. Germany has fully acknowledged the "untold suffering inflicted on Italian men and women in particular during massacres, and on former Italian military internees" (Joint Declaration of Germany and Italy, Trieste, 18 November 2008), accepts that these acts were unlawful and stated before this Court that it "is fully aware of [its] responsibility in this regard". The Court considers that the acts in question can only be described as displaying a complete disregard for the "elementary considerations of humanity" (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 112). One category of cases involved the large-scale killing of civilians in occupied territory as part of a policy of reprisals, exemplified by the massacres committed on 29 June 1944 in Civitella (Val di Chiana), Cornia and San Pancrazio by members of the "Hermann Göring" division of the German armed forces involving the killing of 203 civilians taken as hostages after resistance fighters had killed four German soldiers a few days earlier (*Max Josef Milde* case, Military Court of La Spezia, judgment of 10 October 2006 (registered on 2 February 2007)). Another category involved members of the civilian population who, like Mr. Luigi Ferrini, were deported from Italy to what was in substance slave labour in Germany. The third concerned members of the Italian armed forces who were denied the status of prisoner of war, together with the protections which that status entailed, to which they were entitled and who were similarly used as forced labourers. The Court considers that there can be no doubt that this conduct was a serious violation of the international law of armed conflict applicable in 1943-1945. Article 6 *(b)* of the Charter of the International Military Tribunal, 8 August 1945 (United Nations, *Treaty Series (UNTS)*, Vol. 82, p. 279), convened at Nuremberg included as war crimes "murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory", as well as "murder or ill-treatment of prisoners of war". The list of crimes against humanity in Article 6 *(c)* of the Charter included "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war". The murder of civilian hostages in Italy was one of the counts on which a number of war crimes defendants were condemned in trials immediately after the Second World War (e.g., *Von Mackensen and Maelzer* (1946), *Annual Digest*, Vol. 13, p. 258; *Kesselring* (1947), *Annual Digest*, Vol. 13, p. 260; and

Kappler (1948), *Annual Digest*, Vol. 15, p. 471). The principles of the Nuremberg Charter were confirmed by the General Assembly of the United Nations in resolution 95 (I) of 11 December 1946.

53. However, the Court is not called upon to decide whether these acts were illegal, a point which is not contested. The question for the Court is whether or not, in proceedings regarding claims for compensation arising out of those acts, the Italian courts were obliged to accord Germany immunity. In that context, the Court notes that there is a considerable measure of agreement between the Parties regarding the applicable law. In particular, both Parties agree that immunity is governed by international law and is not a mere matter of comity.

54. As between Germany and Italy, any entitlement to immunity can be derived only from customary international law, rather than treaty. Although Germany is one of the eight States parties to the European Convention on State Immunity of 16 May 1972 (Council of Europe*, European Treaty Series (ETS)*, No. 74; *UNTS*, Vol. 1495, p. 182) (hereinafter the "European Convention"), Italy is not a party and the Convention is accordingly not binding upon it. Neither State is party to the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted on 2 December 2004 (hereinafter the "United Nations Convention"), which is not yet in force in any event. As of 1 February 2012, the United Nations Convention had been signed by twenty-eight States and obtained thirteen instruments of ratification, acceptance, approval or accession. Article 30 of the Convention provides that it will enter into force on the thirtieth day after deposit of the thirtieth such instrument. Neither Germany nor Italy has signed the Convention.

55. It follows that the Court must determine, in accordance with Article 38 (1) *(b)* of its Statute, the existence of "international custom, as evidence of a general practice accepted as law" conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law. In particular, as the Court made clear in the *North Sea Continental Shelf* cases, the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris* (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 44, para. 77). Moreover, as the Court has also observed,

> "[i]t 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), Judgment, I.C.J. Reports 1985*, pp. 29-30, para. 27).

In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.

56. Although there has been much debate regarding the origins of State immunity and the identification of the principles underlying that immunity in the past, the International Law Commission concluded in 1980 that the rule of State immunity had been "adopted as a general rule of customary international law solidly rooted in the current practice of States" (*Yearbook of the International Law Commission*, 1980, Vol. II (2), p. 147, para. 26). That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention. That practice shows that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.

57. The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sov-

ereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.

58. The Parties are thus in broad agreement regarding the validity and importance of State immunity as a part of customary international law. They differ, however, as to whether (as Germany contends) the law to be applied is that which determined the scope and extent of State immunity in 1943-1945, i.e., at the time that the events giving rise to the proceedings in the Italian courts took place, or (as Italy maintains) that which applied at the time the proceedings themselves occurred. The Court observes that, in accordance with the principle stated in Article 13 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred. In that context, it is important to distinguish between the relevant acts of Germany and those of Italy. The relevant German acts — which are described in paragraph 52 — occurred in 1943-1945, and it is, therefore, the international law of that time which is applicable to them. The relevant Italian acts — the denial of immunity and exercise of jurisdiction by the Italian courts — did not occur until the proceedings in the Italian courts took place. Since the claim before the Court concerns the actions of the Italian courts, it is the international law in force at the time of those proceedings which the Court has to apply. Moreover, as the Court has stated (in the context of the personal immunities accorded by international law to foreign ministers), the law of immunity is essentially procedural in nature (*Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60). It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful. For these reasons, the Court considers that it must examine and apply the law on State immunity as it existed at the time of the Italian proceedings, rather than that which existed in 1943-1945.

59. The Parties also differ as to the scope and extent of the rule of State immunity. In that context, the Court notes that many States (including both Germany and Italy) now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii*. That approach has also been followed in the United Nations Convention and the European Convention (see also the draft Inter-American Convention on Jurisdictional Immunity of States drawn up by the Inter-American

Juridical Committee of the Organization of American States in 1983 (*ILM*, Vol. 22, p. 292)).

60. The Court is not called upon to address the question of how international law treats the issue of State immunity in respect of *acta jure gestionis*. The acts of the German armed forces and other State organs which were the subject of the proceedings in the Italian courts clearly constituted *acta jure imperii*. The Court notes that Italy, in response to a question posed by a Member of the Court, recognized that those acts had to be characterized as *acta jure imperii*, notwithstanding that they were unlawful. The Court considers that the terms *"jure imperii"* and *"jure gestionis"* do not imply that the acts in question are lawful but refer rather to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power *(jus imperii)* or the law concerning non-sovereign activities of a State, especially private and commercial activities *(jus gestionis)*. To the extent that this distinction is significant for determining whether or not a State is entitled to immunity from the jurisdiction of another State's courts in respect of a particular act, it has to be applied before that jurisdiction can be exercised, whereas the legality or illegality of the act is something which can be determined only in the exercise of that jurisdiction. Although the present case is unusual in that the illegality of the acts at issue has been admitted by Germany at all stages of the proceedings, the Court considers that this fact does not alter the characterization of those acts as *acta jure imperii*.

61. Both Parties agree that States are generally entitled to immunity in respect of *acta jure imperii*. That is the approach taken in the United Nations, European and draft Inter-American Conventions, the national legislation in those States which have adopted statutes on the subject and the jurisprudence of national courts. It is against that background that the Court must approach the question raised by the present proceedings, namely whether that immunity is applicable to acts committed by the armed forces of a State (and other organs of that State acting in co-operation with the armed forces) in the course of conducting an armed conflict. Germany maintains that immunity is applicable and that there is no relevant limitation on the immunity to which a State is entitled in respect of *acta jure imperii*. Italy, in its pleadings before the Court, maintains that Germany is not entitled to immunity in respect of the cases before the Italian courts for two reasons: first, that immunity as to *acta jure imperii* does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State, and, secondly, that, irrespective of where the relevant acts took place, Germany was not entitled to immunity because those acts involved the most serious violations of rules of international law of a peremptory character for which no alternative means of redress was available. The Court will consider each of Italy's arguments in turn.

2. Italy's First Argument: The Territorial Tort Principle

62. The essence of the first Italian argument is that customary international law has developed to the point where a State is no longer entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum State, even if the act in question was performed *jure imperii*. Italy recognizes that this argument is applicable only to those of the claims brought before the Italian courts which concern acts that occurred in Italy and not to the cases of Italian military internees taken prisoner outside Italy and transferred to Germany or other territories outside Italy as forced labour. In support of its argument, Italy points to the adoption of Article 11 of the European Convention and Article 12 of the United Nations Convention and to the fact that nine of the ten States it identified which have adopted legislation specifically dealing with State immunity (the exception being Pakistan) have enacted provisions similar to those in the two Conventions. Italy acknowledges that the European Convention contains a provision to the effect that the Convention is not applicable to the acts of foreign armed forces (Art. 31) but maintains that this provision is merely a saving clause aimed primarily at avoiding conflicts between the Convention and instruments regulating the status of visiting forces present with the consent of the territorial sovereign and that it does not show that States are entitled to immunity in respect of the acts of their armed forces in another State. Italy dismisses the significance of certain statements (discussed in paragraph 69 below) made during the process of adoption of the United Nations Convention suggesting that that Convention did not apply to the acts of armed forces. Italy also notes that two of the national statutes (those of the United Kingdom and Singapore) are not applicable to the acts of foreign armed forces but argues that the other seven (those of Argentina, Australia, Canada, Israel, Japan, South Africa and the United States of America) amount to significant State practice asserting jurisdiction over torts occasioned by foreign armed forces.

63. Germany maintains that, in so far as they deny a State immunity in respect of *acta jure imperii*, neither Article 11 of the European Convention, nor Article 12 of the United Nations Convention reflects customary international law. It contends that, in any event, they are irrelevant to the present proceedings, because neither provision was intended to apply to the acts of armed forces. Germany also points to the fact that, with the exception of the Italian cases and the *Distomo* case in Greece, no national court has ever held that a State was not entitled to immunity in respect of acts of its armed forces, in the context of an armed conflict and that, by

contrast, the courts in several States have expressly declined jurisdiction in such cases on the ground that the respondent State was entitled to immunity.

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64. The Court begins by observing that the notion that State immunity does not extend to civil proceedings in respect of acts committed on the territory of the forum State causing death, personal injury or damage to property originated in cases concerning road traffic accidents and other "insurable risks". The limitation of immunity recognized by some national courts in such cases was treated as confined to *acta jure gestionis* (see, e.g., the judgment of the Supreme Court of Austria in *Holubek* v. *Government of the United States of America* (*Juristische Blätter* (Vienna), Vol. 84, 1962, p. 43; *ILR*, Vol. 40, p. 73)). The Court notes, however, that none of the national legislation which provides for a "territorial tort exception" to immunity expressly distinguishes between *acta jure gestionis* and *acta jure imperii*. The Supreme Court of Canada expressly rejected the suggestion that the exception in the Canadian legislation was subject to such a distinction (*Schreiber* v. *Federal Republic of Germany and the Attorney General of Canada*, [2002] *Supreme Court Reports (SCR)*, Vol. 3, p. 269, paras. 33-36). Nor is such a distinction featured in either Article 11 of the European Convention or Article 12 of the United Nations Convention. The International Law Commission's commentary on the text of what became Article 12 of the United Nations Convention makes clear that this was a deliberate choice and that the provision was not intended to be restricted to *acta jure gestionis* (*Yearbook of the International Law Commission*, 1991, Vol. II (2), p. 45, para. 8). Germany has not, however, been alone in suggesting that, in so far as it was intended to apply to *acta jure imperii*, Article 12 was not representative of customary international law. In criticizing the International Law Commission's draft of what became Article 12, China commented in 1990 that "the article had gone even further than the restrictive doctrine, for it made no distinction between sovereign acts and private law acts" (United Nations doc. A/C.6/45/SR.25, p. 2) and the United States, commenting in 2004 on the draft United Nations Convention, stated that Article 12 "must be interpreted and applied consistently with the time-honoured distinction between acts *jure imperii* and acts *jure gestionis*" since to extend jurisdiction without regard to that distinction "would be contrary to the existing principles of international law" (United Nations doc. A/C.6/59/SR.13, p. 10, para. 63).

65. The Court considers that it is not called upon in the present proceedings to resolve the question whether there is in customary interna-

tional law a "tort exception" to State immunity applicable to *acta jure imperii* in general. The issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict.

66. The Court will first consider whether the adoption of Article 11 of the European Convention or Article 12 of the United Nations Convention affords any support to Italy's contention that States are no longer entitled to immunity in respect of the type of acts specified in the preceding paragraph. As the Court has already explained (see paragraph 54 above), neither Convention is in force between the Parties to the present case. The provisions of these Conventions are, therefore, relevant only in so far as their provisions and the process of their adoption and implementation shed light on the content of customary international law.

67. Article 11 of the European Convention states the territorial tort principle in broad terms,

> "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

That provision must, however, be read in the light of Article 31, which provides,

> "Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State."

Although one of the concerns which Article 31 was intended to address was the relationship between the Convention and the various agreements on the status of visiting forces, the language of Article 31 makes clear that it is not confined to that matter and excludes from the scope of the Convention all proceedings relating to acts of foreign armed forces, irrespective of whether those forces are present in the territory of the forum with the consent of the forum State and whether their acts take place in peacetime or in conditions of armed conflict. The Explanatory Report on the Convention, which contains a detailed commentary prepared as part of the negotiating process, states in respect of Article 31,

> "The Convention is not intended to govern situations which may arise in the event of armed conflict; *nor* can it be invoked to resolve

problems which may arise between allied States as a result of the stationing of forces. These problems are generally dealt with by special agreements (cf. Art. 33).

. . . . . .

[Article 31] prevents the Convention being interpreted as having any influence upon these matters." (Para. 116; emphasis added.)

68. The Court agrees with Italy that Article 31 takes effect as a "saving clause", with the result that the immunity of a State for the acts of its armed forces falls entirely outside the Convention and has to be determined by reference to customary international law. The consequence, however, is that the inclusion of the "territorial tort principle" in Article 11 of the Convention cannot be treated as support for the argument that a State is not entitled to immunity for torts committed by its armed forces. As the Explanatory Report states, the effect of Article 31 is that the Convention has no influence upon that question. Courts in Belgium (judgment of the Court of First Instance of Ghent in *Botelberghe* v. *German State*, 18 February 2000), Ireland (judgment of the Supreme Court in *McElhinney* v. *Williams*, 15 December 1995, [1995] 3 *Irish Reports* 382; *ILR*, Vol. 104, p. 691), Slovenia (case No. Up-13/99, Constitutional Court, para. 13), Greece (*Margellos* v. *Federal Republic of Germany*, case No. 6/2002, *ILR*, Vol. 129, p. 529) and Poland (judgment of the Supreme Court of Poland, *Natoniewski* v. *Federal Republic of Germany, Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299) have concluded that Article 31 means that the immunity of a State for torts committed by its armed forces is unaffected by Article 11 of the Convention.

69. Article 12 of the United Nations Convention provides,

"Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission."

Unlike the European Convention, the United Nations Convention contains no express provision excluding the acts of armed forces from its scope. However, the International Law Commission's commentary on the text of Article 12 states that that provision does not apply to "situations involving armed conflicts" (*Yearbook of the International Law Commis-*

sion, 1991, Vol. II (2), p. 46, para. 10). Moreover, in presenting to the Sixth Committee of the General Assembly the Report of the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property (United Nations doc. A/59/22), the Chairman of the *Ad Hoc* Committee stated that the draft Convention had been prepared on the basis of a general understanding that military activities were not covered (United Nations doc. A/C.6/59/SR.13, p. 6, para. 36).

No State questioned this interpretation. Moreover, the Court notes that two of the States which have so far ratified the Convention, Norway and Sweden, made declarations in identical terms stating their understanding that "the Convention does not apply to military activities, including the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, and activities undertaken by military forces of a State in the exercise of their official duties" (United Nations doc. C.N.280.2006.TREATIES-2 and United Nations doc. C.N.912.2009.TREATIES-1). In the light of these various statements, the Court concludes that the inclusion in the Convention of Article 12 cannot be taken as affording any support to the contention that customary international law denies State immunity in tort proceedings relating to acts occasioning death, personal injury or damage to property committed in the territory of the forum State by the armed forces and associated organs of another State in the context of an armed conflict.

70. Turning to State practice in the form of national legislation, the Court notes that nine of the ten States referred to by the Parties which have legislated specifically for the subject of State immunity have adopted provisions to the effect that a State is not entitled to immunity in respect of torts occasioning death, personal injury or damage to property occurring on the territory of the forum State (United States of America Foreign Sovereign Immunities Act 1976, 28 *USC*, Sect. 1605 *(a)* (5); United Kingdom State Immunity Act 1978, Sect. 5; South Africa Foreign States Immunities Act 1981, Sect. 6; Canada State Immunity Act 1985, Sect. 6; Australia Foreign States Immunities Act 1985, Sect. 13; Singapore State Immunity Act 1985, Sect. 7; Argentina Law No. 24.488 (Statute on the Immunity of Foreign States before Argentine Tribunals) 1995, Art. 2 *(e)*; Israel Foreign State Immunity Law 2008, Sect. 5; and Japan, Act on the Civil Jurisdiction of Japan with respect to a Foreign State, 2009, Art. 10). Only Pakistan's State Immunity Ordinance 1981 contains no comparable provision.

71. Two of these statutes (the United Kingdom State Immunity Act 1978, Section 16 (2) and the Singapore State Immunity Act 1985, Sec-

tion 19 (2) *(a)*) contain provisions that exclude proceedings relating to the acts of foreign armed forces from their application. The corresponding provisions in the Canadian, Australian and Israeli statutes exclude only the acts of visiting forces present with the consent of the host State or matters covered by legislation regarding such visiting forces (Canada State Immunity Act 1985, Section 16; Australia Foreign States Immunities Act 1985, Section 6; Israel Foreign State Immunity Law 2008, Section 22). The legislation of South Africa, Argentina and Japan contains no exclusion clause. However, the Japanese statute (in Article 3) states that its provisions "shall not affect the privileges or immunities enjoyed by a foreign State . . . based on treaties or the established international law".

The United States Foreign Sovereign Immunities Act 1976 contains no provision specifically addressing claims relating to the acts of foreign armed forces but its provision that there is no immunity in respect of claims "in which money damages are sought against a foreign State for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign State" (Sec. 1605 *(a)* (5)) is subject to an exception for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused" (Sec. 1605 *(a)* (5) (A)). Interpreting this provision, which has no counterpart in the legislation of other States, a court in the United States has held that a foreign State whose agents committed an assassination in the United States was not entitled to immunity (*Letelier* v. *Republic of Chile* (1980), *Federal Supplement (F. Supp.)*, Vol. 488, p. 665; *ILR*, Vol. 63, p. 378 (United States District Court, District of Columbia)). However, the Court is not aware of any case in the United States where the courts have been called upon to apply this provision to acts performed by the armed forces and associated organs of foreign States in the course of an armed conflict.

Indeed, in none of the seven States in which the legislation contains no general exclusion for the acts of armed forces, have the courts been called upon to apply that legislation in a case involving the armed forces of a foreign State, and associated organs of State, acting in the context of an armed conflict.

72. The Court next turns to State practice in the form of the judgments of national courts regarding State immunity in relation to the acts of armed forces. The question whether a State is entitled to immunity in proceedings concerning torts allegedly committed by its armed forces when stationed on or visiting the territory of another State, with the consent of the latter, has been considered by national courts on a number of occasions. Decisions of the courts of Egypt (*Bassionni Amrane* v. *John*, *Gazette des Tribunaux mixtes d'Egypte*, January 1934, p. 108; *Annual Digest*, Vol. 7, p. 187), Belgium (*S.A. Eau, gaz, électricité et applications* v.

Office d'aide mutuelle, *Cour d'appel*, Brussels, *Pasicrisie belge*, 1957, Vol. 144, 2nd Part, p. 88; *ILR*, Vol. 23, p. 205) and Germany (*Immunity of the United Kingdom*, Court of Appeal of Schleswig, *Jahrbuch für Internationales Recht*, 1957, Vol. 7, p. 400; *ILR*, Vol. 24, p. 207) are earlier examples of national courts according immunity where the acts of foreign armed forces were characterized as *acta jure imperii*. Since then, several national courts have held that a State is immune with respect to damage caused by warships (*United States of America* v. *Eemshaven Port Authority*, Supreme Court of the Netherlands, *Nederlandse Jurisprudentie*, 2001, No. 567; *ILR*, Vol. 127, p. 225; *Allianz Via Insurance* v. *United States of America* (1999), *Cour d'appel*, Aix-en-Provence, 2nd Chamber, judgment of 3 September 1999, *ILR*, Vol. 127, p. 148) or military exercises (*FILT-CGIL Trento* v. *United States of America*, Italian Court of Cassation, *Rivista di diritto internazionale*, Vol. 83, 2000, p. 1155; *ILR*, Vol. 128, p. 644). The United Kingdom courts have held that customary international law required immunity in proceedings for torts committed by foreign armed forces on United Kingdom territory if the acts in question were *acta jure imperii* (*Littrell* v. *United States of America (No. 2)*, Court of Appeal, [1995] 1 *Weekly Law Reports (WLR)* 82; *ILR*, Vol. 100, p. 438; *Holland* v. *Lampen-Wolfe*, House of Lords, [2000] 1 *WLR* 1573; *ILR*, Vol. 119, p. 367).

The Supreme Court of Ireland held that international law required that a foreign State be accorded immunity in respect of acts *jure imperii* carried out by members of its armed forces even when on the territory of the forum State without the forum State's permission (*McElhinney* v. *Williams*, [1995] 3 *Irish Reports* 382; *ILR*, Vol. 104, p. 691). The Grand Chamber of the European Court of Human Rights later held that this decision reflected a widely held view of international law so that the grant of immunity could not be regarded as incompatible with the European Convention on Human Rights (*McElhinney* v. *Ireland* [GC], application No. 31253/96, judgment of 21 November 2001, *ECHR Reports* 2001-XI, p. 39; *ILR*, Vol. 123, p. 73, para. 38).

While not directly concerned with the specific issue which arises in the present case, these judicial decisions, which do not appear to have been contradicted in any other national court judgments, suggest that a State is entitled to immunity in respect of *acta jure imperii* committed by its armed forces on the territory of another State.

73. The Court considers, however, that for the purposes of the present case the most pertinent State practice is to be found in those national judicial decisions which concerned the question whether a State was entitled to immunity in proceedings concerning acts allegedly committed by its armed forces in the course of an armed conflict. All of those cases, the facts of which are often very similar to those of the cases before the

Italian courts, concern the events of the Second World War. In this context, the *Cour de cassation* in France has consistently held that Germany was entitled to immunity in a series of cases brought by claimants who had been deported from occupied French territory during the Second World War (No. 02-45961, 16 December 2003, *Bull. civ.*, 2003, I, No. 258, p. 206 (the *Bucheron* case); No. 03-41851, 2 June 2004, *Bull. civ.*, 2004, I, No. 158, p. 132 (the *X* case) and No. 04-47504, 3 January 2006 (the *Grosz* case)). The Court also notes that the European Court of Human Rights held in *Grosz* v. *France* (application No. 14717/06, decision of 16 June 2009) that France had not contravened the European Convention on Human Rights in the proceedings which were the subject of the 2006 *Cour de cassation* judgment (judgment No. 04-47504), because the *Cour de cassation* had given effect to an immunity required by international law.

74. The highest courts in Slovenia and Poland have also held that Germany was entitled to immunity in respect of unlawful acts perpetrated on their territory by its armed forces during the Second World War. In 2001 the Constitutional Court of Slovenia ruled that Germany was entitled to immunity in an action brought by a claimant who had been deported to Germany during the German occupation and that the Supreme Court of Slovenia had not acted arbitrarily in upholding that immunity (case No. Up-13/99, judgment of 8 March 2001). The Supreme Court of Poland held, in *Natoniewski* v. *Federal Republic of Germany* (judgment of 29 October 2010, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), that Germany was entitled to immunity in an action brought by a claimant who in 1944 had suffered injuries when German forces burned his village in occupied Poland and murdered several hundred of its inhabitants. The Supreme Court, after an extensive review of the decisions in *Ferrini*, *Distomo* and *Margellos*, as well as the provisions of the European Convention and the United Nations Convention and a range of other materials, concluded that States remained entitled to immunity in respect of torts allegedly committed by their armed forces in the course of an armed conflict. Judgments by lower courts in Belgium (judgment of the Court of First Instance of Ghent in 2000 in *Botelberghe* v. *German State*), Serbia (judgment of the Court of First Instance of Leskovac, 1 November 2001) and Brazil (*Barreto* v. *Federal Republic of Germany*, Federal Court, Rio de Janeiro, judgment of 9 July 2008 holding Germany immune in proceedings regarding the sinking of a Brazilian fishing vessel by a German submarine in Brazilian waters) have also held that Germany was immune in actions for acts of war committed on their territory or in their waters.

75. Finally, the Court notes that the German courts have also concluded that the territorial tort principle did not remove a State's entitle-

ment to immunity under international law in respect of acts committed by its armed forces, even where those acts took place on the territory of the forum State (judgment of the Federal Supreme Court of 26 June 2003 (*Greek Citizens* v. *Federal Republic of Germany*, case No. III ZR 245/98, *NJW*, 2003, p. 3488; *ILR*, Vol. 129, p. 556), declining to give effect in Germany to the Greek judgment in the *Distomo* case on the ground that it had been given in breach of Germany's entitlement to immunity).

76. The only State in which there is any judicial practice which appears to support the Italian argument, apart from the judgments of the Italian courts which are the subject of the present proceedings, is Greece. The judgment of the Hellenic Supreme Court in the *Distomo* case in 2000 contains an extensive discussion of the territorial tort principle without any suggestion that it does not extend to the acts of armed forces during an armed conflict. However, the Greek Special Supreme Court, in its judgment in *Margellos* v. *Federal Republic of Germany* (case No. 6/2002, *ILR*, Vol. 129, p. 525), repudiated the reasoning of the Supreme Court in *Distomo* and held that Germany was entitled to immunity. In particular, the Special Supreme Court held that the territorial tort principle was not applicable to the acts of the armed forces of a State in the conduct of armed conflict. While that judgment does not alter the outcome in the *Distomo* case, a matter considered below, Greece has informed the Court that courts and other bodies in Greece faced with the same issue of whether immunity is applicable to torts allegedly committed by foreign armed forces in Greece are required to follow the stance taken by the Special Supreme Court in its decision in *Margellos* unless they consider that customary international law has changed since the *Margellos* judgment. Germany has pointed out that, since the judgment in *Margellos* was given, no Greek court has denied immunity in proceedings brought against Germany in respect of torts allegedly committed by German armed forces during the Second World War and in a 2009 decision (decision No. 853/2009), the Supreme Court, although deciding the case on a different ground, approved the reasoning in *Margellos*. In view of the judgment in *Margellos* and the dictum in the 2009 case, as well as the decision of the Greek Government not to permit enforcement of the *Distomo* judgment in Greece itself and the Government's defence of that decision before the European Court of Human Rights in *Kalogeropoulou and Others* v. *Greece and Germany* (application No. 59021/00, decision of 12 December 2002, *ECHR Reports* 2002-X, p. 417; *ILR*, Vol. 129, p. 537), the Court concludes that Greek State practice taken as a whole actually contradicts, rather than supports, Italy's argument.

77. In the Court's opinion, State practice in the form of judicial decisions supports the proposition that State immunity for *acta jure imperii*

continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State. That practice is accompanied by *opinio juris*, as demonstrated by the positions taken by States and the jurisprudence of a number of national courts which have made clear that they considered that customary international law required immunity. The almost complete absence of contrary jurisprudence is also significant, as is the absence of any statements by States in connection with the work of the International Law Commission regarding State immunity and the adoption of the United Nations Convention or, so far as the Court has been able to discover, in any other context asserting that customary international law does not require immunity in such cases.

78. In light of the foregoing, the Court considers that customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict. That conclusion is confirmed by the judgments of the European Court of Human Rights to which the Court has referred (see paragraphs 72, 73 and 76).

79. The Court therefore concludes that, contrary to what had been argued by Italy in the present proceedings, the decision of the Italian courts to deny immunity to Germany cannot be justified on the basis of the territorial tort principle.

3. Italy's Second Argument: The Subject-Matter and Circumstances of the Claims in the Italian Courts

80. Italy's second argument, which, unlike its first argument, applies to all of the claims brought before the Italian courts, is that the denial of immunity was justified on account of the particular nature of the acts forming the subject-matter of the claims before the Italian courts and the circumstances in which those claims were made. There are three strands to this argument. First, Italy contends that the acts which gave rise to the claims constituted serious violations of the principles of international law applicable to the conduct of armed conflict, amounting to war crimes and crimes against humanity. Secondly, Italy maintains that the rules of international law thus contravened were peremptory norms *(jus cogens)*. Thirdly, Italy argues that the claimants having been denied all other forms of redress, the exercise of jurisdiction by the Italian courts was necessary as a matter of last resort. The Court will consider each of these strands in turn, while recognizing that, in the oral proceedings, Italy also contended that its courts had been entitled to deny State immunity because of the combined effect of these three strands.

A. The gravity of the violations

81. The first strand is based upon the proposition that international law does not accord immunity to a State, or at least restricts its right to immunity, when that State has committed serious violations of the law of armed conflict (international humanitarian law as it is more commonly termed today, although the term was not used in 1943-1945). In the present case, the Court has already made clear (see paragraph 52 above) that the actions of the German armed forces and other organs of the German Reich giving rise to the proceedings before the Italian courts were serious violations of the law of armed conflict which amounted to crimes under international law. The question is whether that fact operates to deprive Germany of an entitlement to immunity.

82. At the outset, however, the Court must observe that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem. Immunity from jurisdiction is an immunity not merely from being subjected to an adverse judgment but from being subjected to the trial process. It is, therefore, necessarily preliminary in nature. Consequently, a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established. If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim.

83. That said, the Court must nevertheless inquire whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict. Apart from the decisions of the Italian courts which are the subject of the present proceedings, there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case. Although the Hellenic Supreme Court in the *Distomo* case adopted a form of that proposition, the Special Supreme Court in *Margellos* repudiated that approach two years later. As the Court has noted in paragraph 76 above, under Greek law it is the stance adopted in *Margellos* which must be followed in later cases unless the Greek courts find that there has been a change in customary international law since 2002, which they have not done. As with the territorial tort principle, the Court considers that Greek practice, taken as a whole, tends to deny that the proposition advanced by Italy has become part of customary international law.

84. In addition, there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.

85. That practice is particularly evident in the judgments of national courts. Arguments to the effect that international law no longer required State immunity in cases of allegations of serious violations of international human rights law, war crimes or crimes against humanity have been rejected by the courts in Canada (*Bouzari* v. *Islamic Republic of Iran*, Court of Appeal of Ontario, [2004] *Dominion Law Reports (DLR)*, 4th Series, Vol. 243, p. 406; *ILR*, Vol. 128, p. 586; allegations of torture), France (judgment of the Court of Appeal of Paris, 9 September 2002, and *Cour de cassation*, No. 02-45961, 16 December 2003, *Bulletin civil de la Cour de cassation (Bull. civ.)*, 2003, I, No. 258, p. 206 (the *Bucheron* case); *Cour de cassation*, No. 03-41851, 2 June 2004, *Bull. civ.*, 2004, I, No. 158, p. 132 (the *X* case) and *Cour de cassation*, No. 04-47504, 3 January 2006 (the *Grosz* case); allegations of crimes against humanity), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia; allegations of war crimes and crimes against humanity), New Zealand (*Fang* v. *Jiang*, High Court, [2007] *New Zealand Administrative Reports (NZAR)*, p. 420; *ILR*, Vol. 141, p. 702; allegations of torture), Poland (*Natoniewski*, Supreme Court, 2010, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299; allegations of war crimes and crimes against humanity) and the United Kingdom (*Jones* v. *Saudi Arabia*, House of Lords, [2007] 1 *Appeal Cases (AC)* 270; *ILR*, Vol. 129, p. 629; allegations of torture).

86. The Court notes that, in its response to a question posed by a Member of the Court, Italy itself appeared to demonstrate uncertainty about this aspect of its case. Italy commented,

> "Italy is aware of the view according to which war crimes and crimes against humanity could not be considered to be sovereign acts for which the State is entitled to invoke the defence of sovereign immunity . . . While Italy acknowledges that in this area the law of State immunity is undergoing a process of change, it also recognizes that it is not clear at this stage whether this process will result in a new general exception to immunity — namely a rule denying immunity with respect to every claim for compensation arising out [of] international crimes."

A similar uncertainty is evident in the orders of the Italian Court of Cassation in *Mantelli* and *Maietta* (orders of 29 May 2008).

87. The Court does not consider that the United Kingdom judgment in *Pinochet (No. 3)* ([2000] 1 *AC* 147; *ILR*, Vol. 119, p. 136) is relevant, notwithstanding the reliance placed on that judgment by the Italian Court

of Cassation in *Ferrini*. *Pinochet* concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself in proceedings designed to establish its liability to damages. The distinction between the immunity of the official in the former type of case and that of the State in the latter case was emphasized by several of the judges in *Pinochet* (Lord Hutton at pp. 254 and 264, Lord Millett at p. 278 and Lord Phillips at pp. 280-281). In its later judgment in *Jones* v. *Saudi Arabia* ([2007] 1 *AC* 270; *ILR*, Vol. 129, p. 629), the House of Lords further clarified this distinction, Lord Bingham describing the distinction between criminal and civil proceedings as "fundamental to the decision" in *Pinochet* (para. 32). Moreover, the rationale for the judgment in *Pinochet* was based upon the specific language of the 1984 United Nations Convention against Torture, which has no bearing on the present case.

88. With reference to national legislation, Italy referred to an amendment to the United States Foreign Sovereign Immunities Act, first adopted in 1996. That amendment withdraws immunity for certain specified acts (for example, torture and extra-judicial killings) if allegedly performed by a State which the United States Government has "designated as a State sponsor of terrorism" (28 *USC* 1605A). The Court notes that this amendment has no counterpart in the legislation of other States. None of the States which has enacted legislation on the subject of State immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged.

89. It is also noticeable that there is no limitation of State immunity by reference to the gravity of the violation or the peremptory character of the rule breached in the European Convention, the United Nations Convention or the draft Inter-American Convention. The absence of any such provision from the United Nations Convention is particularly significant, because the question whether such a provision was necessary was raised at the time that the text of what became the Convention was under consideration. In 1999 the International Law Commission established a Working Group which considered certain developments in practice regarding some issues of State immunity which had been identified by the Sixth Committee of the General Assembly. In an appendix to its report, the Working Group referred, as an additional matter, to developments regarding claims "in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*" and stated that this issue was one which should not be ignored, although it did not recommend any amendment to the text of the International Law Commission Articles (*Yearbook of the International Law Commission*, 1999, Vol. II (2), pp. 171-172). The matter was then considered by the Working Group established by the Sixth Committee of the General Assembly, which reported later in 1999 that it had decided not to take up the matter as "it did not seem to be ripe enough for the Working

Group to engage in a codification exercise over it" and commented that it was for the Sixth Committee to decide what course of action, if any, should be taken (United Nations doc. A/C.6/54/L.12, p. 7, para. 13). During the subsequent debates in the Sixth Committee no State suggested that a *jus cogens* limitation to immunity should be included in the Convention. The Court considers that this history indicates that, at the time of adoption of the United Nations Convention in 2004, States did not consider that customary international law limited immunity in the manner now suggested by Italy.

90. The European Court of Human Rights has not accepted the proposition that States are no longer entitled to immunity in cases regarding serious violations of international humanitarian law or human rights law. In 2001, the Grand Chamber of that Court, by the admittedly narrow majority of nine to eight, concluded that,

> "Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged." (*Al-Adsani* v. *United Kingdom* [GC], application No. 35763/97, judgment of 21 November 2001, *ECHR Reports* 2001-XI, p. 101, para. 61; *ILR*, Vol. 123, p. 24.)

The following year, in *Kalogeropoulou and Others* v. *Greece and Germany*, the European Court of Human Rights rejected an application relating to the refusal of the Greek Government to permit enforcement of the *Distomo* judgment and said that,

> "The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity." (Application No. 59021/00, decision of 12 December 2002, *ECHR Reports* 2002-X, p. 417; *ILR*, Vol. 129, p. 537.)

91. The Court concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict. In reaching that conclusion, the Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case.

B. The relationship between jus cogens *and the rule of State immunity*

92. The Court now turns to the second strand in Italy's argument, which emphasizes the *jus cogens* status of the rules which were violated by Germany during the period 1943-1945. This strand of the argument rests on the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany. Since *jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.

93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility (as the Court has explained in paragraph 58 above). For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.

94. In the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943-1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. Nor is the argument strengthened by focusing upon the duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of

State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.

95. To the extent that it is argued that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a *jus cogens* rule might be enforced was rendered unavailable. In *Armed Activities*, it held that the fact that a rule has the status of *jus cogens* does not confer upon the Court a jurisdiction which it would not otherwise possess (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64, and p. 52, para. 125). In *Arrest Warrant*, the Court held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 24, para. 58, and p. 33, para. 78). The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.

96. In addition, this argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts of the United Kingdom (*Jones* v. *Saudi Arabia*, House of Lords, [2007] 1 *AC* 270; *ILR*, Vol. 129, p. 629), Canada (*Bouzari* v. *Islamic Republic of Iran*, Court of Appeal of Ontario, *DLR*, 4th Series, Vol. 243, p. 406; *ILR*, Vol. 128, p. 586), Poland (*Natoniewski*, Supreme Court, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia), New Zealand (*Fang* v. *Jiang*, High Court, [2007] *NZAR*, p. 420; *ILR*, Vol. 141, p. 702) and Greece (*Margel-*

los, Special Supreme Court, *ILR*, Vol. 129, p. 525), as well as by the European Court of Human Rights in *Al-Adsani* v. *United Kingdom* and *Kalogeropoulou and Others* v. *Greece and Germany* (which are discussed in paragraph 90 above), in each case after careful consideration. The Court does not consider the judgment of the French *Cour de cassation* of 9 March 2011 in *La Réunion aérienne* v. *Libyan Arab Jamahiriya* (case No. 09-14743, 9 March 2011, *Bull. civ.*, March 2011, No. 49, p. 49) as supporting a different conclusion. The *Cour de cassation* in that case stated only that, even if a *jus cogens* norm could constitute a legitimate restriction on State immunity, such a restriction could not be justified on the facts of that case. It follows, therefore, that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which this part of Italy's second argument is based. Moreover, none of the national legislation on State immunity considered in paragraphs 70-71 above, has limited immunity in cases where violations of *jus cogens* are alleged.

97. Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected.

C. The "last resort" argument

98. The third and final strand of the Italian argument is that the Italian courts were justified in denying Germany the immunity to which it would otherwise have been entitled, because all other attempts to secure compensation for the various groups of victims involved in the Italian proceedings had failed. Germany's response is that in the aftermath of the Second World War it made considerable financial and other sacrifices by way of reparation in the context of a complex series of inter-State arrangements under which, reflecting the economic realities of the time, no Allied State received compensation for the full extent of the losses which its people had suffered. It also points to the payments which it made to Italy under the terms of the two 1961 Agreements and to the payments made more recently under the 2000 Federal Law to various Italians who had been unlawfully deported to forced labour in Germany. Italy maintains, however, that large numbers of Italian victims were nevertheless left without any compensation.

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99. The Court notes that Germany has taken significant steps to ensure

that a measure of reparation was made to Italian victims of war crimes and crimes against humanity. Nevertheless, Germany decided to exclude from the scope of its national compensation scheme most of the claims by Italian military internees on the ground that prisoners of war were not entitled to compensation for forced labour (see paragraph 26 above). The overwhelming majority of Italian military internees were, in fact, denied treatment as prisoners of war by the Nazi authorities. Notwithstanding that history, in 2001 the German Government determined that those internees were ineligible for compensation because they had had a legal entitlement to prisoner-of-war status. The Court considers that it is a matter of surprise — and regret — that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize, particularly since those victims had thereby been denied the legal protection to which that status entitled them.

100. Moreover, as the Court has said, albeit in the different context of the immunity of State officials from criminal proceedings, the fact that immunity may bar the exercise of jurisdiction in a particular case does not alter the applicability of the substantive rules of international law (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60; see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 244, para. 196). In that context, the Court would point out that whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.

101. That notwithstanding, the Court cannot accept Italy's contention that the alleged shortcomings in Germany's provisions for reparation to Italian victims entitled the Italian courts to deprive Germany of jurisdictional immunity. The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity, is there any evidence that entitlement to immunity is subjected to such a precondition. States also did not include any such condition in either the European Convention or the United Nations Convention.

102. Moreover, the Court cannot fail to observe that the application of any such condition, if it indeed existed, would be exceptionally difficult in practice, particularly in a context such as that of the present case, when claims have been the subject of extensive intergovernmental discussion. If one follows the Italian argument, while such discussions were still ongoing

and had a prospect of achieving a successful outcome, then it seems that immunity would still prevail, whereas, again according to this argument, immunity would presumably cease to apply at some point when prospects for an inter-State settlement were considered to have disappeared. Yet national courts in one of the countries concerned are unlikely to be well placed to determine when that point has been reached. Moreover, if a lump sum settlement has been made — which has been the normal practice in the aftermath of war, as Italy recognizes — then the determination of whether a particular claimant continued to have an entitlement to compensation would entail an investigation by the court of the details of that settlement and the manner in which the State which had received funds (in this case the State in which the court in question is located) has distributed those funds. Where the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals, it is difficult to see why the fact that those individuals had not received a share in the money should be a reason for entitling them to claim against the State that had transferred money to their State of nationality.

103. The Court therefore rejects Italy's argument that Germany could be refused immunity on this basis.

104. In coming to this conclusion, the Court is not unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned.

It considers however that the claims arising from the treatment of the Italian military internees referred to in paragraph 99, together with other claims of Italian nationals which have allegedly not been settled — and which formed the basis for the Italian proceedings — could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue.

D. The combined effect of the circumstances relied upon by Italy

105. In the course of the oral proceedings, counsel for Italy maintained that the three strands of Italy's second argument had to be viewed together; it was because of the cumulative effect of the gravity of the violations, the status of the rules violated and the absence of alternative means of redress that the Italian courts had been justified in refusing to accord immunity to Germany.

106. The Court has already held that none of the three strands of the second Italian argument would, of itself, justify the action of the Italian courts. It is not persuaded that they would have that effect if taken together. Nothing in the examination of State practice lends support to the proposition that the concurrent presence of two, or even all three, of these elements would justify the refusal by a national court to accord to a respondent State the immunity to which it would otherwise be entitled.

In so far as the argument based on the combined effect of the circumstances is to be understood as meaning that the national court should balance the different factors, assessing the respective weight, on the one hand, of the various circumstances that might justify the exercise of its jurisdiction, and, on the other hand, of the interests attaching to the protection of immunity, such an approach would disregard the very nature of State immunity. As explained in paragraph 56 above, according to international law, State immunity, where it exists, is a right of the foreign State. In addition, as explained in paragraph 82 of this Judgment, national courts have to determine questions of immunity at the outset of the proceedings, before consideration of the merits. Immunity cannot, therefore, be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed.

4. Conclusions

107. The Court therefore holds that the action of the Italian courts in denying Germany the immunity to which the Court has held it was entitled under customary international law constitutes a breach of the obligations owed by the Italian State to Germany.

108. It is, therefore, unnecessary for the Court to consider a number of questions which were discussed at some length by the Parties. In particular, the Court need not rule on whether, as Italy contends, international law confers upon the individual victim of a violation of the law of armed conflict a directly enforceable right to claim compensation. Nor need it rule on whether, as Germany maintains, Article 77, paragraph 4, of the Treaty of Peace or the provisions of the 1961 Agreements amounted to a binding waiver of the claims which are the subject of the Italian proceedings. That is not to say, of course, that these are unimportant questions, only that they are not ones which fall for decision within the limits of the present case. The question whether Germany still has a responsibility towards Italy, or individual Italians, in respect of war crimes and crimes against humanity committed by it during the Second World War does not affect Germany's entitlement to immunity. Similarly, the Court's ruling on the issue of immunity can have no effect on whatever responsibility Germany may have.

IV. The Measures of Constraint Taken against Property Belonging to Germany Located on Italian Territory

109. On 7 June 2007, certain Greek claimants, in reliance on a decision of the Florence Court of Appeal of 13 June 2006, declaring enforceable in

Italy the judgment rendered by the Court of First Instance of Livadia, in Greece, which had ordered Germany to pay them compensation, entered in the Land Registry of the Province of Como a legal charge against Villa Vigoni, a property of the German State located near Lake Como (see above, paragraph 35).

110. Germany argued before the Court that such a measure of constraint violates the immunity from enforcement to which it is entitled under international law. Italy has not sought to justify that measure; on the contrary, it indicated to the Court that it "has no objection to any decision by the Court obliging Italy to ensure that the mortgage on Villa Vigoni inscribed at the land registry is cancelled".

111. As a result of Decree-Law No. 63 of 28 April 2010, Law No. 98 of 23 June 2010 and Decree-Law No. 216 of 29 December 2011, the charge in question was suspended in order to take account of the pending proceedings before the Court in the present case. It has not, however, been cancelled.

112. The Court considers that, notwithstanding the above-mentioned suspension, and the absence of any argument by Italy seeking to establish the international legality of the measures of constraint in question, a dispute still exists between the Parties on this issue, the subject of which has not disappeared. Italy has not formally admitted that the legal charge on Villa Vigoni constituted a measure contrary to its international obligations. Nor, as just stated, has it put an end to the effects of that measure, but has merely suspended them. It has told the Court, through its Agent, that the decisions of the Italian courts rendered against Germany have been suspended by legislation pending the decision of this Court, and that execution of those decisions "will only occur should the Court decide that Italy has not committed the wrongful acts complained of by Germany". That implies that the charge on Villa Vigoni might be reactivated, should the Court conclude that it is not contrary to international law. Without asking the Court to reach such a conclusion, Italy does not exclude it, and awaits the Court's ruling before taking the appropriate action thereon.

It follows that the Court should rule, as both Parties wish it to do, on the second of Germany's submissions, which concerns the dispute over the measure of constraint taken against Villa Vigoni.

113. Before considering whether the claims of the Applicant on this point are well-founded, the Court observes that the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow *ipso facto* that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly, any waiver by a State of its jurisdictional immunity before a

foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory.

The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood *stricto sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct, and must be applied separately.

114. In the present case, this means that the Court may rule on the issue of whether the charge on Villa Vigoni constitutes a measure of constraint in violation of Germany's immunity from enforcement, without needing to determine whether the decisions of the Greek courts awarding pecuniary damages against Germany, for purposes of whose enforcement that measure was taken, were themselves in breach of that State's jurisdictional immunity.

Likewise, the issue of the international legality of the measure of constraint in question, in light of the rules applicable to immunity from enforcement, is separate — and may therefore be considered separately — from that of the international legality, under the rules applicable to jurisdictional immunity, of the decisions of the Italian courts which declared enforceable on Italian territory the Greek judgments against Germany. This latter question, which is the subject of the third of the submissions presented to the Court by Germany (see above paragraph 17), will be addressed in the following section of this Judgment.

115. In support of its claim on the point under discussion here, Germany cited the rules set out in Article 19 of the United Nations Convention. That Convention has not entered into force, but in Germany's view it codified, in relation to the issue of immunity from enforcement, the existing rules under general international law. Its terms are therefore said to be binding, inasmuch as they reflect customary law on the matter.

116. Article 19, entitled "State immunity from post-judgment measures of constraint", reads as follows:

> "No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
>
> *(a)* the State has expressly consented to the taking of such measures as indicated:
>
> (i) by international agreement;
> (ii) by an arbitration agreement or in a written contract; or
> (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
>
> *(b)* the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."

117. When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law.

118. Indeed, it suffices for the Court to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim (an illustration of this well-established practice is provided by the decision of the German Constitutional Court *(Bundesverfassungsgericht)* of 14 December 1977 (*BVerfGE*, Vol. 46, p. 342; *ILR*, Vol. 65, p. 146), by the judgment of the Swiss Federal Tribunal of 30 April 1986 in *Kingdom of Spain* v. *Société X* (*Annuaire suisse de droit international*, Vol. 43, 1987, p. 158; *ILR*, Vol. 82, p. 44), as well as the judgment of the House of Lords of 12 April 1984 in *Alcom Ltd.* v. *Republic of Colombia* ([1984] 1 *AC* 580; *ILR*, Vol. 74, p. 170) and the judgment of the Spanish Constitutional Court of 1 July 1992 in *Abbott* v. *Republic of South Africa* (*Revista española de derecho internacional*, Vol. 44, 1992, p. 565; *ILR*, Vol. 113, p. 414)).

119. It is clear in the present case that the property which was the subject of the measure of constraint at issue is being used for governmental purposes that are entirely non-commercial, and hence for purposes falling within Germany's sovereign functions. Villa Vigoni is in fact the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy. This cultural centre is organized and administered on the basis of an agreement between the two Governments concluded in the form of an exchange of notes dated 21 April 1986. Before the Court, Italy described the activities in question as a "centre of excellence for the Italian-German co-operation in the fields of research, culture and education", and recognized that Italy was directly involved in "its peculiar bi-national . . . managing structure". Nor has Germany in any way expressly consented to the taking of a measure such as the legal charge in question, or allocated Villa Vigoni for the satisfaction of the judicial claims against it.

120. In these circumstances, the Court finds that the registration of a legal charge on Villa Vigoni constitutes a violation by Italy of its obligation to respect the immunity owed to Germany.

V. The Decisions of the Italian Courts Declaring Enforceable in Italy Decisions of Greek Courts Upholding Civil Claims against Germany

121. In its third submission, Germany complains that its jurisdictional immunity was also violated by decisions of the Italian courts declaring enforceable in Italy judgments rendered by Greek courts against Germany in proceedings arising out of the Distomo massacre. In 1995, successors in title of the victims of that massacre, committed by the German armed forces in a Greek village in June 1944, brought proceedings for compensation against Germany before the Greek courts. By a judgment of 25 September 1997, the Court of First Instance of Livadia, which had territorial jurisdiction, ordered Germany to pay compensation to the claimants. The appeal by Germany against that judgment was dismissed by a decision of the Hellenic Supreme Court of 4 May 2000, which rendered final the judgment of the Court of First Instance, and at the same time ordered Germany to pay the costs of the appeal proceedings. The successful Greek claimants under the first-instance and Supreme Court judgments applied to the Italian courts for *exequatur* of those judgments, so as to be able to have them enforced in Italy, since it was impossible to enforce them in Greece or in Germany (see above, paragraphs 30 and 32). It was on those applications that the Florence Court of Appeal ruled, allowing them by a decision of 13 June 2006, which was confirmed, following an objection by Germany, on 21 October 2008 as regards the pecuniary damages awarded by the Court of First Instance of Livadia, and by a decision of 2 May 2005, confirmed, following an objection by Germany, on 6 February 2007 as regards the award of costs made by the Hellenic Supreme Court. This latter decision was confirmed by the Italian Court of Cassation on 6 May 2008. As regards the decision confirming the *exequatur* granted in respect of the judgment of the Court of First Instance of Livadia, it has also been appealed to the Italian Court of Cassation, which dismissed that appeal on 12 January 2011.

122. According to Germany, the decisions of the Florence Court of Appeal declaring enforceable the judgments of the Livadia court and the Hellenic Supreme Court constitute violations of its jurisdictional immunity, since, for the same reasons as those invoked by Germany in relation to the Italian proceedings concerning war crimes committed in Italy between 1943 and 1945, the decisions of the Greek courts were themselves rendered in violation of that jurisdictional immunity.

123. According to Italy, on the contrary, and for the same reasons as those set out and discussed in Section III of the present Judgment, there was no violation of Germany's jurisdictional immunity, either by the decisions of the Greek courts or by those of the Italian courts which declared them enforceable in Italy.

124. It should first be noted that the claim in Germany's third submission is entirely separate and distinct from that set out in the preceding

one, which has been discussed in Section IV above (paragraphs 109 to 120). The Court is no longer concerned here to determine whether a measure of constraint — such as the legal charge on Villa Vigoni — violated Germany's immunity from enforcement, but to decide whether the Italian judgments declaring enforceable in Italy the pecuniary awards pronounced in Greece did themselves — independently of any subsequent measure of enforcement — constitute a violation of the Applicant's immunity from jurisdiction. While there is a link between these two aspects — since the measure of constraint against Villa Vigoni could only have been imposed on the basis of the judgment of the Florence Court of Appeal according *exequatur* in respect of the judgment of the Greek court in Livadia — the two issues nonetheless remain clearly distinct. That discussed in the preceding section related to immunity from enforcement; that which the Court will now consider addresses immunity from jurisdiction. As recalled above, these two forms of immunity are governed by different sets of rules.

125. The Court will then explain how it views the issue of jurisdictional immunity in relation to a judgment which rules not on the merits of a claim brought against a foreign State, but on an application to have a judgment rendered by a foreign court against a third State declared enforceable on the territory of the State of the court where that application is brought (a request for *exequatur*). The difficulty arises from the fact that, in such cases, the court is not being asked to give judgment directly against a foreign State invoking jurisdictional immunity, but to enforce a decision already rendered by a court of another State, which is deemed to have itself examined and applied the rules governing the jurisdictional immunity of the respondent State.

126. In the present case, the two Parties appear to have argued on the basis that, in such a situation, the question whether the court seised of the application for *exequatur* had respected the jurisdictional immunity of the third State depended simply on whether that immunity had been respected by the foreign court having rendered the judgment on the merits against the third State. In other words, both Parties appeared to make the question whether or not the Florence Court of Appeal had violated Germany's jurisdictional immunity in declaring enforceable the Livadia and Hellenic Supreme Court decisions dependent on whether those decisions had themselves violated the jurisdictional immunity on which Germany had relied in its defence against the proceedings brought against it in Greece.

127. There is nothing to prevent national courts from ascertaining, before granting *exequatur*, that the foreign judgment was not rendered in breach of the immunity of the respondent State. However, for the purposes of the present case, the Court considers that it must address the issue from a significantly different viewpoint. In its view, it is unnecessary, in order to determine whether the Florence Court of Appeal violated Germany's jurisdictional immunity, to rule on the question of whether the decisions of the Greek courts did themselves violate that immunity — something, more-

over, which it could not do, since that would be to rule on the rights and obligations of a State, Greece, which does not have the status of party to the present proceedings (see *Monetary Gold Removed from Rome in 1943 (Italy* v. *France; United Kingdom and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 105, para. 34).

The relevant question, from the Court's point of view and for the purposes of the present case, is whether the Italian courts did themselves respect Germany's immunity from jurisdiction in allowing the application for *exequatur*, and not whether the Greek court having rendered the judgment of which *exequatur* is sought had respected Germany's jurisdictional immunity. In a situation of this kind, the replies to these two questions may not necessarily be the same; it is only the first question which the Court needs to address here.

128. Where a court is seised, as in the present case, of an application for *exequatur* of a foreign judgment against a third State, it is itself being called upon to exercise its jurisdiction in respect of the third State in question. It is true that the purpose of *exequatur* proceedings is not to decide on the merits of a dispute, but simply to render an existing judgment enforceable on the territory of a State other than that of the court which ruled on the merits. It is thus not the role of the *exequatur* court to re-examine in all its aspects the substance of the case which has been decided. The fact nonetheless remains that, in granting or refusing *exequatur*, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. The proceedings brought before that court must therefore be regarded as being conducted against the third State which was the subject of the foreign judgment.

129. In this regard, the Court notes that, under the terms of Article 6, paragraph 2, of the United Nations Convention:

> "A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:
>
> *(a)* is named as a party to that proceeding; or
>
> *(b)* is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State."

When applied to *exequatur* proceedings, that definition means that such proceedings must be regarded as being directed against the State which was the subject of the foreign judgment. That is indeed why Germany was entitled to object to the decisions of the Florence Court of Appeal granting *exequatur* — although it did so without success — and to appeal to the Italian Court of Cassation against the judgments confirming those decisions.

130. It follows from the foregoing that the court seised of an application for *exequatur* of a foreign judgment rendered against a third State has to ask itself whether the respondent State enjoys immunity from jurisdiction — having regard to the nature of the case in which that judgment was

given — before the courts of the State in which *exequatur* proceedings have been instituted. In other words, it has to ask itself whether, in the event that it had itself been seised of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State (see to this effect the judgment of the Supreme Court of Canada in *Kuwait Airways Corp.* v. *Iraq* ([2010] *SCR*, Vol. 2, p. 571), and the judgment of the United Kingdom Supreme Court in *NML Capital Limited* v. *Republic of Argentina* ([2011] *UKSC* 31).

131. In light of this reasoning, it follows that the Italian courts which declared enforceable in Italy the decisions of Greek courts rendered against Germany have violated the latter's immunity. For the reasons set out in Section III above of the present Judgment, the Italian courts would have been obliged to grant immunity to Germany if they had been seised of the merits of a case identical to that which was the subject of the decisions of the Greek courts which it was sought to declare enforceable (namely, the case of the Distomo massacre). Accordingly, they could not grant *exequatur* without thereby violating Germany's jurisdictional immunity.

132. In order to reach such a decision, it is unnecessary to rule on the question whether the Greek courts did themselves violate Germany's immunity, a question which is not before the Court, and on which, moreover, it cannot rule, for the reasons recalled earlier. The Court will confine itself to noting, in general terms, that it may perfectly well happen, in certain circumstances, that the judgment rendered on the merits did not violate the jurisdictional immunity of the respondent State, for example because the latter had waived its immunity before the courts hearing the case on the merits, but that the *exequatur* proceedings instituted in another State are barred by the respondent's immunity. That is why the two issues are distinct, and why it is not for this Judgment to rule on the legality of the decisions of the Greek courts.

133. The Court accordingly concludes that the above-mentioned decisions of the Florence Court of Appeal constitute a violation by Italy of its obligation to respect the jurisdictional immunity of Germany.

VI. Germany's Final Submissions and the Remedies Sought

134. In its final submissions at the close of the oral proceedings, Germany presented six requests to the Court, of which the first three were declaratory and the final three sought to draw the consequences, in terms of reparation, of the established violations (see paragraph 17 above). It is on those requests that the Court is required to rule in the operative part of this Judgment.

135. For the reasons set out in Sections III, IV and V above, the Court will uphold Germany's first three requests, which ask it to declare, in

turn, that Italy has violated the jurisdictional immunity which Germany enjoys under international law by allowing civil claims based on violations of international humanitarian law by the German Reich between 1943 and 1945; that Italy has also committed violations of the immunity owed to Germany by taking enforcement measures against Villa Vigoni; and, lastly, that Italy has violated Germany's immunity by declaring enforceable in Italy Greek judgments based on occurrences similar to those referred to above.

136. In its fourth submission, Germany asks the Court to adjudge and declare that, in view of the above, Italy's international responsibility is engaged.

There is no doubt that the violation by Italy of certain of its international legal obligations entails its international responsibility and places upon it, by virtue of general international law, an obligation to make full reparation for the injury caused by the wrongful acts committed. The substance, in the present case, of that obligation to make reparation will be considered below, in connection with Germany's fifth and sixth submissions. The Court's ruling thereon will be set out in the operative clause. On the other hand, the Court does not consider it necessary to include an express declaration in the operative clause that Italy's international responsibility is engaged; to do so would be entirely redundant, since that responsibility is automatically inferred from the finding that certain obligations have been violated.

137. In its fifth submission, Germany asks the Court to order Italy to take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable. This is to be understood as implying that the relevant decisions should cease to have effect.

According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 *(a)* of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles.

It follows accordingly that the Court must uphold Germany's fifth submission. The decisions and measures infringing Germany's jurisdictional immunities which are still in force must cease to have effect, and the

effects which have already been produced by those decisions and measures must be reversed, in such a way that the situation which existed before the wrongful acts were committed is re-established. It has not been alleged or demonstrated that restitution would be materially impossible in this case, or that it would involve a burden for Italy out of all proportion to the benefit deriving from it. In particular, the fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.

138. Finally, in its sixth submission, Germany asks the Court to order Italy to take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in its first submission (namely violations of international humanitarian law committed by the German Reich between 1943 and 1945).

As the Court has stated in previous cases (see, in particular, *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150), as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed. Accordingly, while the Court may order the State responsible for an internationally wrongful act to offer assurances of non-repetition to the injured State, or to take specific measures to ensure that the wrongful act is not repeated, it may only do so when there are special circumstances which justify this, which the Court must assess on a case-by-case basis.

In the present case, the Court has no reason to believe that such circumstances exist. Therefore, it will not uphold the last of Germany's final submissions.

* * *

139. For these reasons,

THE COURT,

(1) By twelve votes to three,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under interna-

tional law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Greenwood, Xue, Donoghue;

AGAINST: *Judges* Cançado Trindade, Yusuf; *Judge* ad hoc Gaja;

(2) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by taking measures of constraint against Villa Vigoni;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; *Judge* ad hoc Gaja;

AGAINST: *Judge* Cançado Trindade;

(3) By fourteen votes to one,

Finds that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by declaring enforceable in Italy decisions of Greek courts based on violations of international humanitarian law committed in Greece by the German Reich;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; *Judge* ad hoc Gaja;

AGAINST: *Judge* Cançado Trindade;

(4) By fourteen votes to one,

Finds that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect;

IN FAVOUR: *President* Owada; *Vice-President* Tomka; *Judges* Koroma, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Yusuf, Greenwood, Xue, Donoghue; *Judge* ad hoc Gaja;

AGAINST: *Judge* Cançado Trindade;

(5) Unanimously,

Rejects all other submissions made by the Federal Republic of Germany.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this third day of February, two thousand

and twelve, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany, the Government of the Italian Republic and the Government of the Hellenic Republic, respectively.

(*Signed*) Hisashi OWADA,
President.

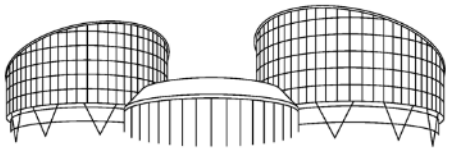
(*Signed*) Philippe COUVREUR,
Registrar.

Judges KOROMA, KEITH and BENNOUNA append separate opinions to the Judgment of the Court; Judges CANÇADO TRINDADE and YUSUF append dissenting opinions to the Judgment of the Court; Judge *ad hoc* GAJA appends a dissenting opinion to the Judgment of the Court.

(*Initialled*) H.O.

(*Initialled*) Ph.C.

Annex 114



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF GEORGIA v. RUSSIA (I)

(Application no. 13255/07)

JUDGMENT
(Just satisfaction)

STRASBOURG

31 January 2019

This judgment is final but it may be subject to editorial revision.

In the case of Georgia v. Russia (I),

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President*,
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Ganna Yudkivska,
Robert Spano,
Vincent A. De Gaetano,
André Potocki,
Dmitry Dedov,
Jon Fridrik Kjølbro,
Branko Lubarda,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Pauliine Koskelo,
Georgios A. Serghides,
Marko Bošnjak,
Lətif Hüseynov,
Lado Chanturia, *judges*,
and Lawrence Early, *jurisconsult*,

Having deliberated in private on 15 February and 7 November 2018,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 13255/07) against the Russian Federation lodged with the Court under Article 33 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Georgia on 26 March 2007. The Georgian Government ("the applicant Government") were represented before the Court by their Agent, Mr Beka Dzamashvili. They had previously been represented successively by their former Agents: Mr Besarion Bokhashvili, Mr David Tomadze and Mr Levan Meskhoradze. The Russian Government ("the respondent Government") were represented by their representative, Mr Mikhail Galperin. They had previously been represented successively by their former representatives: Mrs Veronika Milinchuk and Mr Georgy Matyushkin.

2. In a judgment of 3 July 2014 ("the principal judgment") the Court held that in the autumn of 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals had been put in place in the Russian

Federation which amounted to an administrative practice for the purposes of Convention case-law. It also held that there had been a violation of, *inter alia*, Article 4 of Protocol No. 4, Article 5 §§ 1 and 4 and Article 3 of the Convention, and of Article 13 of the Convention taken in conjunction with Article 5 § 1 and with Article 3 of the Convention (see *Georgia v. Russia (I)* [GC], no. 13255/07, ECHR 2014 (extracts)).

3. As the question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the applicant Government and the respondent Government to submit in writing, within twelve months, their observations on the matter and, in particular, to notify the Court of any agreement that they might reach (see paragraph 240, and point 17 of the operative provisions of the principal judgment).

4. As the parties did not reach an agreement, the applicant Government submitted their claims for just satisfaction under Article 41 on 1 July 2015, and the respondent Government submitted their initial observations in this regard on 2 July 2015.

5. On 8 July 2015 the parties were invited to submit their respective observations in reply, which they did on 9 October 2015.

6. On 6 November 2015 the President of the Grand Chamber, in accordance with Rule 60 § 2 of the Rules of Court, invited the applicant Government to submit a list of the Georgian nationals who had been victims of a "coordinated policy of arresting, detaining and expelling Georgian nationals" put in place in the Russian Federation in the autumn of 2006 (see *Georgia v. Russia (I)*, cited above, § 159). After an extension of the time-limit fixed for that purpose, the applicant Government filed an initial list of 345 alleged victims, together with annexes, on 1 April 2016.

7. On 25 April 2016 the President of the Grand Chamber, in accordance with Rule 60 § 2, invited the applicant Government to submit the final list of Georgian nationals who had been victims of that policy. The applicant Government filed a second list of 1,795 alleged victims (including the 345 alleged victims appearing in the first list), together with annexes, on 31 August and 1 September 2016.

8. On 25 April 2016 the President of the Grand Chamber, in accordance with Article 38 of the Convention and with Rule 58 § 1, also invited the respondent Government to submit all relevant information and documents (in particular the expulsion orders and court decisions) concerning the Georgian nationals who had been victims of the policy in question. He referred in particular to the Contracting States' duty to cooperate as laid down in Rule 44A and to the consequences of a failure to cooperate stipulated in Rule 44C. The respondent Government submitted their comments with regard to the first list produced by the applicant Government, together with annexes, on 1 September 2016.

9. On 13 September 2016 the President of the Grand Chamber invited the respondent Government to submit their comments on the final list (second list) of alleged victims filed by the applicant Government.

10. On 14 November 2016 the applicant Government filed a third list of 21 alleged victims, together with annexes. On 1 December 2016 the President of the Grand Chamber, in accordance with Rule 38 § 1, informed the parties that the additional list would not be included in the file, on the ground that it had been filed out of time.

11. After an extension of the time-limit fixed for that purpose, the respondent Government submitted their comments on the applicant Government's final list (second list), together with annexes, on 13 April 2017. After a further extension of the time-limit fixed for that purpose, they submitted a translation into English of the relevant documents on 30 June, 12 July and 15 August 2017.

12. The composition of the Grand Chamber was determined in accordance with Article 26 §§ 4 and 5 of the Convention and Rule 24.

THE LAW

13. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

14. The relevant part of Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

15. Rule 60 of the Rules of Court provides:

> "1. An applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention in the event of the Court finding a violation of his or her Convention rights must make a specific claim to that effect.
>
> 2. The applicant must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of the applicant's observations on the merits unless the President of the Chamber directs otherwise.
>
> 3. If the applicant fails to comply with the requirements set out in the preceding paragraphs the Chamber may reject the claims in whole or in part.
>
> 4. The applicant's claims shall be transmitted to the respondent Contracting Party for comment."

I. APPLICABILITY OF ARTICLE 41 OF THE CONVENTION TO THE PRESENT CASE

A. The parties' submissions

1. The applicant Government

16. After reiterating the violations found by the Court in the principal judgment, the applicant Government submitted at the outset that it was undisputed that Article 41 of the Convention applied to inter-State cases, and in particular to the present case. They referred, *inter alia*, to the judgment *Cyprus v. Turkey* (just satisfaction) ([GC], no. 25781/94, ECHR 2014).

2. The respondent Government

17. The respondent Government submitted as their principal argument that in the absence of adequate legal rules and established practice of the Court, and having regard to the particular circumstances of the case of *Georgia v. Russia (I)*, cited above, there was no basis for applying Article 41 of the Convention to the present inter-State case.

18. They submitted in particular that in the present case the victims were Georgian nationals, and not the applicant Government, party to the proceedings. Under Article 41 of the Convention, just satisfaction in respect of the violations established by the Court therefore had to be awarded not to the applicant Government, but to the individuals concerned, the vast majority of whom had not been individually identified (see paragraph 43 below). Furthermore, neither Article 33 of the Convention nor Rule 60 of the Rules of Court provided for an award of just satisfaction in inter-State applications. Lastly, the relevant rules of international law on diplomatic protection – in particular Article 19 of the United Nations International Law Commission Draft Articles – were incompatible with Article 41 of the Convention, the general objectives and principles of the Convention and the position of the Court according to which "just satisfaction is not sought with a view to compensating the State for a violation of its rights but for the benefit of individual victims" (they referred to *Cyprus v. Turkey* (just satisfaction), cited above, §§ 46 and 47).

B. The Court's assessment

19. The Court observes that this is the first time since the above-cited judgment of *Cyprus v. Turkey* (just satisfaction) that it is required to examine the question of just satisfaction in an inter-State case.

20. In that judgment the Court referred, *inter alia*, to the principle of public international law relating to a State's obligation to make reparation

for violation of a treaty obligation, and to the case-law of the International Court of Justice on the subject before concluding that Article 41 of the Convention did, as such, apply to inter-State cases.

21. The relevant extract is worded as follows:

> "40. The Court further reiterates that the general logic of the just-satisfaction rule (Article 41, or former Article 50 of the Convention), as intended by its drafters, is directly derived from the principles of public international law relating to State liability, and has to be construed in this context. This is confirmed by the *travaux préparatoires* to the Convention, according to which,
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> "... [t]his provision is in accordance with the actual international law relating to the violation of an obligation by a State. In this respect, jurisprudence of the European Court will never, therefore, introduce any new element or one contrary to existing international law ..." (Report presented by the committee of experts to the Committee of Ministers of the Council of Europe on 16 March 1950 (Doc. CM/WP 1(50)15)).
>
> 41. The most important principle of international law relating to the violation, by a State, of a treaty obligation is "that the breach of an engagement involves an obligation to make reparation in an adequate form" (see the judgment of the Permanent Court of International Justice in the case of the *Factory at Chorzów* (jurisdiction), Judgment No. 8, 1927, PCIJ, Series A, no. 9, p. 21). Despite the specific character of the Convention, the overall logic of Article 41 is not substantially different from the logic of reparations in public international law, according to which "[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" (see the judgment of the International Court of Justice in *Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*), *ICJ Reports* 1997, p. 81, § 152). 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 (see the judgment of the International Court of Justice in the *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)* (merits), *ICJ Reports* 1974, pp. 203-05, §§ 71-76).
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> 42. In these circumstances, bearing in mind the specific nature of Article 41 as *lex specialis* in relation to the general rules and principles of international law, the Court cannot interpret this provision in such a narrow and restrictive way as to exclude inter-State applications from its scope. On the contrary, such an interpretation is confirmed by the wording of Article 41 which provides for "afford[ing] just satisfaction to the injured party" (in French – "à la partie lésée"); a "party" (with a lower-case "p") has to be understood as one of the actual parties to the proceedings before the Court. The respondent Government's reference to the current wording of Rule 60 § 1 of the Rules of Court (paragraphs 12 and 38 above) cannot be deemed convincing in this respect. In fact, this norm, of a lower hierarchical value compared to the Convention itself, only reflects the obvious reality that in practice all the awards made by the Court under this provision until now have been directly granted to individual applicants.
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> 43. The Court therefore considers that Article 41 of the Convention does, as such, apply to inter-State cases. However, the question whether granting just satisfaction to an applicant State is justified has to be assessed and decided by the Court on a case-by-case basis, taking into account, *inter alia*, the type of complaint made by the applicant Government, whether the victims of violations can be identified, as well as the main purpose of bringing the proceedings in so far as this can be discerned from

the initial application to the Court. The Court acknowledges that an application brought before it under Article 33 of the Convention may contain different types of complaints pursuing different goals. In such cases each complaint has to be addressed separately in order to determine whether awarding just satisfaction in respect of it would be justified.

44. Thus, for example, an applicant Contracting Party may complain about general issues (systemic problems and shortcomings, administrative practices, etc.) in another Contracting Party. In such cases the primary goal of the applicant Government is that of vindicating the public order of Europe within the framework of collective responsibility under the Convention. In these circumstances it may not be appropriate to make an award of just satisfaction under Article 41 even if the applicant Government were to make such a claim.

45. There is also another category of inter-State complaint where the applicant State denounces violations by another Contracting Party of the basic human rights of its nationals (or other victims). In fact such claims are substantially similar not only to those made in an individual application under Article 34 of the Convention, but also to claims filed in the context of diplomatic protection, that is, "invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility" (Article 1 of the International Law Commission Draft Articles on Diplomatic Protection, 2006, see *Official Records of the General Assembly*, Sixty-first Session, *Supplement No. 10* (A/61/10), as well as the judgment of the International Court of Justice in the case of *Diallo (Guinea v. Democratic Republic of the Congo)* (preliminary objections), *ICJ Reports* 2007, p. 599, § 39). If the Court upholds this type of complaint and finds a violation of the Convention, an award of just satisfaction may be appropriate having regard to the particular circumstances of the case and the criteria set out in paragraph 43 above.

46. However, it must always be kept in mind that, according to the very nature of the Convention, it is the individual, and not the State, who is directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights. Therefore, if just satisfaction is afforded in an inter-State case, it should always be done for the benefit of individual victims. In this respect, the Court notes that Article 19 of the above-mentioned Articles on Diplomatic Protection recommends "transfer[ring] to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions". Moreover, in the above-mentioned *Diallo* case the International Court of Justice expressly indicated that "the sum awarded to [the applicant State] in the exercise of diplomatic protection of Mr Diallo is intended to provide reparation for the latter's injury" (see *Diallo (Guinea v. Democratic Republic of the Congo)* (compensation), *ICJ Reports* 2012, p. 344, § 57)."

22. In that judgment (§§ 43 to 45, see paragraph 21 above) the Court also set out three criteria for establishing whether awarding just satisfaction was justified in an inter-State case:

(i) the type of complaint made by the applicant Government, which had to concern the violation of basic human rights of its nationals (or other victims);

(ii) whether the victims could be identified; and

(iii) the main purpose of bringing the proceedings.

23. In the present case the Court notes that the applicant Government submitted in their application, lodged under Article 33 of the Convention, that the respondent Government had permitted or caused to exist an administrative practice of arresting, detaining and collectively expelling Georgian nationals from the Russian Federation in the autumn of 2006, resulting in a violation of Articles 3, 5, 8, 13, 14 and 18 of the Convention, and of Articles 1 and 2 of Protocol No. 1, Article 4 of Protocol No. 4 and Article 1 of Protocol No. 7. They also asked the Court to find that they were entitled "to just satisfaction for these violations requiring the remedial measures and compensation to the injured party" and asked it "to award just satisfaction under Article 41, namely, compensation, reparation, *restitutio in integrum*, costs, expenses and further and other relief to be specified for all the pecuniary and non-pecuniary damage suffered or incurred by the injured parties as a result of the violations and the pursuit of these proceedings" (see *Georgia v. Russia* (I), cited above, § 78 *in fine*, and §§ 79 and 239).

24. Following the adoption of the principal judgment, the applicant Government submitted claims for just satisfaction in compensation for violations of the Convention committed with regard to Georgian nationals who had been victims of a "coordinated policy of arresting, detaining and expelling Georgian nationals" put in place in the Russian Federation in the autumn of 2006 (see *Georgia v. Russia (I)*, cited above, § 159).

25. At the Court's request, the applicant Government also submitted a detailed list of 1,795 alleged and identifiable victims of the violations found in the principal judgment (see paragraph 7 above).

26. Just satisfaction is not therefore sought with a view to compensating the State for a violation of its rights but for the benefit of individual victims (see *Cyprus v. Turkey* (just satisfaction), cited above, § 45, paragraph 21 above).

27. As the three criteria referred to above are satisfied in the present case, the Court considers that the applicant Government are entitled to submit a claim under Article 41 of the Convention and that an award of just satisfaction is justified in the present case (see, *mutatis mutandis*, *Cyprus v. Turkey* (just satisfaction), cited above, § 47).

28. It is now necessary to determine the "sufficiently precise and objectively identifiable" group of people (see *Cyprus v. Turkey* (just satisfaction), cited above, § 47) on which the Court will actually base itself for the purposes of awarding just satisfaction in respect of the violations found, and the criteria to be applied for an award of just satisfaction for non-pecuniary damage.

II. THE APPLICANT GOVERNMENT'S CLAIMS IN RESPECT OF JUST SATISFACTION

A. The parties' submissions

1. The applicant Government

29. Referring to paragraph 135 of the principal judgment, the applicant Government submitted claims for just satisfaction for 4,634 Georgian nationals, of whom 2,380 had allegedly been detained and forcibly expelled.

30. Having regard to all the circumstances of the case and in accordance with equitable principles, they claimed a lump sum of EUR 70,320,000 (seventy million three hundred and twenty thousand euros) in respect of non-pecuniary damage suffered by the Georgian nationals, plus any tax that may be chargeable on that amount. Referring to the Court's case-law, they stated that that amount included compensation of EUR 20,000 for anyone detained and forcibly expelled and EUR 10,000 for anyone who had left the Russian Federation by their own means.

31. The applicant Government also claimed EUR 50,000 (fifty thousand euros) in respect of the death of each of the following individuals – Mrs Manana Jabelia, Mr Tengiz Togonidze and Mr Muzashvili – and EUR 30,000 (thirty thousand euros) for Mrs Nato Shavshishvili,[1] who had allegedly lost the use of her left hand on account of a failure to provide appropriate medical assistance.

32. They added that the just satisfaction should be awarded by the Court to the applicant Government, which should then distribute the amounts awarded to the individual victims of the violations found in the principal judgment. Subsequently, they would put an effective mechanism in place for distribution of the above-mentioned sums to the individual victims under the supervision of the Committee of Ministers.

33. The applicant Government also pointed out that in the judgment *Cyprus v. Turkey* (just satisfaction), cited above, the Court had awarded substantial amounts to the applicant Government without the precise number of beneficiaries being determined, and despite the objections raised by the Turkish Government in that regard.

34. In response to the Court's request, the applicant Government submitted an initial list of 345 alleged victims. With a view to preserving the rights of the victims, they considered it essential that the respondent Government also submit all the relevant information and documents in their possession (in particular expulsion orders, court decisions and the list of detained persons).

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1. The Court has delivered individual decisions in respect of Mrs Manana Jabelia, Mr Tengiz Togonidze and Mrs Nato Shavshishvili (see footnote no. 3 below).

35. Subsequently, again in response to the Court's request, the applicant Government submitted a second list of 1,795 alleged victims (including the 345 alleged victims appearing in the first list), specifying that in reality the number of victims was much higher and that many were still contacting the applicant Government on a daily basis. Attached to that list were court decisions on the administrative expulsions, and letters from various ministries and authorities of the Russian Federation.

36. The applicant Government concluded their submissions by referring again to paragraph 135 of the principal judgment and emphasising the need to obtain from the respondent Government all the necessary information from which to identify the complete list of victims.

2. The respondent Government

37. In the alternative, and if the Court were to declare Article 41 applicable to the present case, the respondent Government submitted that, contrary to the applicant Government's allegations, the wording of paragraph 135 of the principal judgment showed that the Court had not yet established the exact number of victims, which was essential, however, for determining the amount of compensation to be awarded.

38. The respondent Government referred to the judgment *Cyprus v. Turkey* (just satisfaction), cited above, in which the Court had based itself on a detailed list of victims, namely, "two sufficiently precise and objectively identifiable groups of people", and submitted that the Court should follow the same approach in the present case.

39. In accordance with the rules of evidence, it was for the applicant Government, as claimant, to submit a list of the persons concerned (with an indication of their full name, place of birth and the region in which the violation had occurred and the type of violation). That was all the more necessary because in the Russian Federation – as in other Contracting States – there was no register of arrested persons against whom an order had been made by an administrative court and who had been placed in detention facilities based on their ethnic origin. Subsequently, the respondent Government would be ready to verify all the information submitted and to send the Court all the requisite documents such as court decisions and so on.

40. The respondent Government also submitted that compensation could only be paid to individual victims of the violations found by the Court and who had been identified by it in its judgment on just satisfaction.

41. Failing that, compensation could conceivably not be awarded at all, and the respondent Government thus not be obliged to pay the award to the applicant Government pending subsequent identification of the victims and distribution to them of the sum in question, even under the supervision of the Committee of Ministers.

42. In the respondent Government's submission, identification of the victims of violations of the Convention was a fact-finding exercise and fell

within the exclusive power of the Court. Assigning that function to the applicant Government (even under the supervision of the Committee of Ministers) or directly to the Committee of Ministers, in the absence of adversarial proceedings before the Court, amounted to a flagrant breach of the principle of a fair trial and equality of arms.

43. The requirement to identify the victims in the present case was also a matter of genuine and reasonable concern for the respondent Government, who feared that without identification compensation would be paid to individuals who had not been victims of violations of the Convention in the Russian Federation at the relevant time, which was totally unacceptable and contrary to the purpose and spirit of the Convention.

44. The respondent Government then submitted that the successive extensions of the time-limit granted to the applicant Government to produce information about the alleged victims amounted to a serious breach of the respondent Government's rights as a party to the proceedings. This was particularly true on account of the limited period for keeping documents concerning the arrest and placement in temporary detention of foreign nationals, judicial procedures and so on.

45. Furthermore, more than ten years after the events in question, document searches were extremely fastidious and had to be done manually, as the majority of the national courts had not been equipped with an electronic system at the relevant time.

46. The respondent Government also maintained, referring to a certain number of judgments delivered by the Court against the Russian Federation, that the applicant Government's calculation of the compensation award was excessive and unjustified on the basis of the violations found.

47. Lastly, they disputed the amounts claimed in respect of the persons named by the applicant Government (see paragraph 31 above), some of whom had lodged individual applications with the Court.

B. The Court's assessment

1. Determination of a "sufficiently precise and objectively identifiable" group of people

(a) Preliminary considerations

48. Paragraph 135 of the principal judgment is worded as follows:

> "Accordingly, it considers that there is nothing enabling it to establish that the applicant Government's allegations as to the number of nationals expelled during the period in question and their sharp increase as compared with the period preceding October 2006 are not credible. In its examination of the present case it therefore assumes that during the period in question more than 4,600 expulsion orders were issued against Georgian nationals, of whom approximately 2,380 were detained and forcibly expelled."

49. Referring to that paragraph, the applicant Government submitted that 4,634 Georgian nationals, of whom 2,380 had been detained and forcibly expelled, represented "sufficiently precise and objectively identifiable" groups of people which the Court should use as a basis on which to award just satisfaction.

50. The respondent Government, for their part, submitted that the wording of paragraph 135 of the principal judgment showed that the Court had not yet established the exact number of victims, which was essential, however, for determining the amount of compensation to be awarded.

51. The Court reiterates that in the principal judgment it held that in the autumn of 2006 a "coordinated policy of arresting, detaining and expelling Georgian nationals" had been put in place in the Russian Federation "which amounted to an administrative practice for the purposes of Convention case-law" (see *Georgia v. Russia (I),* cited above, § 159).

52. Subsequently, failing communication by the respondent Government of monthly statistics on the number of Georgian nationals expelled from the Russian Federation in 2006 and 2007, the Court based itself on the figures adduced by the applicant Government as one of the elements of proof of the existence of that administrative practice (see *Georgia v. Russia (I),* cited above, § 129). The wording used by the Court in its reasoning in paragraph 135 of the principal judgment, and which appears in the "Law" part, is cautious: whilst, in the first sentence, it considers that "there is nothing enabling it to establish" that the applicant Government's allegations are not credible, it does not, however, affirm that they are proved "beyond reasonable doubt", which is the criterion of proof established by the Court in its case-law (see *Georgia v. Russia (I),* cited above, § 93). In the second sentence of that paragraph the Court confines itself to indicating that it "therefore assumes" (in French: "*part donc du principe*") that more than 4,600 expulsion orders were issued against Georgian nationals, of whom approximately 2,380 were detained and forcibly expelled. It thus bases itself on an approximate number of expulsion and detention orders when examining whether there was an administrative practice, which is very different from establishing the identity of individual victims.

53. Moreover, a distinction has to be made between these indications, which define a general numerical framework in the context of the examination of the case on the merits, and the question of the application of Article 41 of the Convention which the Court reserved in the principal judgment, considering that it was not ready for decision (see paragraph 3 above).

54. Furthermore, the general logic of the just-satisfaction rule is directly derived from the principles of public international law relating to State liability (see *Cyprus v. Turkey* (just satisfaction), cited above, §§ 40 and 41, paragraph 21 above). Those principles include both the obligation on the State responsible for the internationally wrongful act "to cease that act, if it

is continuing" and the obligation to "make full reparation for the injury caused by the internationally wrongful act", as laid down in Articles 30 and 31 respectively of the Articles on Responsibility of States for Internationally Wrongful Acts (Yearbook of the Commission of International Law, Volume II, Second Part, pp. 94 and 97, A/CN.4/SER.A/2001/Add.1 (Part 2)).

55. Lastly, and this is an essential factor, the application of Article 41 of the Convention requires identification of the individual victims concerned (see *Cyprus v. Turkey* (just satisfaction), cited above, § 46, see paragraph 21 above).

56. In that connection it can be observed that the case of *Cyprus v. Turkey* and the present case concern different factual contexts. While the former concerned multiple violations of the Convention following the military operations carried out by Turkey in northern Cyprus during the summer of 1974 and which were not based on individual decisions, in the instant case the finding of the existence of an administrative practice contrary to the Convention was based on individual administrative decisions expelling Georgian nationals from the Russian Federation during the autumn of 2006.

57. Accordingly, the Court considers that the parties must be in a position to identify the Georgian nationals concerned and to furnish it with the relevant information.

58. That is the reason why, in accordance with Rule 60 § 2 of the Rules of Court, it invited the applicant Government to submit a list of Georgian nationals who had been victims of the "coordinated policy of arresting, detaining and expelling Georgian nationals" put in place in the Russian Federation in the autumn of 2006 (see paragraphs 6 and 7 above). It also asked the respondent Government to submit all relevant information and documents (in particular the expulsion orders and court decisions) concerning Georgian nationals who had been victims of that policy during the period in question.

59. The Court reiterates in this regard the duty to cooperate of the High Contracting Parties set forth in Article 38 of the Convention and Rule 44A of the Rules of Court. Indeed, "it is of the utmost importance for the effective operation of the system of individual petition instituted under Article 34 of the Convention that States should furnish all necessary facilities to make possible a proper and effective examination of applications. This obligation requires the Contracting States to furnish all necessary facilities to the Court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications" (see, *mutatis mutandis*, *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 202, ECHR 2013).

60. This duty to cooperate, which also applies in inter-State cases (see *Georgia v. Russia (I),* cited above, §§ 99-110), is particularly important for

the proper administration of justice where the Court awards just satisfaction under Article 41 of the Convention in this type of case. It applies to both Contracting Parties: the applicant Government, who, in accordance with Rule 60 of the Rules of Court, must substantiate their claims, and also the respondent Government, in respect of whom the existence of an administrative practice in breach of the Convention has been found in the principal judgment.

61. In the present case the respondent Government therefore also had a duty to produce all relevant information and documents in their possession despite the difficulties associated with the passage of time and gathering a substantial quantity of data. Moreover, like the applicant Government, the respondent Government benefitted from a number of extensions of the time-limit for submitting those documents and having them translated into one of the Court's two official languages.

62. Following repeated requests by the Court, the applicant Government submitted a list of 1,795 individual victims, together with annexes, and the respondent Government sent the Court their comments, also together with annexes, in that regard. In the present case the Court has carried out a preliminary examination of that list (see paragraphs 68 to 72 below), even though the respondent Government have not submitted all the relevant information and documents (in particular the expulsion orders and court decisions) concerning the Georgian nationals who were victims of the coordinated policy of arresting, detaining and expelling Georgian nationals put in place in the Russian Federation in the autumn of 2006.

63. The respondent Government also asked the Court to identify each of the individual victims of the violations found by it in adversarial proceedings, on the ground that the task of establishing the facts fell within the exclusive power of the Court.

64. In that connection the Court notes first of all that in the present case the parties have exchanged observations on the question of just satisfaction in compliance with the adversarial principle, as was the case in *Cyprus v. Turkey* (just satisfaction), cited above.

65. The Court observes next that it has emphasised on several occasions, and particularly in cases concerning systematic violations of the Convention, that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of specific facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions (see, *inter alia*, *mutatis mutandis*, *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99 and 7 others, § 69, ECHR 2010; *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al., § 159 *in fine*, 12 October 2017; *Sargsyan v. Azerbaijan* (just satisfaction)

[GC], no. 40167/06, § 32, 12 December 2017; and *Chiragov and Others v. Armenia* (just satisfaction) [GC], no. 13216/05, § 50, 12 December 2017).

66. This is particularly true of requests for just satisfaction submitted in an inter-State case, which is inherently distinguishable from a case containing a group of several individual applications in which the circumstances specific to each application are set forth in the judgment (see, among many other authorities, *Berdzenishvili and Others v. Russia*[2], nos. 14594/07 and 6 others, 20 December 2016, concerning 7 applications, introduced by nineteen applicants and related to the case of *Georgia v. Russia (I)*).

67. Lastly, States Parties have a duty under Article 46 § 1 of the Convention to "abide by the final judgment of the Court", the supervisory role and responsibility in that respect being entrusted to the Committee of Ministers by virtue of Article 46 § 2 (see, *mutatis mutandis*, *Burmych and Others,* cited above, § 185).

(b) Methodology applied by the Court

68. In the present case the Court has carried out a preliminary examination of the list of 1,795 alleged victims submitted by the applicant Government, and of the comments in reply submitted by the respondent Government, in order to determine the list of Georgian nationals who can be considered victims of a violation of the Convention.

69. Having regard to the general numerical framework on which the Court relied in its principal judgment to conclude that there had been violations of the Convention (see paragraph 48 above), it proceeds on the assumption that the people named in the applicant Government's list can be considered victims of violations of the Convention for which the respondent Government have been held responsible. Having regard to the fact that the findings of a violation of Articles 3 and 5 § 1 of the Convention and of Article 4 of Protocol No. 4 concern individual victims and are based on events which occurred on the territory of the respondent Government, the Court considers that in the particular circumstances of the present case the burden of proof is on the respondent Government to convincingly show that the individuals appearing in the applicant Government's list do not have victim status. Accordingly, where the preliminary examination has enabled the Court to satisfactorily conclude that a person has been the victim of one or more violations of the Convention, and the respondent Government have failed to show that the person in question did not have victim status, that person will be included in the final internal list for the purposes of determining the total sum to be awarded in just satisfaction (see paragraph 71 below).

2. See footnote no. 3 below.

70. In the context of this preliminary examination the Court has based itself on the documents submitted to it by the parties and on the fact that the respondent Government themselves recognised that a certain number of the Georgian nationals appearing in the list submitted by the applicant Government could be regarded as victims. However, 290 persons named in that list cannot be regarded as such for, *inter alia*, the following reasons, rightly advanced by the respondent Government: they appear more than once on that list; they have lodged individual applications[3] before the Court; they have either acquired Russian nationality or from the outset possessed a nationality other than Georgian nationality; expulsion orders were issued against them either before or after the period in question; they have successfully used available remedies; it has not been possible to identify them or their complaints have not been sufficiently substantiated owing to insufficient information submitted by the applicant Government (see, *mutatis mutandis*, *Lisnyy v. Ukraine and Russia*, nos. 5355/15, 44913/15 and 50852/15, 5 July 2016, regarding the applicants' duty to substantiate their allegations before the Court).

71. Accordingly, for the purposes of awarding just satisfaction, the Court considers that it can base itself on a "sufficiently precise and objectively identifiable" group of at least 1,500 Georgian nationals who were victims of a violation of Article 4 of Protocol No. 4 (collective expulsion) in the context of the "coordinated policy of arresting, detaining and expelling Georgian nationals" put in place in the Russian Federation in the autumn of 2006.

72. Among these a certain number were also victims of a violation of Article 5 § 1 (unlawful deprivation of liberty) and Article 3 (inhuman and degrading conditions of detention) of the Convention.

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3. 23 applicants lodged 10 individual applications related to the case of *Georgia v. Russia* (I) before the Court, which ruled as follows:
- In a judgment of 3 May 2016 the Court struck out of the list the application lodged by Mr Shakhi Kvaratskhelia and Mr Shakhi Kvaratskhelia (no. 14985/07), the father and son respectively of Mrs Manana Jabelia, following a friendly settlement reached between the applicants and the respondent Government;
- In a judgment of 20 December 2016 the Court held that there had been a violation of Articles 2 and 3 of the Convention, and of Article 13 taken in conjunction with Article 3, and awarded 40,000 euros in just satisfaction concerning the application lodged by Mrs Nino Dzidzava (no. 16363/07), wife of Mr Tengiz Togonidze.
- With regard to the other applications, the Court grouped them together and delivered a judgment on the merits (*Berdzenishvili and Others*, no. 14594/07) on 20 December 2016. In that judgment it held that there had been no violation of the Articles of the Convention relied on by Mrs Nato Shavshishvili on the ground that her complaints had not been sufficiently substantiated. With regard to the applications in respect of which the Court found a violation of the Convention, it reserved the question of the application of Article 41 pending the adoption of the present just satisfaction judgment.

2. Criteria to be applied for an award of just satisfaction for non-pecuniary damage

73. The Court reiterates that there is no express provision for awards in respect of non-pecuniary damage in the Convention. In *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, § 224, ECHR 2009, *Cyprus v. Turkey* (just satisfaction), § 56, and *Sargsyan* and *Chiragov* (§§ 39 and 57 respectively), cited above, the Court confirmed the following principles which had been gradually developed in its case-law. Situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity can be distinguished from those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is an appropriate form of redress in itself. In some situations, where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right. In other situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that non-pecuniary damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage.

74. In the present case there is no doubt that the group of at least 1,500 Georgian nationals who were victims of a violation of Article 4 of Protocol No. 4, and those among them who were also victims of a violation of Article 5 § 1 and Article 3 of the Convention, in the context of the "coordinated policy of arresting, detaining and expelling Georgian nationals" put in place in the Russian Federation in the autumn of 2006, suffered trauma and experienced feelings of distress, anxiety and humiliation during that period.

75. Accordingly, despite the large number of imponderable factors – due, among other things, to the passage of time – that come into play here, compensation for non-pecuniary damage can be awarded. With regard to calculating the level of just satisfaction to be awarded, the Court has a discretion having regard to what it finds equitable (see, *mutatis mutandis*, *Sargsyan* and *Chiragov,* cited above, §§ 56 and 79). The Court reiterates in this regard that it has in the past always declined to make any awards of

punitive or exemplary damages even where such claims are made by individual victims of an administrative practice (see, as the most recent authority, *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, § 97, ECHR 2010 (extracts), which summarises the Court's case-law on this point).

76. Having regard to all the relevant circumstances of the present case, the Court, ruling on an equitable basis, deems it reasonable to award the applicant Government a lump sum of EUR 10,000,000 (ten million euros) in respect of non-pecuniary damage sustained by this group of at least 1,500 Georgian nationals.

77. In accordance with its case-law, the Court considers that this sum must be distributed by the applicant Government to the individual victims of the violations found in the principal judgment, with EUR 2,000 payable to the Georgian nationals who were victims only of a violation of Article 4 of Protocol No. 4 and an amount ranging from EUR 10,000 to EUR 15,000 payable to those of them who were also victims of a violation of Article 5 § 1 and Article 3 of the Convention. In respect of the latter group, account must be taken of the length of their respective periods of detention, in accordance with the Court's case-law (see, *inter alia*, *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 142, 10 January 2012, and *Idalov v. Russia* [GC], no. 5826/03, § 94, 22 May 2012).

78. The Court reiterates, further, that it falls to the respondent Government to satisfy their legal obligations, under Article 46 of the Convention, as interpreted in the light of Article 1, in conformity with the judgment of the Court and the specific measures taken by the Committee of Ministers in execution of this judgment (see, *inter alia*, *mutatis mutandis*, *Varnava and Others,* cited above, § 222; *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 142, ECHR 2014; and *Burmych and Others*, cited above, §§ 185-92).

79. In the particular circumstances of the instant case it also considers that it must be left to the applicant Government to set up an effective mechanism for distributing the above-mentioned sums to the individual victims of the violations found in the principal judgment while having regard to the aforementioned indications given by the Court (see paragraph 77), and excluding the individuals who cannot be classified as victims according to the above-mentioned criteria (see paragraph 70). This mechanism must be put in place under the supervision of the Committee of Ministers and in accordance with any practical arrangements determined by it in order to facilitate execution of the judgment. This distribution must be carried out within eighteen months from the date of the payment by the respondent Government or within any other period considered appropriate by the Committee of Ministers (see, *mutatis mutandis*, *Cyprus v. Turkey* (just satisfaction), cited above, § 59).

80. Lastly, the Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds*, by sixteen votes to one, that Article 41 of the Convention is applicable in the present case;

2. *Holds*, by sixteen votes to one,
   (a) that the respondent State is to pay the applicant Government, within three months, EUR 10,000,000 (ten million euros) in respect of non-pecuniary damage suffered by a group of at least 1,500 Georgian nationals;

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

   (c) that this amount shall be distributed by the applicant Government to the individual victims, by paying EUR 2,000 to the Georgian nationals who were victims only of a violation of Article 4 of Protocol No. 4, and EUR 10,000 to EUR 15,000 to those of them who were also victims of a violation of Article 5 § 1 and Article 3 of the Convention, taking into account the length of their respective periods of detention;

   (d) that this distribution shall be carried out under the supervision of the Committee of Ministers, within eighteen months from the date of the payment or within any other time-limit considered appropriate by the Committee of Ministers and in accordance with any practical arrangements determined by it in order to facilitate execution of the judgment.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 31 January 2019.

Lawrence Early
Jurisconsult

Guido Raimondi
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly concurring opinion of Judges Yudkivska, Mits, Hüseynov and Chanturia;

(b) dissenting opinion of Judge Dedov.

G.R.
T.L.E.

PARTLY CONCURRING OPINION OF JUDGES YUDKIVSKA, MITS, HÜSEYNOV AND CHANTURIA

1. We agree in principle with all the major findings of the Grand Chamber. In particular, we fully agree with the majority as regards the applicability of Article 41 to the proceedings in question (point 1 of the operative part) and concur with them as regards the establishment of the number of individual victims constituting the relevant group and the consequent calculation of the award (point 2 of the operative part).

2. In particular, the Grand Chamber rightly noted in paragraphs 71 and 76, and in point 2 of the operative part of the present judgment, that "*at least* 1,500 Georgian nationals" were victims of the various violations under the Convention (emphasis added). However, we would have preferred the Grand Chamber to have expressed itself in clearer terms in that respect and to have closely followed what it had itself established previously in paragraph 135 of the principal judgment (the judgment of 3 July 2014 on the merits).

3. Let us reiterate the relevant part of paragraph 135 of the Court's principal judgment in the present case, which reads as follows:

> "135. ... In its examination of the present case [the Grand Chamber] therefore assumes that during the period in question more than 4,600 expulsion orders were issued against Georgian nationals, of whom approximately 2,380 were detained and forcibly expelled."

4. In our view, when calculating the amount of the award under Article 41 of the Convention, the Court should have taken into account the numerical framework appearing in paragraph 135 of the principal judgment. That numerical framework already gave us, pursuant to the criteria developed by the Court in the case of *Cyprus v. Turkey* (just satisfaction judgment), no. 25781/94, § 47, 12 May 2014), two separate groups of "*sufficiently precise*" and "*objectively identifiable*" people (emphasis added).

5. The two groups were "*sufficiently precise*", according to the criteria used in the *Cyprus v. Turkey* case, because in the principal judgment the Court gave very precise figures for the groups appearing in two overlapping, but still distinct, factual situations. Of significant relevance for considering these two groups to be "*sufficiently precise*" is the fact that the respondent Government had themselves conceded before the Court, during the examination on the merits, that more than 4,000 administrative expulsion orders had been issued against Georgian nationals in 2006 (see paragraph 132 of the principal judgment).

6. Those two groups were moreover "*objectively identifiable*", according to the criteria used in the *Cyprus v. Turkey* case, because the facts of

expulsion and detention were, as the Grand Chamber had itself found in the principal judgment, confirmed by the physical existence of expulsion and detention orders issued by the relevant administrative agency and/or the domestic courts. Since the Court acknowledged the existence of those court orders, we do not think it would be reasonable to assume that the Russian authorities had issued those orders out of thin air, in respect of non-existent, anonymous "phantom" people. On the contrary, such orders obviously contained the names, dates of birth and other identification data of all the people concerned.

7. It is true that, when examining the question of the application of Article 41 of the Convention, the Court did not have at its disposal a copy of all the expulsion and detention orders mentioned in paragraph 135 of the principal judgment. However, and it is important to emphasise this, the lack of information in the case file was caused by the respondent Government's own failure to cooperate duly with the Court and provide it with the relevant documents (see the findings made in paragraphs 100 to 110 of the principal judgment). Indeed, since the expulsion and detention of 4,600 and 2,380 people respectively took place in Russia, on the basis of administrative and court orders issued in that country, it was reasonable to assume that all the legal traces of those expulsions and detentions could only be found in the archives of the Russian Federation (and not, for instance, in Georgia). As the respondent Government continued withholding the requisite documents from the Court even at the just-satisfaction stage of the proceedings (see paragraph 62 of the present judgment), the list of victims submitted by the applicant Government during the current stage of the proceedings (see paragraph 68 of the present judgment) should have been treated as an open-ended, illustrative list only.

8. It is for these reasons that we believe that the sufficiently precise numerical framework established by the Court in paragraph 135 of the principal judgment should have been taken as the basis for calculating an award under Article 41 of the Convention.

DISSENTING OPINION OF JUDGE DEDOV

I am in the minority in the present case because I voted against the findings of violations in the principal judgment. As regards the issue of just satisfaction, the present judgment represents, to some extent, a progressive development of the case-law providing guidance for the implementation of the principal judgment. However, the main problem remains unresolved. I regret that the Court did not allow the amount awarded in compensation to be distributed directly by the respondent Government in cooperation with the applicant Government, as should happen in the context of international relations between sovereign States. On the contrary, the Court left it exclusively to the applicant Government to create an effective mechanism for the distribution of compensation after, and not before, payment of the amount by the respondent Government. This algorithm excludes the respondent Government from any participation in the distribution and undermines the status of the Russian Federation as a member State of the Council of Europe, rendering it comparable to the status of an offender who pays a penalty to be further distributed at the discretion of the State. The national and international implementation procedure should indeed be different.

Annex 115

PUBLICATIONS DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE

SÉRIE A — N° 17

Le 13 septembre 1928

RECUEIL DES ARRÊTS

N° 13

AFFAIRE RELATIVE A L'USINE DE CHORZÓW

(DEMANDE EN INDEMNITÉ)

(FOND)

PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

SERIES A.—No. 17

September 13th, 1928

COLLECTION OF JUDGMENTS

No. 13

CASE CONCERNING THE FACTORY AT CHORZÓW

(CLAIM FOR INDEMNITY)

(MERITS)

LEYDE
SOCIÉTÉ D'ÉDITIONS
A. W. SIJTHOFF
1928

LEYDEN
A. W. SIJTHOFF'S
PUBLISHING COMPANY
1928

COUR PERMANENTE DE JUSTICE INTERNATIONALE

1928.
Le 13 septembre.
Dossier E. c. XIII.
Rôle XIV: 1.

QUATORZIÈME SESSION (ORDINAIRE)

Présents :

MM. ANZILOTTI, *Président,*
HUBER, *ancien Président,*
Lord FINLAY,
MM. LODER,
NYHOLM,
DE BUSTAMANTE, } *Juges,*
ALTAMIRA,
ODA,
PESSÔA,
M. BEICHMANN, *Juge suppléant,*
MM. RABEL,
EHRLICH, } *Juges nationaux.*

ARRÊT N° 13

AFFAIRE RELATIVE A L'USINE DE CHORZÓW

(DEMANDE EN INDEMNITÉ)

(FOND)

Entre le Gouvernement d'Allemagne, représenté par M. le Dr Erich Kaufmann, professeur à Berlin,

Demandeur,

et le Gouvernement de Pologne, représenté par M. le Dr Thadée Sobolewski, agent du Gouvernement polonais auprès du Tribunal arbitral mixte polono-allemand,

Défendeur.

PERMANENT COURT OF INTERNATIONAL JUSTICE.

FOURTEENTH (ORDINARY) SESSION.

1928.
September 13th.
File E. c. XIII.
Docket XIV: 1.

Before :

MM. ANZILOTTI, *President,*
HUBER, *Former President,*
Lord FINLAY,
MM. LODER,
NYHOLM,
DE BUSTAMANTE,
ALTAMIRA,
ODA,
PESSÔA,
Judges,
M. BEICHMANN, *Deputy-Judge,*
MM. RABEL,
EHRLICH,
National Judges.

JUDGMENT No. 13.

CASE CONCERNING THE FACTORY AT CHORZÓW

(CLAIM FOR INDEMNITY)

(THE MERITS).

The Government of Germany, represented by Dr. Erich Kaufmann, Professor at Berlin,

Applicant,

versus

The Government of the Polish Republic, represented by Dr. Thadeus Sobolewski, Agent for the Polish Government before the Polish-German Mixed Arbitral Tribunal,

Respondent.

LA COUR,

composée ainsi qu'il est dit ci-dessus,

après avoir entendu les Parties en leurs observations et conclusions,

a rendu l'arrêt suivant :

Par Requête introductive d'instance, déposée au Greffe de la Cour le 8 février 1927, en conformité de l'article 40 du Statut et de l'article 35 du Règlement, le Gouvernement du Reich a introduit devant la Cour permanente de Justice internationale une instance relative à la réparation qui serait due par le Gouvernement polonais du chef du préjudice souffert par les Sociétés anonymes Oberschlesische Stickstoffwerke A.-G. (ci-après dénommée l'Oberschlesische) et Bayerische Stickstoffwerke A.-G. (ci-après dénommée la Bayerische) à la suite de l'attitude adoptée par ce Gouvernement, lors de la prise de possession par lui de l'usine d'azote sise à Chorzów, vis-à-vis de ces Sociétés, attitude que la Cour avait déclarée, dans son Arrêt n° 7 du 25 mai 1926, comme n'étant pas conforme aux dispositions des articles 6 et suivants de la Convention relative à la Haute-Silésie, conclue à Genève, le 15 mai 1922, entre l'Allemagne et la Pologne (et désignée ci-après sous le nom de Convention de Genève).

Au reçu, le 3 mars 1927, du Mémoire du Gouvernement allemand en l'affaire, le Gouvernement polonais souleva, le 14 avril 1927, une exception préliminaire qui, contestant la compétence de la Cour pour connaître de l'instance introduite devant elle, concluait à ce qu'il plaise à la Cour, « sans entrer dans le fond, se déclarer incompétente ».

Sur ce moyen, la Cour se prononça par son Arrêt n° 8 du 26 juillet 1927, par lequel elle décida de rejeter l'exception préliminaire soulevée par le Gouvernement de Pologne et de retenir, pour statuer au fond, l'instance introduite le 8 février 1927 par le Gouvernement d'Allemagne.

Cet arrêt chargeait, en outre, le Président de fixer les délais pour le dépôt des Contre-Mémoire, Réplique et Duplique sur le fond. Ces délais, fixés d'abord aux 30 septembre, 15 novembre et 30 décembre 1927, furent par la suite étendus, en vertu

THE COURT,

composed as above,

having heard the observations and conclusions of the Parties,

delivers the following judgment:

The Government of the German Reich, by an Application instituting proceedings filed with the Registry of the Court on February 8th, 1927, in conformity with Article 40 of the Statute and Article 35 of the Rules of Court, has submitted to the Permanent Court of International Justice a suit concerning the reparation which, in the contention of the Government of the Reich, is due by the Polish Government for the damage suffered by the Oberschlesische Stickstoffwerke A.-G. (hereinafter designated as the Oberschlesische) and the Bayerische Stickstoffwerke A.-G. (hereinafter designated as the Bayerische) in consequence of the attitude adopted by that Government towards those Companies in taking possession of the nitrate factory situated at Chorzów, which attitude has been declared by the Court in Judgment No. 7 (May 25th, 1926) not to have been in conformity with the provisions of Article 6 and the following articles of the Convention concerning Upper Silesia concluded at Geneva on May 15th, 1922, between Germany and Poland (hereinafter described as the Geneva Convention).

On receipt of the German Government's Case in the suit, on March 3rd, 1927, the Polish Government, on April 14th, 1927, raised a preliminary objection denying the Court's jurisdiction to hear the suit brought before it and submitting that the Court should, "without entering into the merits, declare that it had no jurisdiction".

The Court dealt with this plea in its Judgment No. 8 given on July 26th, 1927, by which it overruled the preliminary objection raised by the Polish Government and reserved for judgment on the merits the suit brought on February 8th, 1927, by the German Government.

Furthermore, under the terms of this judgment, the President was instructed to fix the times for the filing of the Counter-Case, Reply and Rejoinder on the merits. These times, which were in the first place fixed to expire on

de décisions successives, aux 30 novembre 1927, 20 février et 7 mai 1928 respectivement.

Les pièces de la procédure écrite furent dûment déposées au Greffe dans les délais définitivement fixés, et firent l'objet des communications prévues à l'article 43 du Statut.

Au cours des audiences tenues les 21, 22, 25, 27 et 29 juin 1928, la Cour a entendu, en leurs plaidoiries, réplique et duplique, les agents des Parties, indiqués ci-dessus.

* * *

Les conclusions formulées dans la Requête du 8 février 1927 du Gouvernement allemand étaient ainsi conçues :

« Plaise à la Cour,

Dire et juger,

1° que, en raison de son attitude vis-à-vis des Sociétés anonymes Oberschlesische Stickstoffwerke et Bayerische Stickstoffwerke, constatée par la Cour comme n'étant pas conforme aux dispositions des articles 6 et suivants de la Convention de Genève, le Gouvernement polonais est tenu à la réparation du préjudice subi de ce chef par lesdites Sociétés à partir du 3 juillet 1922 jusqu'à la date de l'arrêt demandé ;

2° que le montant des indemnités à payer par le Gouvernement polonais est de 59.400.000 Reichsmarks pour le dommage causé à l'Oberschlesische Stickstoffwerke A.-G. et de 16.775.200 Reichsmarks pour le dommage causé à la Bayerische Stickstoffwerke A.-G. ;

3° en ce qui concerne le mode de paiement :

a) que le Gouvernement polonais devra payer, pendant le délai d'un mois à dater de l'arrêt, les indemnités dues à l'Oberschlesische Stickstoffwerke A.-G. pour la reprise de son capital d'exploitation (matières premières, produits finis et demi-finis, matériel emmagasiné, etc.) et les indemnités dues à la Bayerische Stickstoffwerke A.-G. pour la période d'exploitation du 3 juillet 1922 jusqu'à l'arrêt ;

b) que le Gouvernement polonais devra payer les sommes restantes, au plus tard, le 15 avril 1928 ;

September 30th, November 15th and December 30th, 1927, were subsequently extended by successive decisions until November 30th, 1927, February 20th and May 7th, 1928, respectively.

The documents of the written proceedings were duly filed with the Registrar of the Court within the times finally fixed and were communicated to those concerned as provided in Article 43 of the Statute.

In the course of hearings held on June 21st, 22nd, 25th, 27th and 29th, 1928, the Court has heard the oral statements, reply and rejoinder submitted by the above-mentioned Agents for the Parties.

* * *

The submissions made in the German Government's Application of February 8th, 1927, were as follows:

It is submitted:

[*Translation.*]

(1) that by reason of its attitude in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to make good the consequent damage sustained by the aforesaid Companies from July 3rd, 1922, until the date of the judgment sought;

(2) that the amount of the compensation to be paid by the Polish Government is 59,400,000 Reichsmarks for the damage caused to the Oberschlesische Stickstoffwerke Company and 16,775,200 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke Company;

(3) in regard to the method of payment:

(*a*) that the Polish Government should pay within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke Company for the taking possession of the working capital (raw material, finished and half-manufactured products, stores, etc.) and the compensation due to the Bayerische Stickstoffwerke Company for the period of exploitation from July 3rd, 1922, to the date of judgment;

(*b*) that the Polish Government should pay the sums remaining unpaid by April 15th, 1928, at latest;

c) que, à partir de l'arrêt, des intérêts à raison de 6 % l'an seront payés par le Gouvernement polonais ;

d) que les paiements visés sous *a*) — *c*) seront effectués sans aucune déduction au compte des deux Sociétés près la Deutsche Bank à Berlin ;

e) que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie. »

Ces conclusions ont, au cours de la procédure soit écrite, soit orale, subi des modifications dont il sera rendu compte ci-après. La Cour ne s'étant pas prévalue, dans la présente espèce, du droit à elle conféré par l'article 48 du Statut, de déterminer par voie d'ordonnance les « formes et délais dans lesquels chaque Partie doit finalement conclure », elle admet, aux fins de cette instance, la faculté pour les Parties de modifier, conformément aux précédents établis, leurs conclusions primitives, non seulement dans les mémoire et contre-mémoire (article 40 du Règlement), mais aussi tant dans les pièces ultérieures de la procédure écrite que dans les déclarations qu'elles peuvent faire au cours des débats oraux (article 55 du Règlement), sous réserve, seulement, que l'autre Partie soit toujours en mesure de se prononcer sur les conclusions amendées.

La conclusion n° 1 de la Requête n'a pas été modifiée par la suite.

En ce qui concerne, par contre, la conclusion n° 2, des modifications importantes sont intervenues. Dans le Mémoire, cette conclusion se trouve libellée de la manière suivante :

« Dire et juger....

2) que le montant des indemnités à payer par le Gouvernement polonais est de 75.920.000 Reichsmarks, plus la valeur actuelle du capital d'exploitation (matières premières, produits finis et demi-finis, matières emmagasinées, etc.), saisi le 3 juillet 1922, pour le dommage causé à l'Oberschlesische Stickstoffwerke A.-G., et de 20.179.000 Reichsmarks pour le dommage causé à la Bayerische Stickstoffwerke A.-G. »

En comparant la conclusion 2) du Mémoire avec la conclusion 2) de la Requête, il convient de tenir compte des faits suivants résultant du Mémoire, savoir :

(*c*) that, from the date of judgment, interest at 6 % per annum should be paid by the Polish Government;

(*d*) that the payments mentioned under (*a*)—(*c*) should be made without deduction to the account of the two Companies with the Deutsche Bank at Berlin;

(*e*) that, until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy.

These submissions have, in the course of the written or oral proceedings, undergone modifications which will be indicated below. As the Court has not in the present suit availed itself of the right conferred upon it under Article 48 of the Statute to make orders as to "the form and time in which each Party must conclude its arguments", it, in this case, allows the Parties, in accordance with established precedent, to amend their original submissions, not only in the Case and Counter-Case (Article 40 of the Rules), but also both in the subsequent documents of the written proceedings and in declarations made by them in the course of the hearings (Article 55 of the Rules), subject only to the condition that the other Party must always have an opportunity of commenting on the amended submissions.

Submission No. 1 of the Application has not been subsequently amended.

On the other hand, with regard to submission No. 2, important amendments have been made. In the Case this submission is worded as follows:

It is submitted: . . . .

[*Translation.*]

(2) that the amount of the compensation to be paid by the Polish Government is 75,920,000 Reichsmarks, plus the present value of the working capital (raw materials, finished and half-manufactured products, stores, etc.) taken over on July 3rd, 1922, for the damage caused to the Oberschlesische Stickstoffwerke Company, and 20,179,000 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke Company.

In comparing submission (2) of the Case with submission (2) of the Application, regard must be had to the following facts resulting from the Case:

a) que le montant de 59.400.000 indiqué dans la Requête comme le dommage de l'Oberschlesische est calculé au 3 juillet 1922 ;

b) que ce montant comprend la somme d'un million pour matières premières, produits finis et demi-finis, matières emmagasinées, etc. ;

c) que la somme de 75.920.000 indiquée dans le Mémoire à titre de dommage pour l'Oberschlesische se décompose en 58.400.000 de dommages au 3 juillet 1922, et 17.520.000 d'intérêts à 6 % sur 58.400.000 pour la période 3 juillet 1922 — 2 juillet 1927 ;

d) que cette somme ne comprend pas de montant pour le « capital d'exploitation », une indemnité pour ce capital « valeur actuelle » étant dans le Mémoire demandée en termes généraux ;

e) que la somme de 16.775.200 indiquée dans la Requête comme montant du dommage de la Bayerische est calculée au 3 juillet 1922 ; et

f) que la somme de 20.179.000 indiquée dans le Mémoire pour le dommage de la Bayerische est calculée au 2 (ou 3) juillet 1927 à un taux d'intérêt de 6 % ; le montant pour la Bayerische fourni dans la Requête serait entaché d'une erreur de calcul.

En dernier lieu, la conclusion 2) de la Requête a été modifiée dans la réplique orale de l'agent du Gouvernement allemand, savoir, en ce qui concerne l'indemnité réclamée pour le dommage causé à l'Oberschlesische. Ladite conclusion se trouve, en effet, dans les conclusions lues par l'agent à l'issue de sa réplique orale, libellée comme suit :

« Dire et juger que le montant des indemnités à payer au Gouvernement allemand est de 58.400.000 Reichsmarks, plus 1.656.000 Reichsmarks, plus les intérêts à 6 % de cette somme à partir du 3 juillet 1922 jusqu'à la date de l'arrêt (pour le dommage causé à l'Oberschlesische Stickstoffwerke A.-G.) ;

que le montant des indemnités à payer au Gouvernement allemand est de 20.179.000 Reichsmarks pour le dommage causé à la Bayerische Stickstoffwerke A.-G. »

Il s'ensuit que, pour l'Oberschlesische, le Gouvernement allemand *a*) revient à la somme de 58.400.000 au 3 juillet 1922 ;

(*a*) that the total of 59,400,000 mentioned in the Application as the figure representing the damage suffered by the Oberschlesische is calculated as on July 3rd, 1922;

(*b*) that this sum includes the sum of 1 million for raw materials, finished and half-manufactured products, stores, etc.;

(*c*) that the sum of 75,920,000 mentioned in the Case as the figure representing the damage suffered by the Oberschlesische is made up of 58,400,000 for damages as on July 3rd, 1922, and 17,520,000 for interest at 6 % on 58,400,000 for the period July 3rd, 1922, to July 2nd, 1927;

(*d*) that this sum does not include an amount for "working capital", compensation for the "present value" of this capital being in the Case sought in general terms;

(*e*) that the sum of 16,775,200 mentioned in the Application as the figure representing the damage suffered by the Bayerische is calculated as on July 3rd, 1922;

(*f*) that the sum of 20,179,000 mentioned in the Case as representing the damage suffered by the Bayerische is calculated as on July 2nd (or 3rd), 1927, at a rate of interest of 6 %; the amount for the Bayerische indicated in the Application is said to contain an error of calculation.

Lastly, submission (2) of the Application has been amended in the German Agent's oral reply as concerns the compensation claimed for the damage suffered by the Oberschlesische. This submission runs as follows in the submissions read by the Agent at the conclusion of his oral Reply:

It is submitted:
[*Translation.*]
that the total of the compensation to be paid to the German Government is 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks, plus interest at 6 % on this sum as from July 3rd, 1922, until the date of judgment (for the damage done to the Oberschlesische Stickstoffwerke A.-G.);

that the total of the compensation to be paid to the German Government is 20,179,000 Reichsmarks for the damage done to the Bayerische Stickstoffwerke A.-G.

It follows that, as regards the Oberschlesische, the German Government (*a*) reverts to the sum of 58,400,000 as on

b) fixe à 1.656.000 la valeur du capital d'exploitation à cette date ; *c*) demande sur ces deux sommes les intérêts à 6 % jusqu'à la date de l'arrêt, en renonçant au calcul forfaitaire avancé dans le Mémoire.

En ce qui concerne la conclusion 3) de la Requête du Gouvernement allemand, il y a à noter, dans la suite de la procédure, des modifications tant de forme que de fond.

Pour ce qui est de la forme, l'alinéa *e*) de la conclusion 3 de la Requête constitue, dans le Mémoire, à elle seule une nouvelle conclusion 3, tandis que la substance des alinéas *a*) — *d*) de la conclusion 3 de la Requête a été versée dans une nouvelle conclusion 4 *a*) — *d*) du Mémoire. Dans ces conditions, il est préférable de retracer les modifications survenues à chacun des alinéas de la conclusion 3 primitive.

L'alinéa 3 *a*) est ainsi libellé dans le Mémoire (où il porte le n° 4 *a*) :

« Dire et juger, en ce qui concerne le mode de paiement, que le Gouvernement polonais devra payer, pendant le délai d'un mois à dater de l'arrêt, les indemnités dues à l'Oberschlesische Stickstoffwerke A.-G., pour la reprise de son capital d'exploitation et les indemnités dues à la Bayerische Stickstoffwerke A.-G., pour la période d'exploitation du 3 juillet 1922 jusqu'à l'arrêt. »

Par rapport à la Requête, cet alinéa n'a, par conséquent, subi qu'une modification de pure forme (suppression d'une parenthèse explicative) ; elle n'a plus été amendée par la suite.

L'alinéa 3 *b*) est libellé de la manière suivante dans le Mémoire (où il porte le n° 4 *b*) :

« Dire et juger que le Gouvernement polonais devra payer les sommes restantes, au plus tard le 15 avril 1928 ;

subsidiairement que, pour autant que le paiement serait effectué par tranches, le Gouvernement polonais délivre, pendant le délai d'un mois à dater de l'arrêt, des lettres de change aux montants des tranches, y compris les intérêts, à payer aux dates d'échéance respectives à l'Oberschlesische Stickstoffwerke A.-G. et à la Bayerische Stickstoffwerke A.-G. »

July 3rd, 1922; (*b*) fixes as 1,656,000 the value of the working capital on that date; (*c*) claims on these two sums interest at 6 % until the date of judgment, thus abandoning the claim for a lump sum made in the Case.

As regards submission (3) of the German Government's Application, amendments both of form and of substance are to be noted in the course of the subsequent procedure.

As regards form, paragraph (*e*) of submission (3) of the Application constitutes by itself a new third submission in the Case, whilst the substance of paragraphs (*a*)—(*d*) of submission No. 3 of the Application has been embodied in a new submission No. 4 (*a*)—(*d*) in the Case. In these circumstances, it is preferable to trace back the modifications made to each of the paragraphs of the original third submission.

Paragraph 3 (*a*) is worded as follows in the Case (where it is numbered 4 (*a*)):

[*Translation.*]

that the Polish Government should pay, within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke Company for the taking possession of the working capital and the compensation due to the Bayerische Stickstoffwerke Company for the period of exploitation from July 3rd, 1922, to the date of judgment.

As compared with the Application, therefore, this paragraph has undergone a purely superficial modification (deletion of an explanatory remark in parenthesis), and it has not subsequently been amended.

Paragraph 3 (*b*) is worded as follows in the Case (where it is numbered 4 (*b*)):

[*Translation.*]

that the Polish Government should pay the remaining sums by April 15th, 1928, at latest;

in the alternative, that, in so far as payment may be effected in instalments, the Polish Government shall deliver, within one month from the date of judgment, bills of exchange for the amounts of the instalments, including interest, payable on the respective dates on which they fall due to the Oberschlesische Stickstoffwerke Company and to the Bayerische Stickstoffwerke Company.

Ainsi, à la conclusion principale primitive a été ajoutée une conclusion subsidiaire visant l'éventualité d'un paiement par tranches.

Le même alinéa est formulé comme suit dans la Réplique orale :

« Dire et juger que le Gouvernement polonais doit payer les sommes restantes au plus tard dans un délai de quinze jours à dater du commencement de l'année budgétaire qui suit l'arrêt ; subsidiairement, que, pour autant que le paiement serait effectué par tranches, le Gouvernement polonais délivre, pendant le délai d'un mois à dater de l'arrêt, des lettres de change aux montants des tranches, y compris les intérêts à payer aux dates d'échéance respectives à l'Oberschlesische Stickstoffwerke A.-G. et à la Bayerische Stickstoffwerke A.-G. »

La modification par rapport à la version précédente consiste en la substitution à la date du 15 avril 1928, déjà écoulée, d'un délai calculé en rapport avec l'ouverture de l'année budgétaire polonaise.

L'alinéa 3 *c*) des conclusions de la Requête (4 *c*) du Mémoire) n'a pas subi de changements par la suite.

Par contre, l'alinéa 3 *d*) de la Requête figure dans le Mémoire sous la forme suivante (n° 4 *d*) du Mémoire) :

« Dire et juger que le Gouvernement polonais n'est pas autorisé à compenser contre la créance susdite du Gouvernement allemand d'être indemnisé sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité ; et que les paiements visés sous *a*) — *c*) seront effectués sans aucune déduction au compte des deux Sociétés près la Deutsche Bank à Berlin. »

La conclusion primitive se trouve dans le dernier membre de phrase de cette formule, dont la partie principale demande maintenant une déclaration excluant toute possibilité de compensation extra-judiciaire.

La formule du Mémoire a été maintenue tant dans la Réplique écrite que dans la réplique orale, sauf addition d'une nouvelle conclusion subsidiaire, relative à la question de l'interdiction d'une compensation extra-judiciaire, et ainsi conçue :

Thus to the main original submission has been added an alternative contemplating the possibility of payment by instalments.

The same paragraph is couched in the following terms in the oral reply:

[*Translation.*]

It is submitted that the Polish Government should pay the remaining sums at latest within fifteen days after the beginning of the financial year following the judgment; in the alternative that, in so far as payment may be effected by instalments, the Polish Government should, within one month from the date of judgment, give bills of exchange for the amounts of the instalments, including interest, payable on maturity to the Oberschlesische Stickstoffwerke A.-G. and to the Bayerische Stickstoffwerke A.-G.

The modification as compared with the previous version consists in the substitution for the date April 15th, 1928, which had already passed, a time-limit fixed in relation to the beginning of the Polish financial year.

Paragraph 3 (*c*) of the submissions of the Application (4 (*c*) of the Case) has undergone no subsequent modification.

On the other hand, paragraph 3 (*d*) of the Application appears in the Case in the following form (No. 4 (*d*) of the Case):

[*Translation.*]

that the Polish Government is not entitled to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the above-mentioned claim for indemnity; and that the payments mentioned under (*a*)—(*c*) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin.

The original submission is contained in the last part of this paragraph, the principal clause of which now seeks a declaration excluding any possibility of extra-judicial set-off.

The wording of the Case is retained both in the written and in the oral reply, except that a new alternative submission is added in regard to the question of the prohibition of extra-judicial set-off. This addition runs as follows:

« Dire et juger, subsidiairement, qu'une compensation n'est autorisée que lorsque le Gouvernement polonais invoque à cette fin une créance reconnue par le Gouvernement allemand ou constatée par un arrêt rendu entre les deux Gouvernements. »

Venant, enfin, à l'alinéa 3 *e*) des conclusions de la Requête, il y a lieu de constater que ce dernier se retrouve sans aucun changement dans la conclusion 3 du Mémoire. Par contre, la Réplique écrite, tout en reproduisant également la formule de la Requête, y ajoute la conclusion subsidiaire suivante :

« Juger et décider que le Gouvernement polonais est obligé de cesser l'exploitation de l'usine, respectivement des installations chimiques pour transformer l'azote de chaux en nitrate d'ammoniaque, etc. »

Ainsi complétée, la conclusion dont il s'agit figure également dans la réplique orale, savoir dans la forme suivante :

« subsidiairement, pour le cas où la Cour n'adopterait pas les points de vue développés aux paragraphes 55 et 57 de la Réplique, dire et juger que le Gouvernement polonais est obligé de cesser l'exploitation de l'usine, respectivement des installations chimiques pour produire le nitrate d'ammoniaque, etc. »

* * *

À l'occasion de certaines conclusions présentées par le Gouvernement polonais et relatives à l'indemnisation de l'Oberschlesische, le Gouvernement allemand a non seulement demandé à la Cour de les rejeter, mais a encore formulé deux autres conclusions, savoir :

« Dire et juger

1° que le Gouvernement polonais n'est pas autorisé à refuser le paiement au Gouvernement allemand des indemnités en raison d'arguments tirés de l'article 256 et en raison d'égards vis-à-vis de la Commission des Réparations et d'autres tierces personnes ;

2° que l'obligation du Gouvernement polonais de payer l'indemnité allouée par la Cour n'est nullement écartée par un jugement rendu ou à rendre par un tribunal interne polonais dans un procès ayant pour objet la question de la propriété de l'usine sise à Chorzów. »

[*Translation.*]

In the alternative it is submitted that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments.

Turning lastly to paragraph 3 (*e*) of the submissions in the Application, it is to be observed that this reappears unchanged in submission 3 of the Case. On the other hand, in the written Reply, whilst the submission of the Application is repeated, the following alternative is added:

[*Translation.*]

It is submitted that the Polish Government should be obliged to cease the exploitation of the factory and of the chemical equipment for the transformation of nitrate of lime into ammonium nitrate, etc.

With this addition, this submission also appears in the oral reply in the following form:

[*Translation.*]

in the alternative, should the Court not adopt the points of view set out in paragraphs 55 and 57 of the Reply, it is submitted that the Polish Government should be obliged to cease the exploitation of the factory or of the chemical equipment for the production of ammonium nitrate, etc.

* * *

In connection with certain submissions made by the Polish Government in regard to the compensation of the Oberschlesische, the German Government has not merely asked the Court to reject these submissions but has also formulated two other submissions, namely:

[*Translation.*]

(1) that the Polish Government is not entitled to refuse to pay compensation to the German Government on the basis of arguments drawn from Article 256 and for motives of respect for the rights of the Reparation Commission and other third parties;

(2) that the Polish Government's obligation to pay the indemnity awarded by the Court is in no way set aside by a judgment given or to be given by a Polish municipal court in a suit concerning the question of the ownership of the factory at Chorzów.

Ces conclusions, formulées soit dans la Réplique écrite soit dans la première plaidoirie de l'agent allemand, ont été maintenues sans changement dans la réplique orale.

Abstraction faite de ces deux demandes complémentaires, les conclusions finales du Gouvernement allemand sont donc les suivantes :

« 1) que, en raison de son attitude vis-à-vis des Sociétés anonymes Oberschlesische Stickstoffwerke et Bayerische Stickstoffwerke constatée par la Cour comme n'étant pas conforme aux dispositions des articles 6 et suivants de la Convention de Genève, le Gouvernement polonais est tenu à la réparation du préjudice subi de ce chef par lesdites Sociétés à partir du 3 juillet 1922 jusqu'à la date de l'arrêt demandé ;

2) *a*) que le montant des indemnités à payer au Gouvernement allemand est de 58.400.000 Reichsmarks, plus 1.656.000 Reichsmarks, plus les intérêts à 6 % de cette somme à partir du 3 juillet 1922 jusqu'à la date de l'arrêt (pour le dommage causé à l'Oberschlesische Stickstoffwerke A.-G.) ;

b) que le montant des indemnités à payer au Gouvernement allemand est de 20.179.000 Reichsmarks pour le dommage causé à la Bayerische Stickstoffwerke A.-G. ;

3) que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie ;

subsidiairement, que le Gouvernement polonais est obligé de cesser l'exploitation de l'usine, respectivement des installations chimiques pour produire le nitrate d'ammoniaque, etc. ;

4) *a*) que le Gouvernement polonais devra payer, pendant le délai d'un mois à dater de l'arrêt, les indemnités dues à l'Oberschlesische Stickstoffwerke A.-G. pour la reprise de son capital d'exploitation, et les indemnités dues à la Bayerische Stickstoffwerke A.-G. pour la période d'exploitation du 3 juillet 1922 jusqu'à l'arrêt ;

b) que le Gouvernement polonais doit payer les sommes restantes au plus tard pendant un délai de quinze jours à dater du commencement de l'année budgétaire qui suit l'arrêt ;

subsidiairement, que, pour autant que le paiement serait effectué par tranches, le Gouvernement polonais délivre, pendant le délai d'un mois à dater de l'arrêt, des lettres de change aux montants des tranches, y compris les intérêts à payer aux dates d'échéance respectives à l'Oberschlesische Stickstoffwerke A.-G. et à la Bayerische Stickstoffwerke A.-G. ;

c) que, à partir de l'arrêt, des intérêts à raison de 6 % l'an seront payés par le Gouvernement polonais ;

These submissions, which were made in the written Reply and in the first oral statement of the German Agent respectively, have been maintained unaltered in the oral reply.

Apart from the two additional claims just referred to, the final submissions of the German Government are therefore as follows:

[*Translation.*]

(1) that by reason of its attitude in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to make good the consequent injury sustained by the aforesaid Companies from July 3rd, 1922, until the date of the judgment sought;

(2) (*a*) that the amount of the compensation to be paid to the German Government is 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks, plus interest at 6 % on this sum as from July 3rd, 1922, until the date of judgment (for the damage caused to the Oberschlesische Stickstoffwerke A.-G.);

(*b*) that the amount of the compensation to be paid to the German Government is 20,179,000 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke A.-G.;

(3) that until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy;

in the alternative, that the Polish Government should be obliged to cease from exploiting the factory or the chemical equipment for the production of nitrate of ammonia, etc.;

(4) (*a*) that the Polish Government should pay, within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke A.-G. for the taking possession of the working capital and the compensation due to the Bayerische Stickstoffwerke A.-G. for the period of exploitation from July 3rd, 1922, to the date of judgment;

(*b*) that the Polish Government should pay the remaining sums at latest within fifteen days after the beginning of the financial year following the judgment; in the alternative, that, in so far as payment may be effected by instalments, the Polish Government should within one month from the date of judgment, give bills of exchange for the amounts of the instalments, including interest, payable on maturity to the Oberschlesische Stickstoffwerke A.-G. and to the Bayerische Stickstoffwerke A.-G.;

(*c*) that from the date of judgment, interest at 6 % per annum should be paid by the Polish Government;

d) que le Gouvernement polonais n'est pas autorisé à compenser contre la créance susdite du Gouvernement allemand d'être indemnisé sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité ; et que les paiements visés sous *a*) à *c*) seront effectués sans aucune déduction au compte des deux Sociétés près la Deutsche Bank à Berlin ;

subsidiairement, qu'une compensation n'est autorisée que lorsque le Gouvernement polonais invoque à cette fin une créance reconnue par le Gouvernement allemand ou constatée par un arrêt rendu entre les deux Gouvernements. »

Le Gouvernement polonais n'a pas soulevé d'objection en la forme contre les modifications apportées successivement aux conclusions primitives du Gouvernement allemand.

* * *

Les conclusions que le Gouvernement polonais a formulées en réponse à celles qui se trouvent exprimées dans la Requête et dans le Mémoire allemand sont libellées de la manière suivante dans le Contre-Mémoire :

« Plaise à la Cour :

A. Pour ce qui concerne l'Oberschlesische :

1) débouter le Gouvernement requérant de sa demande ;

2) subsidiairement, surseoir provisoirement sur la demande en indemnité ;

3) très subsidiairement, pour le cas où la Cour serait amenée à allouer une indemnité quelconque, dire et juger que celle-ci ne sera payable que : *a*) après le retrait préalable par ladite Société de sa requête pendante au Tribunal arbitral mixte germano-polonais relative à l'usine de Chorzów et après sa renonciation en bonne et due forme à toute prétention contre le Gouvernement polonais, du chef de la prise en possession et de l'exploitation de l'usine de Chorzów ; *b*) lorsque le procès civil intenté contre ladite Société par le Gouvernement polonais et ayant pour objet la validité de l'inscription de son titre de propriété au registre foncier sera définitivement jugé en faveur de la Société Oberschlesische.

4) En tout cas, dire et juger que le Gouvernement allemand doit, en premier lieu, livrer au Gouvernement polonais la totalité des actions de la Société anonyme Oberschlesische

(*d*) that the Polish Government is not entitled to sett off against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the said claim for indemnity; and that the payments mentioned under (*a*) to (*c*) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin;

in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments.

The Polish Government has made no formal objection to the amendments successively made in the original submissions of the German Government.

* * *

The submissions formulated by the Polish Government in reply to those set out in the Application and Case of the German Government are worded as follows in the Counter-Case:

It is submitted:

[*Translation.*]

A. In regard to the Oberschlesische:

(1) that the applicant Government's claim should be dismissed;

(2) in the alternative, that the claim for indemnity should be provisionally suspended;

(3) as a further alternative, in the event of the Court awarding some compensation, that such compensation should only be payable: (*a*) after the previous withdrawal by the said Company of the action brought by it and pending before the German-Polish Mixed Arbitral Tribunal in regard to the Chorzów factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzów factory; (*b*) when the civil action brought against the said Company by the Polish Government in respect of the validity of the entry of its title to ownership in the land register has been finally decided in favour of the Oberschlesische.

(4) In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische

Stickstoffwerke, de la valeur nominale de 110.000.000 de marks dont il dispose en vertu du contrat du 24 décembre 1919.

B. Pour ce qui concerne la Bayerische :

1) *a*) débouter le Gouvernement requérant de sa demande en indemnité pour le passé, pour autant qu'elle dépasse la somme de 1.000.000 de Reichsmarks ;
   b) allouer *pro futuro* une rente annuelle de 250.000 Reichsmarks payable à partir du 1er janvier 1928 jusqu'au 31 mars 1941 ;
   c) dire et juger que ces indemnités ne seront payables qu'après le retrait préalable par ladite Société de sa requête pendante au Tribunal arbitral mixte germano-polonais relative à l'usine de Chorzów, et après sa renonciation, en bonne et due forme, à toute prétention contre le Gouvernement polonais du chef de la prise en possession et de l'exploitation de l'usine de Chorzów ;
2) débouter le Gouvernement requérant de sa conclusion n° 3, tendant à ce qu'il soit dit et jugé que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie.

C. Pour ce qui concerne l'Oberschlesische et la Bayerische en commun :

rejeter la conclusion n° 4 tendant à ce qu'il soit dit et jugé que le Gouvernement polonais n'est pas autorisé à compenser, contre la créance susdite du Gouvernement allemand d'être indemnisé, sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité, et que les paiements visés sous 4 *a*) — *c*) seront effectués sans aucune déduction au compte des deux Sociétés près la Deutsche Bank à Berlin. »

Ces conclusions n'ont, par la suite, subi d'autres modifications que le retrait, opéré au moyen d'une déclaration insérée dans la Duplique écrite, de la conclusion A, 3 *b*).

Le Gouvernement allemand ayant contesté le droit pour le Gouvernement polonais de retirer cette conclusion, à laquelle le Gouvernement allemand avait opposé une demande de débouté, dans le stade de la procédure où ce retrait avait eu lieu, le Gouvernement polonais a déclaré maintenir le retrait.

Pour les motifs développés ci-dessus, la Cour estime qu'il n'y a rien qui puisse empêcher le Gouvernement polonais de

Stickstoffwerke Company, of the nominal value of 110,000,000 Marks, which are in its hands under the contract of December 24th, 1919.

B. In regard to the Bayerische:

(1) (*a*) that the applicant Government's claim for compensation in respect of the past, in excess of 1,000,000 Reichsmarks, should be dismissed;

(*b*) that, *pro futuro*, an annual rent of 250,000 Reichsmarks, payable as from January 1st, 1928, until March 31st, 1941, should be awarded;

(*c*) that these indemnities should only be payable after previous withdrawal by the said Company of the claim pending before the German-Polish Mixed Arbitral Tribunal in respect of the Chorzów factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzów factory;

(2) that the applicant Government's third submission to the effect that until June 30th, 1931, no exportation of nitrated lime or nitrate of ammonia should take place to Germany, the United States of America, France or Italy, should be dismissed.

C. In regard to the Oberschlesische and Bayerische jointly:

that submission No. 4—to the effect that it is not permissible for the Polish Government to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia, that it may not make use of any other set-off against the above-mentioned claim for indemnity, and that the payments mentioned under 4 (*a*)—(*c*) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin—should be rejected.

These submissions have not subsequently been amended except that submission A, 3 (*b*), was withdrawn by means of a declaration contained in the written Rejoinder.

The German Government having disputed the right of the Polish Government to withdraw this submission (the rejection of which had been demanded by the former) at the stage of the proceedings reached when the withdrawal took place, the latter Government maintained its withdrawal.

For the reasons given above, the Court holds that there is nothing to prevent the Polish Government for its part from

modifier, quant à lui, ses conclusions primitives, d'autant moins que cette modification s'est produite encore au cours de la phase écrite de la procédure et a pris la forme d'un abandon d'une partie des conclusions. De l'avis de la Cour, la seconde des « demandes complémentaires » du Gouvernement allemand, mentionnée ci-dessus, se dirigeait sans doute contre la conclusion polonaise qui a été abandonnée.

*

La Cour considère, par conséquent, qu'elle se trouve en présence de conclusions finales polonaises ainsi libellées :

« Plaise à la Cour :

A. pour ce qui concerne l'Oberschlesische :

1) débouter le Gouvernement requérant de sa demande ;

2) subsidiairement, surseoir provisoirement sur la demande en indemnité ;

3) très subsidiairement, pour le cas où la Cour serait amenée à allouer une indemnité quelconque, dire et juger que celle-ci ne sera payable qu'après le retrait préalable par ladite Société de sa requête pendante au Tribunal arbitral mixte germano-polonais relative à l'usine de Chorzów et après sa renonciation en bonne et due forme à toute prétention contre le Gouvernement polonais, du chef de la prise en possession et de l'exploitation de l'usine de Chorzów.

4) En tout cas, dire et juger que le Gouvernement allemand doit, en premier lieu, livrer au Gouvernement polonais la totalité des actions de la Société anonyme Oberschlesische Stickstoffwerke, de la valeur nominale de 110.000.000 de marks, dont il dispose en vertu du contrat du 24 décembre 1919.

B. Pour ce qui concerne la Bayerische :

1) *a*) débouter le Gouvernement requérant de sa demande en indemnité pour le passé, pour autant qu'elle dépasse la somme de 1.000.000 de Reichsmarks ;

b) allouer *pro futuro* une rente annuelle de 250.000 Reichsmarks payable à partir du 1er janvier 1928 jusqu'au 31 mars 1941 ;

c) dire et juger que ces indemnités ne seront payables qu'après le retrait préalable par ladite Société de sa requête pendante au Tribunal arbitral mixte germano-

amending its original submissions, especially seeing that this amendment occurred while the written proceedings were still in progress and took the form of the abandonment of a part of its submissions. In the Court's opinion, the second of the "additional claims" of the German Government mentioned above, was doubtless designed to meet the Polish submission which has been thus abandoned.

*

The Court therefore considers that the final submissions of the Polish Government may be set down as under:

"It is submitted:

A. As regards the Oberschlesische:

(1) that the claim of the applicant Government should be dismissed;

(2) in the alternative, that the claim for indemnity should be provisionally suspended;

(3) as a further alternative, in the event of the Court awarding some compensation, that such compensation should only be payable after the previous withdrawal by the said Company of the action brought by it and pending before the German-Polish Mixed Arbitral Tribunal in regard to the Chorzów factory, and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzów factory.

(4) In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of 110,000,000 Marks, which are in its hands under the contract of December 24th, 1919.

B. As regards the Bayerische:

(1) (*a*) that the applicant Government's claim for compensation in respect of the past, in excess of 1,000,000 Reichsmarks, should be dismissed;

(*b*) that, *pro futuro*, an annual rent of 250,000 Reichsmarks, payable as from January 1st, 1928, until March 31st, 1941, should be awarded;

(*c*) that these indemnities should only be payable after previous withdrawal by the said Company of the claim pending before the German-Polish Mixed Arbitral

polonais relative à l'usine de Chorzów, et après sa renonciation, en bonne et due forme, à toute prétention contre le Gouvernement polonais du chef de la prise en possession et de l'exploitation de l'usine de Chorzów ;

2) débouter le Gouvernement requérant de sa conclusion n° 3 tendant à ce qu'il soit dit et jugé que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie.

C. Pour ce qui concerne l'Oberschlesische et la Bayerische en commun :

rejeter la conclusion n° 4 tendant à ce qu'il soit dit et jugé que le Gouvernement polonais n'est pas autorisé à compenser contre la créance susdite du Gouvernement allemand d'être indemnisé, sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité, et que les paiements visés sous 4 *a*) — *c*) seront effectués sans aucune déduction au compte des deux Sociétés près la Deutsche Bank à Berlin. »

* * *

D'une comparaison entre les conclusions finales allemandes et polonaises qui ont été ainsi établies, il ressort :

I. — A) en ce qui concerne la conclusion allemande n° 1 : qu'il y a désaccord entre les Parties, sauf pour ce qui est de la réparation du dommage subi par la Bayerische ;

B) en ce qui concerne la conclusion allemande n° 2 *a* : que le Gouvernement polonais demande que le Gouvernement allemand soit débouté ; et, subsidiairement, qu'il soit sursis provisoirement à la demande en indemnité ; c'est sans doute contre la demande subsidiaire opposée ainsi par le Gouvernement polonais à la conclusion n° 2 *a* du Gouvernement allemand que se dirige la première des « demandes complémentaires » de ce Gouvernement, mentionnées plus haut ;

C) en ce qui concerne la conclusion allemande n° 2 *b* : que le Gouvernement polonais demande que le Gouvernement allemand en soit débouté, sauf pour ce

Tribunal in respect of the Chorzów factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzów factory;

(2) that the applicant Government's third submission to the effect that until June 30th, 1931, no exportation of nitrate of lime or nitrate of ammonia should take place to Germany, the United States of America, France or Italy.

C. As regards the Oberschlesische and Bayerische jointly:

that submission No. 4—to the effect that it is not permissible for the Polish Government to set off against the above-mentioned claim for indemnity of the German Government its claim in respect of social insurances in Upper Silesia, that it may not make use of any other set-off against the above-mentioned claim for indemnity, and that the payments mentioned under 4 (*a*)—(*c*) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin—should be rejected.

* * *

A comparison between the German and Polish final submissions as thus set out leads to the following results:

I.—(A) as regards the first German submission: that the Parties are at variance except in regard to the reparation of the damage sustained by the Bayerische;

(B) as regards submission No. 2 *a* of the German Government: that the Polish Government asks that it should be dismissed; and, in the alternative, that the claim for indemnity should be provisionally suspended; it is doubtless the alternative claim thus put forward by Poland in reply to submission No. 2 *a* of the German Government that the first of the "additional claims" of the latter Government mentioned above is intended to meet;

(C) as regards submission No. 2 *b* of the German Government: that the Polish Government asks that it should be dismissed except as regards the award, in respect of

qui est de l'allocation, pour le passé, d'une somme ne dépassant pas 1.000.000 de Reichsmarks et, pour l'avenir, d'une rente annuelle de 250.000 Reichsmarks payable du 1er janvier 1928 au 31 mars 1941 ;

D) en ce qui concerne la conclusion allemande n° 3 : que le Gouvernement polonais demande que le Gouvernement allemand soit débouté de la conclusion *principale*, mais ne se prononce pas en forme de conclusion sur la conclusion *subsidiaire* inscrite sous ce numéro ;

E) en ce qui concerne les conclusions allemandes n° 4 *a*) — *c*) : que le Gouvernement polonais ne se prononce pas spécifiquement sur ces conclusions, sauf en formulant sa conclusion A 3, relative au sursis de paiement ;

F) en ce qui concerne la conclusion allemande n° 4 *d*) : que le Gouvernement polonais conclut au rejet de la conclusion *principale* portant ce numéro, mais ne se prononce pas en forme de conclusion sur la conclusion *subsidiaire* allemande.

II. — En ce qui concerne les conclusions polonaises : que la conclusion A 4, dépassant le cadre des conclusions allemandes, a provoqué de la part du Gouvernement allemand une demande en rejet, formulée au cours de la phase orale de la procédure.

* * *

C'est donc exclusivement sur les points de divergence ainsi constatés qu'il appartient à la Cour de statuer dans l'arrêt qu'elle va rendre. Il est vrai que les Parties ont formulé, au cours de la procédure tant écrite qu'orale, encore d'autres demandes. Pour autant, cependant, que ces demandes ne constituent pas des développements des conclusions primitives, ou des demandes subsidiaires à ces conclusions, la Cour ne saurait les regarder autrement que, suivant l'expression de l'agent du Gouvernement allemand, comme des « motivations à titre subsidiaire », ou bien comme de simples suggestions quant à la procédure à suivre ; cela est certainement le cas en ce qui concerne les nombreuses demandes tendant à obtenir la consul-

the past, of a sum not exceeding 1,000,000 Reichsmarks for the future, of an annual rent of 250,000 Reichsmarks payable as from January 1st, 1928, until March 31st, 1941;

(D) as regards the German submission No. 3: that the Polish Government asks that the German Government's *principal* submission should be dismissed but does not formulate a definite submission with regard to the *alternative* submission under this number;

(E) as regards the German submissions Nos. 4 (*a*)—(*c*): that the Polish Government does not say anything specific concerning these submissions except in so far as it formulates its submission A 3, regarding the suspension of payment;

(F) as regards the German Government's submission No. 4 (*d*): that the Polish Government submits that the *principal* submission under this number should be rejected, but does not formulate any definite submission regarding the *alternative* German submission.

II.— As regards the Polish submissions: that submission A 4, which goes beyond the scope of the German submissions, has given rise to a claim for its rejection on the part of the German Government, formulated during the oral proceedings.

* * *

It is therefore solely with the points of divergence as set out above that the Court has to deal in the judgment which it is about to deliver. It is true that the Parties have, both in the written and oral proceedings, formulated yet other claims. In so far, however, as these claims do not constitute developments of the original submissions, or alternatives to them, the Court cannot regard them otherwise than—to use the expression of the Agent of the German Government—as "subsidiary arguments" or as mere suggestions as to the procedure to be adopted; this is certainly the case as regards the numerous requests with a view to the consultation of experts or the hearing of witnesses. There is no occasion for the Court

tation d'experts ou l'audition de témoins. Sur toutes ces demandes, la Cour n'a pas besoin de statuer ; elle peut donc se borner à en tenir compte, dans la mesure où cela convient, au cours de la discussion, aux fins de l'exposé des motifs de l'arrêt des arguments avancés par les Parties à l'appui de leurs conclusions.

* * *

Les Parties ont soumis à la Cour de nombreux documents, soit comme annexes aux pièces de la procédure écrite, soit au cours des débats oraux, soit, enfin, à la suite de demandes formulées ou de questions posées par la Cour. (Annexe.)

POINT DE FAIT.

Les faits qui se trouvent à la base de la présente affaire ont déjà été succinctement exposés ou rappelés dans les Arrêts n^{os} 6, 7, 8 et 11 rendus par la Cour les 25 août 1925, 25 mai 1926, 26 juillet 1927, et 16 décembre 1927.

Le présent arrêt, cependant, doit s'occuper de l'affaire dite de l'usine de Chorzów à un point de vue où la Cour n'a pas eu à se placer antérieurement, savoir, à celui de la nature — et, le cas échéant, du montant ainsi que des modalités de paiement — de la réparation due éventuellement par la Pologne pour avoir, ainsi que l'a constaté la Cour par son Arrêt n° 7, adopté une attitude qui n'était pas conforme à la Convention de Genève du 15 mai 1922. Il y a donc lieu, avant d'aborder le point de droit soulevé par la Requête allemande du 8 février 1927, de retracer brièvement les faits pertinents à ce point de vue particulier.

Le 5 mars 1915 avait été conclu entre le chancelier de l'Empire allemand, pour le Reich et la Bayerische, un contrat aux termes duquel la Société s'engageait à « installer pour le Reich et à commencer immédiatement à construire », entre autres, une usine d'azote de chaux à Chorzów en Haute-Silésie. Les terrains nécessaires seraient acquis pour le compte du Reich

to pass upon all these requests; it may therefore confine itself to taking them into account, in so far as may be necessary during the discussion of the arguments advanced by the Parties in support of their submissions, for the purposes of stating the reasons of the judgment.

* * *

The Parties have presented to the Court numerous documents either as annexes to the documents of the written proceedings or in the course of the hearings, or, lastly, in response to requests made or questions put by the Court. (Annex.)

THE FACTS.

The facts underlying the present suit have already been succinctly stated or referred to in Judgments Nos. 6, 7, 8 and 11, given by the Court on August 25th, 1925, May 25th, 1926, July 26th, 1927, and December 16th, 1927.

The present judgment, however, must deal with the so-called case of the factory at Chorzów from a point of view with which the Court has not hitherto had to concern itself, namely, that of the nature—and, if necessary, the amount and method of payment—of the reparation which may be due by Poland in consequence of her having, as established by the Court in Judgment No. 7, adopted an attitude not in conformity with the Geneva Convention of May 15th, 1922. Accordingly, it is necessary, before approaching the point of law raised by the German Application of February 8th, 1927, briefly to trace out the relevant facts from this particular standpoint.

On March 5th, 1915, a contract was concluded between the Chancellor of the German Empire, on behalf of the Reich, and the Bayerische, according to which that Company undertook "to establish for the Reich and forthwith to begin the construction of", amongst other things, a nitrate factory at Chorzów in Upper Silesia. The necessary lands were to be acquired on

et inscrits à son nom dans le livre foncier. Les installations mécaniques devaient être établies conformément aux brevets et licences ainsi qu'aux expériences de la Société, qui s'engageait à diriger, jusqu'au 31 mars 1941, l'exploitation de l'usine, en utilisant l'ensemble des brevets, licences, expériences et innovations, améliorations et perfectionnements, ainsi que tous contrats de fournitures et de livraisons qui lui revenaient. Dans ce but, une section spéciale de la Société devait être établie ; elle serait soumise, dans une certaine mesure, au contrôle du Reich, qui avait le droit de participer, pour chaque année financière, à l'excédent résultant de l'exploitation. Le Reich avait le droit de résilier au 31 mars de chaque année à partir du 31 mars 1926, après préavis de quinze mois, la direction de l'usine par la Société. Cette résiliation pouvait avoir lieu déjà à partir du 31 mars 1921, toujours après préavis de quinze mois, si la participation du Reich à l'excédent n'atteignait pas un niveau déterminé.

Ce contrat fut plus tard complété par une série de sept contrats additionnels, dont, cependant, seuls les deuxième et septième, conclus les 16 novembre 1916 et 22 novembre 1918 respectivement, ont trait à l'usine de Chorzów. Le 14 mai 1919, la Bayerische intenta un procès contre le Reich, demandant que celui-ci fût tenu à dédommager la Société pour le préjudice qu'elle aurait souffert à la suite de certains manquements allégués à l'exécution du contrat du 5 mars 1915 et des contrats additionnels. Cette affaire, toutefois, fut liquidée à l'amiable par une transaction conclue le 24 octobre 1919 entre le Reich et la Bayerische, transaction qui, remplaçant le cinquième contrat additionnel, n'avait pas trait à l'usine de Chorzów.

Le 24 décembre 1919 furent passés à Berlin divers actes juridiques notariés ayant pour but la création d'une nouvelle Société, l'Oberschlesische, au capital social de 250.000 marks, augmenté plus tard à 110.000.000 de marks, et la vente par le Reich à cette Société de l'usine de Chorzów, c'est-à-dire de l'ensemble des terrains, bâtiments et installations y appartenant, avec tous accessoires, réserves, matières premières et matériaux d'exploitation, ainsi que les stocks. La direction et l'exploita-

behalf of the Reich and entered in its name in the land register. The machinery and equipment were to be in accordance with the patents and licences of the Company and the experience gained by it, and the Company undertook to manage the factory until March 31st, 1941, making use of all patents, licences, experience gained, innovations and improvements, as also of all supply and delivery contracts of which it had the benefit. For this purpose, a special section of the Company was to be formed which was, to a certain extent, to be subject to the supervision of the Reich, which had the right to a share of the profits resulting from the working of the factory during each financial year. The Reich had the right, commencing on March 31st, 1926, to terminate the contract for the management of the factory by the Company on March 31st of any year upon giving fifteen months' notice. The contract could be determined as early as March 31st, 1921, always on condition of fifteen months' notice being given, if the Reich's share of the surplus did not reach a fixed level.

This contract was subsequently supplemented by a series of seven additional contracts, of which, however, only the second and seventh, concluded on November 16th, 1916, and November 22nd, 1918, respectively, relate to the Chorzów factory. On May 14th, 1919, the Bayerische brought an action against the Reich, claiming that the latter was bound to compensate the Company for the damage said to have been suffered by it, owing to certain alleged shortcomings with respect to the fulfilment of the contract of March 5th, 1915, and the additional contracts. This matter was, however, settled out of court by an arrangement concluded on October 24th, 1919, between the Reich and the Bayerische, an arrangement which replaced the fifth additional contract and did not relate to the Chorzów factory.

On December 24th, 1919, a series of legal instruments were signed and legalized at Berlin with a view to the formation of a new Company, the Oberschlesische Stickstoffwerke A.-G., with a share capital of 250,000 marks, increased subsequently to 110 millions of marks, and the sale by the Reich to this Company of the factory at Chorzów, that is to say, the whole of the land, buildings and installations belonging thereto, with all accessories, reserves, raw material, equipment and stocks. The

tion de l'usine devaient rester entre les mains de la Bayerische, qui utiliserait dans ce but ses brevets, licences, expériences et contrats. Ces rapports entre les deux Sociétés furent confirmés au moyen de lettres échangées entre elles, datées des 24 et 28 décembre 1919. L'Oberschlesische fut dûment inscrite, le 29 janvier 1920, à l'*Amtsgericht* de Königshütte, dans le livre foncier de Chorzów, comme propriétaire des biens-fonds qui constituaient l'usine d'azote de Chorzów. Le siège social de l'Oberschlesische qui, aux termes de l'acte de fondation, était établi à Chorzów, fut, dans la suite, par acte du 14 janvier 1920, transféré à Berlin.

Dans le contrat du 24 décembre 1919 entre le Reich et l'Oberschlesische nouvellement créée, intervint également une deuxième Société, à responsabilité limitée, créée le même jour, et appelée *Stickstoff Treuhand Gesellschaft m. b. H.* (ci-après dénommée la « Treuhand »), Société dont le capital social était de 300.000 marks, augmenté plus tard à 1.000.000 de marks. Aux termes du contrat, l'ensemble de l'usine pour la production de l'azote à chaux avec installations accessoires, sise à Chorzów, fut cédé par le Reich à l'Oberschlesische au prix de 110.000.000 de marks environ, prix calculé sur certaines données indiquées dans le contrat même, — la Treuhand reprenant aux lieu et place de l'Oberschlesische, comme débiteur unique et indépendant, toutes les obligations que le contrat imposait à cette Société à l'égard du Reich et obtenant, comme contre-prestation sans payement, des actions de l'Oberschlesische de la valeur nominale de 109.750.000 marks. Plus tard, la Treuhand a acquis également les actions restantes de l'Oberschlesische et est ainsi devenue l'actionnaire unique de cette Société. En garantie des créances appartenant au Reich en vertu du contrat, la Treuhand s'engageait à procurer au Reich le droit de gage sur toutes les actions de l'Oberschlesische. La Treuhand amortirait le prix d'achat exclusivement en versant au Reich des dividendes sur les actions de l'Oberschlesische. Néanmoins, la Treuhand était autorisée à payer, à tout moment, en tout ou en partie, le prix d'achat, ce qui aurait pour effet de libérer du gage les actions dont le capital nominal correspondrait au versement ainsi effectué. Le Reich était auto-

management and working of the factory were to remain in the hands of the Bayerische, which, for this purpose, was to utilize its patents, licences, experience gained and contracts. These relations between the two Companies were confirmed by means of letters dated December 24th and 28th, 1919, exchanged between them. The Oberschlesische was duly entered, on January 29th, 1920, at the *Amtsgericht* of Königshütte, in the Chorzów land register, as owner of the landed property constituting the nitrate factory at Chorzów. The registered office of the Oberschlesische which, under the memorandum of association, was established at Chorzów, was subsequently, by an amendment executed on January 14th, 1920, transferred to Berlin.

In the contract of December 24th, 1919, between the Reich and the newly created Oberschlesische, a second limited liability company, founded the same day and known as the *Stickstoff Treuhand Gesellschaft m. b. H.* (hereinafter called the "Treuhand") was also concerned. This Company had a share capital of 300,000 marks, subsequently increased to 1,000,000 marks. Under the contract, the whole of the factory for the production of nitrated lime, with the accessory installations, situated at Chorzów, was ceded by the Reich to the Oberschlesische at the price of approximately 110 million marks,—which price was calculated according to certain data indicated in the contract itself,—the Treuhand taking over, in the place of the Oberschlesische, as sole and independent debtor, all the obligations imposed by the contract upon the latter in regard to the Reich, and obtaining in consideration thereof, without payment, shares of the Oberschlesische—to the nominal value of 109,750,000 marks. Later, the Treuhand also acquired the rest of the shares of the Oberschlesische, thus becoming the sole shareholder of that Company. As guarantee for the sums due to the Reich under the contract, the Treuhand undertook to obtain for the Reich a lien on all the shares of the Oberschlesische. The Treuhand was to liquidate the purchase price exclusively by paying to the Reich the dividends on the shares of the Oberschlesische. Nevertheless, the Treuhand was authorized to pay at any time the whole or a part of the purchase price; this would have the effect of removing the lien on shares of a nominal value corresponding to the payment

risé à exercer lui-même tous les droits découlant de la possession des actions et en particulier le droit de vote à l'assemblée générale, mais se déclarait d'accord pour maintenir la direction de l'exploitation de l'Oberschlesische entre les mains de la Bayerische. Une aliénation des actions engagées ne serait autorisée, même après l'expiration du droit de gage, qu'avec l'assentiment du Reich. En garantie de l'exécution de cette obligation, le Reich conserverait, même après cette expiration, la possession des actions et l'exercice de tous les droits découlant de cette possession. Le prix réalisé lors d'une vente éventuelle des actions servirait en premier lieu à amortir le solde de la créance du Reich. De tout excédent, le Reich toucherait, le cas échéant, soit les 85 % — si la vente était faite par la Treuhand —, soit les 90 % — si elle était faite par le Reich ; dans les deux cas, le solde seulement reviendrait à la Treuhand, qui, cependant, dans la seconde éventualité, obtenait le droit d'acquérir les actions au prix auquel le Reich désirait les réaliser.

Le 15 mai 1922 fut signée à Genève entre l'Allemagne et la Pologne la Convention relative à la Haute-Silésie.

Après la signature de cette Convention, mais avant la cession effective de la Haute-Silésie polonaise à la Pologne, la Treuhand offrit, par lettre du 26 mai 1922, à une société suisse, la Compagnie d'azote et de fertilisants S. A. à Genève, une option jusqu'à la fin de l'année pour l'achat, au prix de cinq millions de francs suisses à verser au plus tard le 2 janvier 1923, de la moitié (55 millions de marks) des actions de l'Oberschlesische, moyennant quoi la société genevoise obtiendrait, entre autres, le droit de participer aux négociations avec le Gouvernement polonais. Cette offre n'aboutit pas.

Le 1er juillet 1922, le Tribunal polonais de Huta Krolewska, qui avait succédé à l'*Amtsgericht* de Königshütte, rendit une décision suivant laquelle l'enregistrement près ce Tribunal de l'Oberschlesische comme propriétaire de l'usine en question, déclaré nul, devait être rayé, la situation antérieure rétablie, et le droit de propriété sur les biens-fonds dont il s'agit enregistré au profit du Fisc de l'État polonais. Cette décision, qui

made. The Reich was authorized itself to exercise all the rights resulting from the possession of the shares, and in particular the right to vote at the general meeting of shareholders, but agreed that the management of the exploitation of the Oberschlesische should be left in the hands of the Bayerische. An alienation of the shares so pledged would be authorized only with the approval of the Reich, even after the lien had expired. As a guarantee for the fulfilment of this obligation, the Reich would, even after expiration of the lien, retain possession of the shares and the exercise of all rights resulting from such possession. The price realized in the event of a sale of the shares was in the first place to be devoted to the liquidation of the balance of the Reich's claim. Of any surplus, the Reich was to receive either 85%—if the sale were effected by the Treuhand—or 90 %—if it were effected by the Reich; in both cases, the balance only would fall to the Treuhand which, however, in the second case, would obtain a right to acquire the shares at the price at which the Reich wished that they should be disposed of.

On May 15th, 1922, was signed at Geneva between Germany and Poland the Convention concerning Upper Silesia.

After the signature of this Convention, but before the actual cession of Polish Upper Silesia to Poland, the Treuhand, by a letter dated May 26th, 1922, offered to a Swiss company, the *Compagnie d'azote et de fertilisants S. A.* at Geneva, an option until the end of the year for the purchase, at a price of five million Swiss francs, to be paid by January 2nd, 1923, at latest, of one half (55 million marks) of the shares of the Oberschlesische, in consideration of which the Genevese Company would, amongst other things, acquire the right to take part in the negotiations with the Polish Government. This offer came to nothing.

On July 1st, 1922, the Polish Court of Huta Krolewska, which had replaced the *Amtsgericht* of Königshütte, gave a decision to the effect that the registration with this Court of the Oberschlesische as owner of the factory, which was declared null and void, was to be cancelled and the previously existing situation restored and that the right of ownership in the landed property in question was to be registered in the name of the

invoquait l'article 256 du Traité de Versailles, ainsi que les lois polonaises des 14 juillet 1920 et 16 juin 1922, fut mise à exécution le même jour.

Le 3 juillet suivant, M. Ignacy Moscicki, nommé fondé de pouvoirs général de l'usine de Chorzów, par un décret ministériel polonais du 24 juin 1922, prit possession de l'usine et en assuma l'administration, conformément aux termes du décret ; le Gouvernement allemand a allégué, et le Gouvernement polonais n'a pas contesté, que ledit fondé de pouvoirs, en entreprenant la gestion de l'exploitation de l'usine, se mit en même temps en possession des biens meubles et des brevets, licences, etc.

Après avoir saisi l'usine, le Gouvernement polonais l'inscrivit sur la liste des biens à lui transférés en vertu de l'article 256 du Traité de Versailles, liste qu'il a dûment notifiée à la Commission des Réparations. Le Gouvernement polonais allègue qu'à la suite de l'Arrêt n° 7 de la Cour, le Gouvernement allemand a demandé la radiation de l'usine de la liste en question ; il n'a cependant pas été informé que cette radiation ait été effectuée.

Entre temps, l'Oberschlesische avait introduit, le 15 novembre 1922, devant le Tribunal arbitral mixte germano-polonais à Paris, une requête concluant à faire condamner le Gouvernement polonais notamment à la restitution de l'usine. Cette requête, signifiée au Gouvernement défendeur le 17 janvier 1923, fut retirée par l'Oberschlesische en juin 1928, avant que le Tribunal eût eu l'occasion de statuer.

L'Oberschlesische intenta une action parallèle concernant les biens meubles qui se trouvaient à Chorzów lors de la prise de l'usine, en ouvrant, le 24 novembre 1922, une procédure contre le Fisc polonais devant le Tribunal civil de Katowice, procédure dont le but était d'obtenir soit la restitution à l'Oberschlesische ou à la Bayerische de ces biens, soit le remboursement de leur valeur ; ce procès n'aboutit cependant à aucune décision quant au fond.

En ce qui la concerne, la Bayerische a, elle aussi, intenté, le 25 mars 1925, devant le Tribunal arbitral mixte germano-polo-

Polish Treasury. This decision, which cited Article 256 of the Treaty of Versailles and the Polish laws of July 14th, 1920, and June 16th, 1922, was carried into effect on the same day.

On July 3rd, 1922, M. Ignacy Moscicki, who was delegated with full powers to take charge of the factory at Chorzów by a Polish ministerial decree of June 24th, 1922, took possession of the factory and took over the management in accordance with the terms of the decree. The German Government contended, and the Polish Government did not deny, that the said delegate, in undertaking the control of the working of the factory, at the same time took possession of the movable property, patents, licences, etc.

After having taken over the factory, the Polish Government entered it in the list of property transferred to it under Article 256 of the Treaty of Versailles, which list was duly communicated to the Reparation Commission. The Polish Government alleges that after the pronouncement of Judgment No. 7 by the Court, the German Government asked that the factory should be struck out of the list in question; the former Government has not, however, been informed whether this has been done.

In the meantime, the Oberschlesische, on November 15th, 1922, had brought an action before the German-Polish Mixed Arbitral Tribunal at Paris, claiming, amongst other things, that the Polish Government should be ordered to restore the factory. This action, notice of which was served upon the respondent Government on January 17th, 1923, was withdrawn by the Oberschlesische in June 1928, before the Tribunal had been able to give a decision.

The Oberschlesische, on November 24th, 1922, instituted a parallel action in regard to the movable property existing at Chorzów at the time of the taking over of the factory, against the Polish Treasury before the Civil Court of Katowice, with a view to obtaining either the restitution to the Oberschlesische or the Bayerische of such property, or the payment of the equivalent value. This action however led to no decision on the merits.

As regards the Bayerische, that Company also, on March 25th, 1925, brought an action before the German-Polish Mixed

nais, une action contre le Fisc polonais, en vue d'obtenir une indemnité annuelle jusqu'à la restitution de l'usine à l'Oberschlesische et de se faire restituer la possession et la direction de l'usine. La requête introduisant cette instance fut signifiée au Gouvernement défendeur le 16 décembre 1925 ; mais l'affaire fut retirée en juin 1928, en même temps que l'instance introduite par l'Oberschlesische, et dans les mêmes conditions.

L'Arrêt n° 7 de la Cour fut rendu le 25 mai 1926. Cet arrêt fut la source d'événements qui se développèrent dans deux directions différentes.

D'une part, en effet, sur l'initiative du Gouvernement allemand, il vint à former le point de départ pour des négociations directes entre les deux Gouvernements intéressés. De ces négociations il y a lieu de retenir ici uniquement que, le 14 janvier 1927, le Gouvernement allemand avait reconnu que l'usine ne pouvait plus être restituée en nature, et que, par conséquent, la réparation due devait en principe prendre la forme du versement d'une indemnité, déclaration d'ailleurs formellement répétée dans le Mémoire. Les négociations, par ailleurs, n'aboutirent pas, à cause notamment du fait que, de l'avis du Gouvernement polonais, la nécessité d'une compensation entre l'indemnité à allouer à l'Allemagne et différents montants dont la Pologne serait créancière de l'Allemagne, s'imposerait. Leur insuccès eut pour résultat la présente instance.

D'autre part, l'Arrêt n° 7 de la Cour provoqua de la part du Gouvernement polonais une requête adressée au Tribunal polonais de Katowice contre l'Oberschlesische et demandant qu'il fût déclaré que celle-ci n'était pas devenue propriétaire des biens-fonds de Chorzów ; que l'inscription au registre foncier opérée en sa faveur le 29 janvier 1922 était dépourvue de validité ; et que — indépendamment des lois du 14 juillet 1920 et 16 juin 1922 — la propriété des biens-fonds en question revenait au Fisc de l'État polonais. L'arrêt du Tribunal sur cette requête — arrêt qui, rendu par contumace, fut publié le 12 novembre 1927 et entra en force de chose jugée le 2 janvier 1928 — fit droit à toutes les conclusions du demandeur.

Arbitral Tribunal against the Polish Treasury with a view to obtaining an annual indemnity until the restitution of the factory to the Oberschlesische, and to causing the possession and management of the factory to be restored to it. Notice of this action was served on the respondent Government on December 16th, 1925; but the case was withdrawn in June 1928, at the same time as the action brought by the Oberschlesische and in the same circumstances.

The Court's Judgment No. 7 was given on May 25th, 1926. This judgment was the source of developments tending in two different directions.

On the one hand, at the initiative of the German Government, it formed the starting point for direct negotiations between the two Governments concerned. In regard to these negotiations, it is only necessary here to note that, on January 14th, 1927, the German Government had recognized that the factory could no longer be restored in kind and that consequently the reparation due must, in principle, take the form of the payment of compensation, a statement which is moreover formally repeated in the Case. The negotiations were unsuccessful owing, amongst other things, to the fact that, in the opinion of the Polish Government, certain claims which Poland was said to have against Germany, must be set off against the indemnity to be awarded to Germany. The failure of the negotiations resulted in the institution of the present proceedings.

On the other hand, the Court's Judgment No. 7 gave rise on the part of the Polish Government to the bringing of an action before the Polish Court of Katowice against the Oberschlesische in order to obtain a declaration that that Company had not become owner of the landed property at Chorzów; that the entry in the land register made in its favour on January 29th, 1922, was not valid, and that—independently of the laws of July 14th, 1920, and June 16th, 1922,—the ownership of the landed property in question fell to the Polish Treasury. The judgment of the Court in this action—which was given by default—was published on November 12th, 1927, and took effect on January 2nd, 1928; it admitted all the submissions of the claimant.

Entre temps, la Cour avait été saisie, le 18 octobre 1927, d'une nouvelle requête, émanant du Gouvernement allemand qui, se fondant sur les dispositions de l'article 60 du Statut et l'article 66 du Règlement de la Cour, demanda à celle-ci de donner une interprétation de ses Arrêts n° 7, du 25 mai 1926, et n° 8, du 26 juillet 1927, dont le sens et la portée seraient devenus litigieux entre les deux Gouvernements, à savoir, sur le point qui avait servi d'origine à la procédure devant le Tribunal de Katowice.

La Cour rendit, le 16 décembre 1927, son arrêt, qui porte le n° 11, sur ladite requête. A teneur de cet arrêt, la Cour avait entendu reconnaître, par son Arrêt n° 7, avec force obligatoire pour les Parties au litige et dans le cas décidé, entre autres choses, le droit de propriété de l'Oberschlesische sur l'usine de Chorzów au point de vue du droit civil.

Tandis que la procédure relative à la demande en interprétation se poursuivait, le Gouvernement allemand, par Requête datée du 14 octobre 1927 et déposée au Greffe le 15 novembre suivant, demanda à la Cour d'indiquer au Gouvernement polonais qu'il devait payer au Gouvernement allemand, à titre provisoire, la somme de trente millions de Reichsmarks.

La Cour, statuant sur cette demande, qui était présentée sur la base de l'article 41 du Statut, décida par une Ordonnance, rendue le 21 novembre 1927, qu'il n'y avait pas lieu d'y donner suite, la demande du Gouvernement allemand devant être considérée comme visant non l'indication de mesures conservatoires, mais bien l'adjudication d'une partie des conclusions de la Requête du 8 février 1927.

Meanwhile, on October 18th, 1927, the Court had received a fresh application from the German Government which, relying on the terms of Article 60 of the Statute and Article 66 of the Rules of Court, prayed the Court to give an interpretation of its Judgments Nos. 7, of May 25th, 1926, and 8, of July 26th, 1927, alleging that a divergence of opinion had arisen between the two Governments in regard to the meaning and scope of these two judgments in connection with the point which had given rise to the proceedings before the Court of Katowice.

The Court, on December 16th, 1927, delivered its judgment in this suit (No. 11). According to this judgment the Court's intention in Judgment No. 7 had been to recognize, with binding effect between the Parties concerned and in respect of that particular case, amongst other things, the right of ownership of the Oberschlesische in the Chorzów factory under municipal law.

Whilst the proceedings in connection with the request for an interpretation were in progress, the German Government, by means of a Request dated October 14th, 1927, and filed with the Registry on November 15th, besought the Court to indicate to the Polish Government that it should pay to the German Government, as a provisional measure, the sum of 30 million Reichsmarks.

The Court gave its decision upon this request, which was submitted under the terms of Article 41 of the Statute, in the form of an Order made on November 21st, 1927. It held that effect could not be given to the request of the German Government, since it was to be regarded as designed to obtain not the indication of measures of protection, but judgment in favour of a part of the claim formulated in the Application of February 8th, 1927.

* * *

POINT DE DROIT.

I.

La Cour, avant d'aborder l'examen des conclusions des Parties, doit fixer le sens de la requête qui est à la base de la procédure actuelle, afin d'en établir la nature et la portée. C'est à la lumière de ces constatations qu'elle devra apprécier ensuite les conclusions qui lui ont été soumises au cours de la procédure tant écrite qu'orale.

La requête demande à la Cour :

1° de constater l'obligation du Gouvernement polonais, en raison de son attitude à l'égard des Sociétés Oberschlesische et Bayerische, attitude que la Cour a déclarée non conforme à la Convention de Genève, de réparer le préjudice subi de ce chef par lesdites Sociétés ;

2° d'allouer des indemnités, dont le montant est indiqué dans la requête, pour le dommage causé respectivement à l'une et à l'autre desdites Sociétés ;

3° de fixer le mode de paiement, entre autres de dire que les paiements à faire par le Gouvernement polonais devraient être effectués au compte des deux Sociétés près la Deutsche Bank à Berlin.

Au cours de la procédure orale, une divergence de vues s'est fait jour entre les Parties quant à la nature et à la portée de la requête. L'agent du Gouvernement allemand avait émis dans sa plaidoirie la thèse selon laquelle un gouvernement peut accepter une réparation dans toute forme qu'il jugera convenable, et que la réparation ne doit pas nécessairement consister en un dédommagement des personnes lésées. Il convient de retenir notamment le passage suivant :

« C'est, en effet, de son propre droit, du droit du Gouvernement allemand, qu'il s'agit. Le Gouvernement allemand n'intervient pas en qualité de représentant des individus qui ont souffert le dommage, mais il peut mesurer le dommage dont il réclame la réparation en son propre nom, d'après l'échelle des pertes subies par les sociétés pour lesquelles il a pris fait et

* * *

THE LAW.

I.

The Court, before proceeding to consider the Parties' submissions, must determine the import of the application which has given rise to the present proceedings, in order to ascertain its nature and scope. In the light of the results of this investigation, it will then proceed to consider the submissions made in the course of the written and oral proceedings.

In the application the Court is asked:

(1) to declare that the Polish Government, by reason of its attitude in respect of the Oberschlesische and Bayerische Companies, which attitude the Court had declared not to be in conformity with the Geneva Convention, is under an obligation to make good the consequent damage sustained by those Companies;

(2) to award compensation, the amount of which is indicated in the application, for the damage caused to each of the respective Companies;

(3) to fix the method of payment, and amongst other things to order the payments to be made by the Polish Government to be effected to the account of the two Companies with the Deutsche Bank at Berlin.

In the course of the oral proceedings, a difference of opinion between the two Parties became apparent as to the nature and scope of the application. The Agent for the German Government argued in his address to the Court that a government may content itself with reparation in any form which it may consider proper, and that reparation need not necessarily consist in the compensation of the individuals concerned. The following passage should especially be noted:

[*Translation.*]

"It is in fact a question of the German Government's own rights. The German Government has not brought this suit as representative of the individuals who have suffered injury, but it may estimate the damage for which it claims reparation on its own behalf, according to the measure provided by the losses suffered by the companies whose case it has

cause. Le Gouvernement allemand peut demander le paiement de cette indemnité à tout *locus solutionis* qui lui semble utile en l'espèce, que ce soit une caisse publique ou une caisse privée.

Le litige actuel est donc un litige entre gouvernements, et rien qu'un litige entre gouvernements ; il se distingue très nettement d'un procès ordinaire en dommages-intérêts, intenté par des particuliers par-devant un tribunal civil, comme le dit le Gouvernement polonais dans sa Duplique. »

L'agent du Gouvernement polonais, dans sa duplique, a dit estimer que cette manière de voir comportait une modification de l'objet du litige et, d'une certaine manière, aussi de la nature de la requête, car, selon la thèse polonaise, le demandeur aurait défini l'objet du litige comme étant l'obligation d'indemniser les deux Sociétés. Or, le dommage étant en corrélation avec l'indemnisation, la demande allemande se trouverait placée sur un autre terrain, dès qu'il s'agirait de l'indemnisation non plus des Sociétés, mais de l'État pour les torts par lui subis. L'agent du Gouvernement polonais a contesté au Gouvernement allemand le droit de faire ce changement dans l'état où se trouvait la procédure, et a refusé d'y consentir.

Même si les termes de la requête, ainsi que des conclusions ultérieures de la Partie demanderesse, permettaient de les interpréter comme visant une indemnisation due directement aux deux Sociétés pour les dommages subis par elles, et non une réparation due à l'Allemagne pour une violation de la Convention de Genève, il résulte toutefois des conditions dans lesquelles la Cour a été saisie de la présente affaire, ainsi que des considérations pour lesquelles elle l'a retenue, par son Arrêt n° 8, pour statuer quant au fond, que l'objet de la requête allemande ne peut viser que la réparation due pour un tort subi par l'Allemagne en sa qualité de Partie contractante de la Convention de Genève.

La présente requête se base explicitement et exclusivement sur l'Arrêt n° 7 qui a constaté que l'attitude du Gouvernement polonais à l'égard des deux Sociétés Oberschlesische et Bayerische n'était pas conforme aux dispositions des articles 6 et suivants de ladite Convention. Déjà dans l'Arrêt n° 6, qui a établi la compétence de la Cour pour statuer sur la violation alléguée de la Convention de Genève, il a été reconnu par la

taken up. The German Government may claim the payment of this compensation at any *locus solutionis* which it may think fit in this case, whether it be a public or a private office.

The present dispute is therefore a dispute between governments and nothing but a dispute between governments. It is very clearly differentiated from an ordinary action for damages, brought by private persons before a civil court, as the Polish Government has said in its Rejoinder."

The Agent for the Polish Government in his Rejoinder submitted that this method of regarding the question involved a modification of the subject of the dispute and, in some sort also, of the nature of the application, for, according to Poland's view, the subject of the dispute had been defined by Germany as the obligation to compensate the two Companies. But damage and compensation being interdependent conceptions, the German claim assumed another aspect if it was no longer a question of compensating the Companies, but of compensating the State for the injury suffered by it. The Agent for the Polish Government disputed the German Government's right to make this change at that stage of the proceedings and refused to accept it.

Even should it be possible to construe the terms of the application and of the subsequent submissions of the Applicant as contemplating compensation due directly to the two Companies for damages suffered by them and not reparation due to Germany for a breach of the Geneva Convention, it follows from the conditions in which the Court has been seized of the present suit, and from the considerations which led the Court to reserve it by Judgment No. 8 for decision on the merits, that the object of the German application can only be to obtain reparation due for a wrong suffered by Germany in her capacity as a contracting Party to the Geneva Convention.

The present application is explicitly and exclusively based on Judgment No. 7 which declared that the attitude of the Polish Government in respect of the two Companies, the Oberschlesische and Bayerische, was not in conformity with Article 6 and the following articles of the said Convention. Already in Judgment No. 6, establishing the Court's jurisdiction to deal with the alleged violation of the Geneva Convention, the

Cour, conformément à une thèse de la Partie demanderesse, qu'il s'agissait exclusivement d'une contestation entre États au sujet de l'interprétation et application d'une convention en vigueur entre eux. L'article 23 de la Convention de Genève ne vise que les divergences d'opinions résultant de l'interprétation et application des articles 6 à 22 de la Convention de Genève, qui s'élèveraient entre les deux Gouvernements signataires. En effet, la Cour a affirmé sa compétence pour statuer sur la réparation demandée parce qu'elle considérait la réparation comme le corollaire de la violation des obligations résultant d'un engagement entre États. Cette manière de voir, conforme au caractère général d'une juridiction internationale qui, en principe, ne connaît que des rapports d'État à État, s'impose avec une force particulière en l'espèce parce que la Convention de Genève, dans son système très développé d'instances de recours, a précisément créé ou maintenu pour certaines catégories de réclamations de particuliers des instances arbitrales d'un caractère international spécial, telles que le Tribunal arbitral haut-silésien et le Tribunal arbitral mixte germano-polonais. C'est en se basant, entre autres, sur le caractère purement interétatique de la contestation tranchée par l'Arrêt n° 7 que la Cour avait retenu l'affaire, nonobstant le fait que des réclamations introduites par les deux Sociétés étaient pendantes devant l'une des instances arbitrales mentionnées ci-dessus, réclamations relatives à la même dépossession qui a donné lieu à la requête actuellement soumise à la Cour par le Gouvernement allemand.

La Cour ayant, par son Arrêt n° 8, retenu cette requête pour statuer au fond, n'a pu le faire que sur les mêmes bases qu'elle a admises pour son Arrêt n° 7, arrêt qui est le point de départ pour la demande en réparation avancée actuellement par l'Allemagne. C'est donc à la lumière de cette conception qu'il convient d'interpréter les déclarations de la Partie demanderesse dans la présente procédure ; il y aurait également lieu de suivre cette méthode même si ladite Partie n'avait pas formulé aussi explicitement sa thèse dans sa plaidoirie.

Il est un principe de droit international que la réparation d'un tort peut consister en une indemnité correspondant au dommage que les ressortissants de l'État lésé ont subi par

Court recognized that—as had been maintained by the Applicant—the matter was exclusively a dispute between States as to the interpretation and application of a convention in force between them. Article 23 of the Geneva Convention only contemplates differences of opinion respecting the interpretation and application of Articles 6 to 22 of the Geneva Convention arising between the two Governments. The Court in fact declared itself competent to pass upon the claim for reparation because it regarded reparation as the corollary of the violation of the obligations resulting from an engagement between States. This view of the matter, which is in conformity with the general character of an international tribunal which, in principle, has cognizance only of interstate relations, is indicated with peculiar force in this case for the specific reason that the Geneva Convention, with its very elaborate system of legal remedies, has created or maintained for certain categories of private claims arbitral tribunals of a special international character, such as the Upper Silesian Arbitral Tribunal and the German-Polish Mixed Arbitral Tribunal. It was on the basis, amongst other things, of the purely interstate character of the dispute decided by Judgment No. 7 that the Court reserved the case for judgment, notwithstanding the fact that actions brought by the two Companies were pending before one of the arbitral tribunals above mentioned, actions which related to the same act of dispossession which led to the filing with the Court of the German Government's Application now before it.

The Court, which by Judgment No. 8 reserved the present application for judgment on the merits, could only do so on the grounds on which it had already based its Judgment No. 7 which constitutes the starting point for the claim for compensation now put forward by Germany. Accordingly the declarations of the Applicant in the present proceedings must be construed in the light of this conception and this method must also have been followed even if that Party had not stated its contention as explicitly as it has done in the German Agent's address to the Court.

It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered

suite de l'acte contraire au droit international. C'est même la forme de réparation la plus usitée ; l'Allemagne l'a choisie en l'espèce, et son admissibilité n'est pas contestée. Mais la réparation due à un État par un autre État ne change pas de nature par le fait qu'elle prend la forme d'une indemnité pour le montant de laquelle le dommage subi par un particulier fournira la mesure. Les règles de droit qui déterminent la réparation sont les règles de droit international en vigueur entre les deux États en question, et non pas le droit qui régit les rapports entre l'État qui aurait commis un tort et le particulier qui aurait subi le dommage. Les droits ou intérêts dont la violation cause un dommage à un particulier se trouvent toujours sur un autre plan que les droits de l'État auxquels le même acte peut également porter atteinte. Le dommage subi par le particulier n'est donc jamais identique en substance avec celui que l'État subira ; il ne peut que fournir une mesure convenable de la réparation due à l'État.

Le droit international n'exclut pas qu'un État accorde à un autre le droit de demander à des instances arbitrales internationales d'allouer directement aux ressortissants de ce dernier des indemnités pour des dommages qu'ils ont subis à la suite d'une violation du droit international par le premier État. Mais rien — ni dans les termes de l'article 23, ni dans les rapports entre cette clause et certaines autres dispositions d'ordre juridictionnel insérées dans la Convention de Genève — ne porte à croire que la juridiction établie par l'article 23 s'étende à des réparations autres que celles dues par une des Parties contractantes à l'autre comme conséquence d'une violation des articles 6 à 22 dûment constatée par la Cour.

Cette manière de voir peut, d'ailleurs, très bien se concilier avec les conclusions présentées par la Partie demanderesse. La première de ses conclusions vise, dans toutes les phases de la procédure, la constatation de l'obligation de réparer. Les indemnités à payer au Gouvernement allemand, selon la conclusion finale n° 2, constituent, aux termes de la conclusion 4 *d*, aussi bien du Mémoire que de la réplique orale, une créance de ce Gouvernement. La demande formulée dans la même conclusion et tendant à faire effectuer le paiement aux comptes des deux

as a result of the act which is contrary to international law. This is even the most usual form of reparation; it is the form selected by Germany in this case and the admissibility of it has not been disputed. The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.

International law does not prevent one State from granting to another the right to have recourse to international arbitral tribunals in order to obtain the direct award to nationals of the latter State of compensation for damage suffered by them as a result of infractions of international law by the first State. But there is nothing—either in the terms of Article 23 or in the relation between this provision and certain others of a jurisdictional character included in the Geneva Convention—which tends to show that the jurisdiction established by Article 23 extends to reparation other than that due by one of the contracting Parties to the other in consequence of an infraction of Articles 6 to 22, duly recognized as such by the Court.

This view is moreover readily reconcilable with the submissions of the Applicant. The first of its submissions, throughout all stages of the proceedings, aims at the establishment of an obligation to make reparation. The indemnities to be paid to the German Government, according to No. 2 of the final submissions, constitute, in the terms of submission 4 *d*, as set out in both the Case and the oral reply, a debt due to that Government. The claim formulated in the same submission, to the effect that payment should be made to the account of the

Sociétés près la Deutsche Bank à Berlin est interprétée par l'agent du Gouvernement allemand comme visant seulement un *locus solutionis*.

La Cour est donc d'avis que la Partie demanderesse n'a pas changé l'objet du litige au cours de la procédure.

* * *

Il résulte de ce qui vient d'être exposé que la requête tend à obtenir, en faveur de l'Allemagne, une réparation dont le montant est déterminé par le dommage subi par les Sociétés Oberschlesische et Bayerische. Trois questions essentielles se posent :

1° L'existence de l'obligation de réparer.

2° L'existence des dommages qui doivent servir de base pour l'évaluation du montant de l'indemnité.

3° L'étendue de ces dommages.

Quant au premier point, la Cour constate que c'est un principe du droit international, voire une conception générale du droit, que toute violation d'un engagement comporte l'obligation de réparer. Déjà dans son Arrêt n° 8, la Cour, statuant sur la compétence qu'elle dérivait de l'article 23 de la Convention de Genève, a dit : la réparation est le complément indispensable d'un manquement à l'application sans qu'il soit nécessaire que cela soit inscrit dans la convention même. L'existence du principe établissant l'obligation de réparer comme un élément du droit international positif n'a du reste jamais été contestée au cours des procédures relatives aux affaires de Chorzów.

L'obligation de réparer étant reconnue en principe, il s'agit de savoir si une violation d'un engagement international a en effet eu lieu dans le cas d'espèce. Or, à cet égard, la Cour se trouve en présence d'une chose jugée. La non-conformité de l'attitude de la Pologne envers les deux Sociétés avec les articles 6 et suivants de la Convention de Genève est établie par le point n° 2 du dispositif de l'Arrêt n° 7. L'application du principe à la présente espèce s'impose donc.

two Companies with the Deutsche Bank at Berlin, is interpreted by the Agent for the German Government as solely relating to the *locus solutionis*.

The Court therefore is of opinion that the Applicant has not altered the subject of the dispute in the course of the proceedings.

* * *

It follows from the foregoing that the application is designed to obtain, in favour of Germany, reparation the amount of which is determined by the damage suffered by the Oberschlesische and Bayerische. Three fundamental questions arise:

(1) The existence of the obligation to make reparation.
(2) The existence of the damage which must serve as a basis for the calculation of the amount of the indemnity.
(3) The extent of this damage.

As regards the first point, the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In Judgment No. 8, when deciding on the jurisdiction derived by it from Article 23 of the Geneva Convention, the Court has already said that reparation 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. The existence of the principle establishing the obligation to make reparation, as an element of positive international law, has moreover never been disputed in the course of the proceedings in the various cases concerning the Chorzów factory.

The obligation to make reparation being in principle recognized, it remains to be ascertained whether a breach of an international engagement has in fact taken place in the case under consideration. Now this point is *res judicata*. The non-conformity of Poland's attitude in respect of the two Companies with Article 6 and the following articles of the Geneva Convention is established by No. 2 of the operative provisions of Judgment No. 7. The application of the principle to the present case is therefore evident.

Pour ce qui est du deuxième point, la question de savoir si un dommage a résulté du tort qui est constant, n'est aucunement résolue par les arrêts antérieurs de la Cour relatifs à l'affaire de Chorzów. La Partie demanderesse ayant calculé le montant de la réparation qu'elle réclame sur la base du dommage subi par les deux Sociétés par suite de l'attitude du Gouvernement polonais, il est nécessaire, pour la Cour, de vérifier si ces Sociétés ont effectivement subi un dommage de ce chef.

En ce qui concerne la Bayerische, la Pologne reconnaît l'existence d'un dommage qui donne lieu à réparation ; la divergence entre les Parties n'a trait qu'à l'étendue de ce dommage et aux modalités de la réparation ; par contre, la Pologne conteste pour l'Oberschlesische l'existence d'un dommage donnant lieu à réparation et conclut, par conséquent, à débouter l'Allemagne de sa demande. Le fait de la dépossession de l'Oberschlesische n'est aucunement contesté. Mais, selon le Gouvernement polonais, cette Société n'aurait nonobstant pas subi de dommage ; il allègue, en effet, d'une part, que le droit de propriété revendiqué par l'Oberschlesische aurait été entaché de nullité ou d'annulabilité ; et, d'autre part, que le contrat du 24 décembre 1919 attribuait au Reich des droits et avantages si considérables qu'en substance un dommage éventuel ne frapperait pas la Société. Subsidiairement, le Gouvernement polonais fait valoir que ces mêmes circonstances ont pour conséquence au moins de réduire essentiellement le dommage pouvant entrer en ligne de compte en ce qui concerne ladite Société.

Abstraction faite de ces objections de nature préalable, il y a désaccord entre les Parties sur le montant et les modalités de paiement d'une réparation éventuelle.

Dans ces conditions, il incombe à la Cour d'examiner tout d'abord s'il y a eu, non seulement pour la Bayerische, mais aussi pour l'Oberschlesische, un dommage susceptible de donner lieu à réparation.

As regards the second point, the question whether damage has resulted from the wrongful act which is common ground, is in no wise settled by the Court's previous decisions relating to the Chorzów case. The Applicant having calculated the amount of the reparation claimed on the basis of the damage suffered by the two Companies as a result of the Polish Government's attitude, it is necessary for the Court to ascertain whether these Companies have in fact suffered damage as a consequence of that attitude.

As regards the Bayerische, Poland admits the existence of a damage affording ground for reparation; the Parties only differ as to the extent of this damage and the mode of reparation; on the other hand, Poland denies the existence of any damage calling for reparation in the case of the Oberschlesische and consequently submits that Germany's claim should be dismissed. The fact of the dispossession of the Oberschlesische is in no way disputed. But notwithstanding this, in the contention of the Polish Government, that Company has suffered no damage: it argues, first, that the right of ownership claimed by the Oberschlesische was null and void or subject to annulment, and, secondly, that the contract of December 24th, 1919, attributed to the Reich rights and benefits so considerable that any possible damage would not materially affect the Company. In the alternative, the Polish Government contends that these same circumstances at all events have the effect of essentially diminishing the extent of the damage to be taken into account in so far as the said Company is concerned.

Apart from these preliminary objections, the Parties are at issue as to the amount and method of payment of any compensation which may be awarded.

In these circumstances, the Court must first of all consider whether damage affording ground for reparation has ensued as regards not only the Bayerische but also the Oberschlesische.

II.

Abordant cet examen, il convient de constater avant tout que, pour évaluer le dommage causé par un acte illicite, il faut tenir compte exclusivement de la valeur des biens, droits et intérêts qui ont été atteints et dont le titulaire est la personne au profit de laquelle l'indemnité est réclamée ou le dommage de qui doit servir de mesure pour l'évaluation de la réparation réclamée. Ce principe, admis dans la jurisprudence arbitrale, a pour conséquence, d'une part, d'exclure du préjudice à évaluer, les dommages causés aux tiers par l'acte illicite, et d'autre part de n'en pas exclure le montant des dettes et autres obligations à la charge du lésé. Le montant du préjudice causé à l'Oberschlesische du fait de la dépossession de l'entreprise de Chorzów est donc égal à la valeur totale — mais exclusivement à la valeur totale — des biens, droits et intérêts de cette Société dans ladite entreprise, sans déduction de passifs.

Le Gouvernement polonais soutient en premier lieu que l'Oberschlesische n'a pas subi de dommage à la suite de la dépossession, parce qu'elle n'était pas la propriétaire légitime, son droit de propriété n'ayant jamais été valable et, en tout cas, ayant cessé de l'être en vertu de l'arrêt rendu le 12 novembre 1927 par le Tribunal de Katowice ; de sorte qu'à partir de cette date tout au moins aucun dommage subi par ladite Société ne pourrait donner lieu pour elle à réparation.

A cet égard, la Cour constate ce qui suit : la Cour a été déjà appelée, lors de la procédure terminée par l'Arrêt n° 7, à s'occuper, comme d'un point incident et préalable, de la question de la validité des transactions en vertu desquelles la propriété de l'usine de Chorzów est passée du Reich à l'Oberschlesische. Elle est arrivée à la conclusion que les diverses transactions dont il s'agit étaient des actes réels et de bonne foi ; et c'est pourquoi elle a pu considérer l'usine de Chorzów comme appartenant à une société contrôlée par des ressortissants allemands, savoir, l'Oberschlesische. Quel que soit l'effet de cette décision incidente sur le droit de propriété du point de vue du droit civil, il est évident que le fait que l'usine

II.

On approaching this question, it should first be observed that, in estimating the damage caused by an unlawful act, only the value of property, rights and interests which have been affected and the owner of which is the person on whose behalf compensation is claimed, or the damage done to whom is to serve as a means of gauging the reparation claimed, must be taken into account. This principle, which is accepted in the jurisprudence of arbitral tribunals, has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible. The damage suffered by the Oberschlesische in respect of the Chorzów undertaking is therefore equivalent to the total value—but to that total only—of the property, rights and interests of this Company in that undertaking, without deducting liabilities.

The Polish Government argues in the first place that the Oberschlesische has suffered no loss as a result of its dispossession, because it was not the lawful owner, its right of ownership having never been valid and having in any case ceased to be so in virtue of the judgment given on November 12th, 1927, by the Court of Katowice; so that from that date at all events no damage for which reparation should be made could ensue as regards that Company.

In regard to this the Court observes as follows: the Court has already, in connection with Judgment No. 7, had to consider as an incidental and preliminary point, the question of the validity of the transactions in virtue of which the ownership of the Chorzów factory passed from the Reich to the Oberschlesische. It then arrived at the conclusion that the various transactions in question were genuine and bona fide; that is why it was able to regard the Chorzów factory as belonging to a company controlled by German nationals, namely, the Oberschlesische. Whatever the effect of this incidental decision may be as regards the right of ownership under municipal law, it is evident that the fact that the

de Chorzów appartenait à l'Oberschlesische était la condition logique de la décision de la Cour d'après laquelle l'attitude du Gouvernement polonais à l'égard de l'Oberschlesische n'était pas conforme aux articles 6 et suivants de la Convention de Genève. Car, si l'usine n'appartenait pas à l'Oberschlesische, cette Société non seulement n'aurait pu subir aucun dommage du fait de la dépossession, mais elle n'aurait pas même pu être l'objet d'une dépossession contraire à la Convention de Genève ; or, par son Arrêt n° 7, la Cour a constaté que tel était le cas. Il y a lieu de faire observer que dans son Arrêt n° 7 la Cour ne s'est pas bornée à constater l'incompatibilité, avec ladite Convention, de l'application de la loi du 14 juillet 1920 aux propriétés inscrites au registre foncier au nom de sociétés contrôlées par des ressortissants allemands, mais, en répondant aux objections soulevées par la Partie défenderesse, a dû s'occuper aussi de la question de savoir si cette inscription était le résultat de transactions fictives et frauduleuses ou bien réelles et de bonne foi. C'est la Pologne elle-même qui a allégué contre la deuxième conclusion de la Requête allemande du 15 mai 1925 que l'inscription de l'Oberschlesische au registre foncier, étant basée sur une transaction fictive et frauduleuse, n'était en tout cas pas valable, et qui a ainsi amené la Cour à se prononcer sur ce point.

Or, la requête qui donne lieu au présent arrêt étant basée sur le tort constaté par l'Arrêt n° 7, il n'est pas possible que le droit de l'Oberschlesische à l'usine de Chorzów soit apprécié d'une manière différente pour les besoins dudit Arrêt n° 7 et par rapport à la demande en réparation basée sur cet arrêt. La Cour ayant été d'avis que le droit de l'Oberschlesische sur l'usine de Chorzów justifiait la conclusion que l'attitude du Gouvernement polonais à l'égard de ladite Société n'était pas conforme aux articles 6 et suivants de la Convention de Genève, elle ne saurait se départir de cet avis alors qu'il s'agit actuellement d'apprécier la même situation juridique aux fins de statuer sur la demande en réparation fondée sur l'acte dont la non-conformité à la Convention a été constatée par la Cour.

Le Gouvernement polonais fait maintenant observer qu'après le prononcé de l'Arrêt n° 7, le Tribunal civil de Katowice, qui,

Chorzów factory belonged to the Oberschlesische was the necessary condition precedent to the Court's decision that the attitude of the Polish Government in respect of the Oberschlesische was not in conformity with Article 6 and the following articles of the Geneva Convention. For if the factory did not belong to the Oberschlesische Stickstoffwerke, not only would that Company not have suffered damage as a result of dispossession, but furthermore it could not have been subjected to a dispossession contrary to the Geneva Convention, but the Court established by Judgment No. 7 that such was the case. It should be noted that the Court in Judgment No. 7 has not confined itself to recording the incompatibility with the Geneva Convention of the application of the law of July 14th, 1920, to properties entered in the land register in the name of companies controlled by German nationals, but has, in replying to the objections put forward by the Respondent, also had to deal with the question whether such entry was the outcome of fictitious and fraudulent transactions or of genuine and bona-fide transactions. Poland herself objected in connection with the second submission of the German Application of May 15th, 1925, that the entry of the Oberschlesische in the land register was in any case not valid as it was based on a fictitious and fraudulent transaction and thus caused the Court to deal with this point.

As the application now under consideration is based on the damage established by Judgment No. 7, it is impossible that the Oberschlesische's right to the Chorzów factory should be looked upon differently for the purposes of that judgment and in relation to the claim for reparation based on the same judgment. The Court, having been of opinion that the Oberschlesische's right to the Chorzów factory justified the conclusion that the Polish Government's attitude in respect of that Company was not in conformity with Article 6 and the following articles of the Geneva Convention, must necessarily maintain that opinion when the same situation at law has to be considered for the purpose of giving judgment in regard to the reparation claimed as a result of the act which has been declared by the Court not to be in conformity with the Convention.

The Polish Government now points out that, after Judgment No. 7 had been rendered, the Civil Court of Katowice

selon les règles du droit international, est sans doute compétent pour connaître des contestations civiles touchant les immeubles situés dans sa circonscription, a déclaré non valable du point de vue du droit civil, et cela indépendamment des lois polonaises des 14 juillet 1920 et 16 juin 1922, l'inscription de l'Oberschlesische au registre foncier comme propriétaire ; il allègue également que la Cour, en statuant maintenant sur la question de la réparation, devrait tenir compte de ce fait nouveau.

La Cour n'a pas besoin de se prononcer sur la question de savoir quelle aurait été la situation juridique par rapport à la Convention de Genève, si la dépossession avait été précédée d'un jugement régulièrement rendu par une instance compétente. Il suffit de rappeler que la Cour, dans son Arrêt n° 8, a dit que la violation de la Convention de Genève qui consistait dans la dépossession d'un propriétaire protégé par les articles 6 et suivants de la Convention de Genève ne pouvait être effacée par un jugement national qui, après coup, enlèverait la base à l'applicabilité de la Convention, base que la Cour avait admise dans son Arrêt n° 7. Le jugement du Tribunal de Katowice du 12 novembre 1927 — jugement rendu par défaut vis-à-vis de l'Oberschlesische, et le Reich n'ayant pas été partie au procès — ne contient pas, dans le texte qui est connu de la Cour, les motifs pour lesquels l'inscription de la propriété en faveur de l'Oberschlesische est déclarée nulle ; mais il résulte de la requête qui a donné lieu à ce jugement que les motifs invoqués par le Fisc polonais sont essentiellement les mêmes que ceux qui ont été déjà débattus sur la base des conclusions du Gouvernement polonais devant la Cour dans la procédure qui a abouti à l'Arrêt n° 7, et qui, de l'avis de la Cour, n'ont pas suffi pour considérer l'Oberschlesische comme ne tombant pas sous le coup des articles 6 et suivants de la Convention de Genève. Si, considérant que l'usine n'appartenait pas à l'Oberschlesische, la Cour niait l'existence d'un dommage au détriment de cette Société, elle se mettrait en contradiction avec un des motifs sur lesquels elle a fondé son Arrêt n° 7 et elle admettrait qu'un jugement national pût infirmer indirectement un arrêt rendu par une instance internationale, ce qui est impossible. Quel que soit l'effet du jugement du Tribunal de Katowice, du 12 novembre 1927, du point de vue du

which, under International Law, doubtless has jurisdiction in disputes at civil law concerning immovable property situated within its district, has declared the entry of the Oberschlesische in the land register as owner not to be valid under the municipal law applicable to the case, and this apart from the Polish laws of July 14th, 1920, and June 16th, 1922; it further contends that the Court, in now giving judgment on the question of damages, should bear in mind this new fact.

There is no need for the Court to consider what would have been the situation at law as regards the Geneva Convention, if dispossession had been preceded by a judgment given by a competent tribunal. It will suffice to recall that the Court in Judgment No. 8 has said that the violation of the Geneva Convention consisting in the dispossession of an owner protected by Article 6 and following of the Geneva Convention could not be rendered non-existent by the judgment of a municipal court which, after dispossession had taken place, nullified the grounds rendering the Convention applicable, which grounds were relied upon by the Court in Judgment No. 7. The judgment of the Tribunal of Katowice given on November 12th, 1927,—which judgment was given by default as regards the Oberschlesische, the Reich not being a Party to the proceedings,—does not contain in the text known to the Court the reasons for which the entry of the property in the name of the Oberschlesische was declared null and void; but it appears from the application upon which this judgment was given that the reasons advanced by the Polish Treasury are essentially the same as those already discussed before the Court on the basis of the Polish Government's submissions in the proceedings leading up to Judgment No. 7, which reasons, in the opinion of the Court, did not suffice to show that the Oberschlesische did not fall within the scope of Article 6 and the following articles of the Geneva Convention. If the Court were to deny the existence of a damage on the ground that the factory did not belong to the Oberschlesische, it would be contradicting one of the reasons on which it based its Judgment No. 7 and it would be attributing to a judgment of a municipal court power indirectly to invalidate a judgment of an international court, which is impossible. Whatever the

droit interne, ce jugement ne saurait ni effacer la violation de la Convention de Genève constatée par la Cour dans son Arrêt n° 7, ni soustraire à cet arrêt une des bases sur lesquelles il est fondé.

C'est à l'objection dont la Cour vient de s'occuper, ainsi qu'à la conclusion y relative, formulée par le Gouvernement polonais dans son Contre-Mémoire mais retirée par lui plus tard, que se réfère la conclusion du Gouvernement allemand à l'effet

que l'obligation du Gouvernement polonais de payer l'indemnité allouée par la Cour n'est nullement écartée par un jugement rendu ou à rendre par un tribunal interne polonais dans un procès ayant pour objet la question de la propriété de l'usine sise à Chorzów.

Cette conclusion a été maintenue malgré le retrait de ladite conclusion polonaise.

La Cour, étant d'avis que cette dernière conclusion doit être considérée comme valablement retirée, mais que, nonobstant, l'objection à laquelle elle se référait subsiste, estime qu'il n'y a pas lieu de statuer en termes exprès sur la conclusion y relative formulée par le Gouvernement allemand, autrement qu'en rejetant la thèse du Gouvernement polonais fondée sur le jugement du Tribunal de Katowice.

* * *

Le Gouvernement polonais ne s'est pas borné à contester l'existence d'un dommage en alléguant que l'Oberschlesische ne serait pas ou aurait cessé d'être propriétaire de l'usine de Chorzów ; il soutient en outre, à différents points de vue, que les droits que le Reich possède dans l'entreprise, étant passés à la Pologne, ne pourraient entrer en ligne de compte pour l'évaluation du dommage dont dépendra le montant de la réparation due par la Pologne à l'Allemagne.

Admettant, par hypothèse, que le contrat du 24 décembre 1919 ne soit pas nul, mais doive être traité comme un acte juridique réel et valable, le Gouvernement polonais considère que, d'après ledit contrat, c'est le Gouvernement allemand qui

effect of the judgment of the Tribunal of Katowice of November 12th, 1927, may be at municipal law, this judgment can neither render inexistent the violation of the Geneva Convention recognized by the Court in Judgment No. 7 to have taken place, nor destroy one of the grounds on which that judgment is based.

It is to the objection dealt with above and to a submission connected therewith which the Polish Government made in its Counter-Case but subsequently withdrew, that the following submission of the German Government relates:

[*Translation.*]

that the obligation of the Polish Government to pay the indemnity awarded by the Court is in no way set aside by a judgment given or to be given by a Polish municipal court in a suit concerning the question of the ownership of the factory situated at Chorzów.

This submission has been maintained notwithstanding the withdrawal of the Polish submission referred to.

The Court, being of opinion that this latter submission is to be regarded as having been validly withdrawn, but that, nevertheless, the objection to which it referred still subsists, considers that there is no need expressly to deal with the submission in regard thereto made by the German Government, save in order to dismiss the submission of the Polish Government based on the judgment of the Tribunal of Katowice.

* * *

The Polish Government not only disputes the existence of a damage for the reason that the Oberschlesische is not or is no longer owner of the factory at Chorzów, but also contends from various points of view that the rights possessed by the Reich in the undertaking, having passed into the hands of Poland, cannot be included amongst the assets to be taken into account in the calculation of the damage sustained on which calculation will depend the amount of the reparation due by Poland to Germany.

The Polish Government, admitting, for the sake of argument, that the contract of December 24th, 1919, was not null and void, but must be regarded as a genuine and valid legal instrument, holds that, according to that contract, the Ger-

est le propriétaire de la totalité des actions de l'Oberschlesische lesquelles représentent l'unique bien de celle-ci, à savoir l'usine. Il en tire la conclusion qu'il s'agit de la transformation d'une entreprise fiscale en une entreprise d'État par actions, et comme il est d'avis que les biens d'une société allemande, dont la totalité des actions appartient au Reich, rentrent dans la catégorie des « biens et propriétés appartenant à l'Empire » qui seraient dévolus à la Pologne en vertu de l'article 256 du Traité de Versailles, il estime qu'il est « difficile de se rendre compte quels furent les droits de l'Oberschlesische auxquels il a été porté atteinte par le Gouvernement polonais ».

Il a développé cette argumentation en insistant notamment sur ce que l'Oberschlesische serait en réalité une société contrôlée par le Gouvernement allemand et non une société contrôlée par des ressortissants allemands, non plus qu'une entreprise privée dans laquelle le Reich posséderait seulement des intérêts prépondérants.

Même s'il n'en était pas ainsi et qu'on voulût, par hypothèse, traiter l'acte du 24 décembre 1919 comme un contrat effectif et réel de vente de l'usine par le Reich à l'Oberschlesische, on ne saurait, selon le Gouvernement polonais, omettre de tenir compte de la circonstance que l'État allemand a conservé toute une série d'intérêts et droits dans l'entreprise. Comme l'indemnité demandée par le Gouvernement allemand est calculée, entre autres, sur la mesure du dommage présumé de l'Oberschlesische, il ne serait pas « fondé logiquement de reconnaître à cette Société des indemnités pour les droits et intérêts qui, dans l'entreprise de Chorzów, appartenaient au Reich ». Il faudrait donc éliminer ces droits des droits de l'Oberschlesische, lesquels, cette élimination effectuée, se réduiraient au seul *nudum jus domini*.

Le Gouvernement polonais invoque, en outre, qu'en vertu de l'article 256 du Traité de Versailles, les droits et intérêts du Gouvernement allemand dans l'entreprise de Chorzów sont transférés à l'État polonais, au plus tard à partir du moment du transfert à la Pologne de la souveraineté sur la partie de la Haute-Silésie à elle attribuée, et que, à supposer que le contrat du 24 décembre 1919 ait donné à l'État allemand la

man Government is the owner of the whole of the shares of the Oberschlesische representing the sole property of that Company, namely the factory. It deduces from this that the transaction consists in the transformation of an ordinary State enterprise into a State enterprise with a share capital, and as it holds that the property of a German company, the whole of the shares of which belong to the Reich, falls within the category of "property and possessions belonging to the Empire" acquired by Poland under Article 256 of the Treaty of Versailles, it considers that it is "difficult to see what the rights of the Oberschlesische were which had been infringed by the Polish Government".

In developing this argument, it has laid special stress on the allegation that the Oberschlesische is in reality a company controlled by the German Government and not a company controlled by German nationals, or even a private enterprise in which the Reich merely possesses preponderating interests.

Even if this should not be the case and if the instrument of December 24th, 1919, were, for argument's sake, to be regarded as an effective and genuine contract for the sale of the factory by the Reich to the Oberschlesische, the Polish Government contends that it is impossible not to take into account the circumstance that the German State retained a whole complex of rights and interests in the undertaking. As the indemnity claimed by the German Government is calculated, amongst other things, on the extent of the damage presumed to have been sustained by the Oberschlesische, it would not be "logically correct to award to that Company compensation for rights and interests in the Chorzów undertaking which belonged to the Reich". These rights should therefore be eliminated from the rights of the Oberschlesische, which, if this were done, would amount simply to a *nudum jus domini*.

The Polish Government also alleges that, under Article 256 of the Treaty of Versailles, the rights and interests of the German Government in the Chorzów undertaking are transferred to the Polish State, at latest as from the date of the transfer to Poland of sovereignty over the part of Upper Silesia allotted to her, and that, on the supposition that the contract of December 24th, 1919, gave the German State

totalité des actions de l'Oberschlesische afin de garantir au Reich ses droits et de lui permettre d'en faire usage, ces actions, à la possession desquelles sont attachés les droits du Reich, doivent être livrées à la Pologne. Si l'acte du 24 décembre 1919 doit être traité comme réel et effectif, le Gouvernement polonais estime que pour déterminer l'indemnité éventuellement due à l'Oberschlesische, il faudrait d'abord éliminer les droits du Reich ; et comme il est d'avis que cette élimination ne peut être réalisée que sous une seule forme, savoir la livraison par l'État allemand à la Pologne des actions de l'Oberschlesische d'une valeur nominale de 110 millions de marks, le Gouvernement polonais, à ce sujet, a formulé, dans son Contre-Mémoire, sous le n° A 4, une conclusion ainsi conçue :

« En tout cas, dire et juger que le Gouvernement allemand doit, en premier lieu, livrer au Gouvernement polonais la totalité des actions de la Société anonyme Oberschlesische Stickstoffwerke de la valeur nominale de 110.000.000 de marks dont il dispose en vertu du contrat du 24 décembre 1919. »

A l'égard de cette conclusion, le Gouvernement allemand a, dans sa Réplique, fait les observations suivantes :

« D'abord, le Gouvernement polonais n'invoque aucune disposition sur laquelle peut être basée la compétence de la Cour pour connaître de cette question, qui résulte de l'interprétation de l'article 256. Dans les procédures antérieures, le Gouvernement polonais avait fortement souligné que l'interprétation de cet article ne serait pas même admissible en tant que question incidente et préalable pour l'interprétation des articles 6 à 22 de la Convention de Genève.

Le Gouvernement allemand ignore si le Gouvernement polonais pense au traité général d'arbitrage signé à Locarno et d'après lequel toute contestation d'ordre juridique doit être soumise à l'arbitrage, et, faute d'entente sur un tribunal arbitral spécial, à la Cour permanente de Justice internationale. Mais quoi qu'il en soit, le Gouvernement allemand, animé du désir d'assurer au Traité de Locarno toute l'étendue qu'il comporte sans s'arrêter aux questions des formes y prévues, et de voir vidée définitivement l'affaire de Chorzów, s'abstient d'entreprendre un examen détaillé sur les questions d'incompétence ou de prématurité même si ces questions entraient en considération pour la demande reconventionnelle que le Gouvernement allemand veut voir dans la conclusion A 4 du Contre-Mémoire. Il se borne à rappeler l'article 40, alinéa 2, chiffre 4, du

the whole of the shares of the Oberschlesische, as guarantee for its rights, and to enable it to exercise those rights, these shares, on the possession of which depend the rights of the Reich, should be transferred to Poland. If the contract of December 24th, 1919, is to be regarded as genuine and effective, the Polish Government holds that, in order to determine the indemnity which may be due to the Oberschlesische, the rights of the Reich must first be eliminated; and as it is of opinion that this can only be done in one way, namely, by the handing over by Germany to Poland of the shares of the Oberschlesische to the nominal value of 110 million marks, the Polish Government has in regard to this point made the following submission (No. A 4) in its Counter-Case:

[*Translation.*]

"In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische Company of the nominal value of 110,000,000 marks, which are in its hands under the contract of December 24th, 1919."

The German Government in its Reply made the following observations in regard to this submission:

[*Translation.*]

"In the first place, the Polish Government cites no provision on which it is possible to base the Court's jurisdiction to take cognizance of this question, which arises from the interpretation of Article 256. In the previous proceedings, the Polish Government strongly maintained that the interpretation of this article would not be admissible even as a question incidental and preliminary to the interpretation of Articles 6 to 22 of the Geneva Convention.

The German Government does not know whether the Polish Government has in mind the general treaty of arbitration signed at Locarno, according to which any dispute of a legal nature must be submitted to arbitration, and, unless some special arbitral tribunal is agreed upon, to the Permanent Court of International Justice. But, however that may be, the German Government, being animated by a wish to ensure that full scope shall be given to the Treaty of Locarno, without pausing to debate questions as to the procedure therein provided for, and also to see the Chorzów case settled once and for all, abstains from undertaking a detailed examination of the questions of lack of jurisdiction or prematurity, even though these questions might enter into account in connection with the counter-claim which, in the German Government's

Règlement de la Cour, en vertu duquel la Cour peut statuer sur des demandes reconventionnelles pour autant que ces dernières rentrent dans la compétence de la Cour. Entre l'Allemagne et la Pologne, ce cas est réalisé pour toute question de droit litigieuse entre elles. On pourrait uniquement discuter le point de savoir si, pour le jeu dudit article du Règlement, aussi les conditions de forme et de délais doivent être remplies, ou s'il suffit que les conditions matérielles soient remplies. Mais ce point peut rester indécis puisque le Gouvernement allemand accepte la juridiction de la Cour pour la question soulevée par le Contre-Mémoire. Lors des négociations relatives à l'affaire de Chorzów, le plénipotentiaire allemand avait déjà proposé au plénipotentiaire polonais de soumettre cette question à la Cour. »

Dans les débats ultérieurs, le Gouvernement polonais ne s'est pas prononcé sur la question de la compétence de la Cour. On ne saurait donc dire s'il accepte la manière de voir du Gouvernement allemand selon laquelle cette compétence pourrait être déduite de la Convention entre l'Allemagne et la Pologne, paraphée à Locarno le 16 octobre 1925, ou s'il revendique la compétence en vertu d'un autre titre. En tout cas, il est constant qu'il n'a pas retiré sa demande et que, partant, il désire que la Cour statue sur la conclusion en question. D'autre part, le Gouvernement allemand, tout en fondant la compétence sur la Convention de Locarno, paraît avant tout désirer que la Cour statue sur cette conclusion au cours de la présente procédure.

Il y a donc accord entre les Parties pour soumettre à la décision de la Cour la question soulevée par ladite conclusion. Comme la Cour l'a dit dans son Arrêt n° 12, relatif à certains droits de minorités en Haute-Silésie, l'article 36 du Statut consacre le principe suivant lequel la juridiction de la Cour dépend de la volonté des Parties ; la Cour est donc toujours compétente du moment où celles-ci acceptent sa juridiction, car il n'y a aucun différend que les États admis à ester devant la Cour ne puissent lui soumettre, sauf dans les cas exceptionnels où le différend serait de la compétence exclusive

contention, is formulated in submission A 4 of the Counter-Case. It will simply refer to Article 40, paragraph 2, No. 4, of the Rules of Court, according to which the Court may give judgment on counter-claims in so far as the latter come within its jurisdiction. As between Germany and Poland this applies in respect of any question of law in dispute between them. The only point which might be disputed is the question whether, for the application of this article of the Rules, the conditions respecting forms and times must also be fulfilled, or whether it is enough that the material conditions should be fulfilled. This point, however, may be left open, since the German Government accepts the jurisdiction of the Court in regard to the question raised in the Counter-Case. In the course of the negotiations in regard to the Chorzów case, the German plenipotentiary had already proposed to the Polish plenipotentiary that this question should be referred to the Court."

In the subsequent proceedings, the Polish Government has not made any statement in regard to the question of the Court's jurisdiction. It is impossible, therefore, to say whether it accepts the view of the German Government according to which it may be inferred that such jurisdiction exists under the Convention between Germany and Poland initialled at Locarno on October 16th, 1925, or whether it contends that the Court has jurisdiction on some other basis. In any case, it is certain that it has not withdrawn its claim and that, consequently, it wishes the Court to give judgment on the submission in question. For its part the German Government, though basing the Court's jurisdiction on the Locarno Convention, seems above all anxious that the Court should give judgment on this submission in the course of the present proceedings.

The Parties therefore are agreed in submitting to the Court for decision the question raised by this submission. As the Court has said in Judgment No. 12, concerning certain rights of minorities in Upper Silesia, Article 36 of the Statute establishes the principle that the Court's jurisdiction depends on the will of the Parties; the Court therefore is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it, save in exceptional cases where a dispute may be within the exclusive jurisdiction of some other body.

d'un autre organe. Or, tel n'est pas le cas en ce qui concerne la conclusion en question.

La Cour constate, en outre, que la demande reconventionnelle est basée sur l'article 256 du Traité de Versailles, qui constitue le fondement de l'exception soulevée par la Partie défenderesse, et que, partant, elle se trouve en rapport de connexité juridique avec la demande principale.

D'autre part, l'article 40 du Règlement de la Cour que le Gouvernement allemand a invoqué, stipule, entre autres, que les contre-mémoires comprennent :

> « 4° des conclusions fondées sur les faits énoncés. Ces conclusions peuvent comprendre des demandes reconventionnelles, pour autant que ces dernières rentrent dans la compétence de la Cour. »

La demande ayant été formulée dans le Contre-Mémoire, les conditions de forme exigées par le Règlement pour des demandes reconventionnelles se trouvent donc réalisées en l'espèce aussi bien que les conditions de fond.

En ce qui concerne les rapports qui existent entre les demandes allemandes et la conclusion polonaise dont il s'agit, la Cour croit utile d'ajouter ce qui suit : Bien qu'étant formellement une demande reconventionnelle, car elle tend à condamner la Partie demanderesse à une prestation envers la défenderesse — en réalité, si l'on tient compte des motifs sur lesquels elle se fonde, la conclusion contient un moyen opposé à la demande de l'Allemagne tendant à obtenir de la Pologne une indemnité dont le montant serait calculé, entre autres, sur la base du dommage subi par l'Oberschlesische. Il s'agit, en effet, d'éliminer du montant de cette indemnité ce qui correspondrait à la valeur des droits et intérêts que le Reich possédait dans l'entreprise en vertu du contrat du 24 décembre 1919, valeur qui, selon le Gouvernement polonais, ne constitue pas une perte pour l'Oberschlesische, parce que ces droits et intérêts appartiendraient au Gouvernement polonais lui-même en vertu de l'article 256 du Traité de Versailles. La Cour ayant, par son Arrêt n° 8, admis sa compétence en vertu de l'article 23 de la Convention de Genève pour connaître de la réparation due du chef du dommage causé aux deux Sociétés par l'attitude du Gouvernement polonais envers elles, elle ne saurait se soustraire à l'examen des objections qui ont pour

But this is not the case as regards the submission in question.

The Court also observes that the counter-claim is based on Article 256 of the Versailles Treaty, which article is the basis of the objection raised by the Respondent, and that, consequently, it is juridically connected with the principal claim.

Again, Article 40 of the Rules of Court, which has been cited by the German Government, lays down amongst other things that counter-cases shall contain:

> "4° conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court."

The claim having been formulated in the Counter-Case, the formal conditions required by the Rules as regards counter-claims are fulfilled in this case, as well as the material conditions.

As regards the relationship existing between the German claims and the Polish submission in question, the Court thinks it well to add the following: Although in form a counter-claim, since its object is to obtain judgment against the Applicant for the delivery of certain things to the Respondent—in reality, having regard to the arguments on which it is based, the submission constitutes an objection to the German claim designed to obtain from Poland an indemnity the amount of which is to be calculated, amongst other things, on the basis of the damage suffered by the Oberschlesische. It is in fact a question of eliminating from the amount of this indemnity a sum corresponding to the value of the rights and interests which the Reich possessed in the enterprise under the contract of December 24th, 1919, which value, according to the Polish Government, does not constitute a loss to the Oberschlesische because these rights and interests are said to belong to the Polish Government itself under Article 256 of the Treaty of Versailles. The Court, having by Judgment No. 8 accepted jurisdiction, under Article 23 of the Geneva Convention, to decide as to the reparation due for the damage caused to the two Companies by the attitude of the Polish Government towards them, cannot dispense with an examination of the objections the

but de démontrer soit qu'un tel dommage n'existe pas, soit qu'il n'a pas l'étendue que prétend la Partie demanderesse. Cela étant, il semble naturel de reconnaître aussi, en vertu du même titre, la compétence pour statuer sur les moyens allégués par le Gouvernement polonais afin d'obtenir que l'indemnité soit limitée au montant correspondant au dommage effectivement subi.

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Passant maintenant à l'examen des objections susdites du Gouvernement polonais, la Cour estime utile, tout d'abord, de préciser quelle est, selon son avis, la nature des droits que le Gouvernement allemand possède à l'égard de l'entreprise de Chorzów en vertu du contrat du 24 décembre 1919, dont le contenu essentiel se trouve exposé plus haut. Renvoyant à cet exposé, la Cour constate que c'est la Treuhand et non le Reich allemand qui, en droit, est propriétaire des actions de l'Oberschlesische. Le Reich est créancier de la Treuhand et a, en cette qualité, un droit de gage sur les actions. Il a aussi, à côté de ce droit de gage, tous les droits découlant de la possession des actions, y compris le droit à la plus grande partie du prix en cas de vente de celles-ci. Ce droit, qui peut être considéré comme prépondérant, est, au point de vue économique, très proche de la propriété, mais il n'est pas la propriété ; et on ne peut, même en se plaçant au point de vue économique, faire abstraction des droits de la Treuhand.

Telle étant la situation en droit, vouloir maintenant identifier l'Oberschlesische avec le Reich, ce qui aurait pour conséquence que la propriété de l'usine serait dévolue à la Pologne en vertu de l'article 256 du Traité de Versailles, serait se mettre en opposition avec la manière de voir adoptée par la Cour dans son Arrêt n° 7 et maintenue ci-dessus, manière de voir qui est le fondement de la décision selon laquelle l'attitude de la Pologne, aussi bien vis-à-vis de l'Oberschlesische que vis-à-vis de la Bayerische, n'était pas conforme aux dispositions de la Convention de Genève.

Il en est de même en ce qui concerne la thèse suivant laquelle l'Oberschlesische serait une société contrôlée non par des ressortissants allemands, mais par le Reich. Il est vrai, comme l'a rappelé le Gouvernement polonais, que la Cour, dans

aim of which is to show either that no such damage exists or that it is not so great as it is alleged to be by the Applicant. This being so, it seems natural on the same grounds also to accept jurisdiction to pass judgment on the submissions which Poland has made with a view to obtaining the reduction of the indemnity to an amount corresponding to the damage actually sustained.

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Proceeding now to consider the above-mentioned objections of the Polish Government, the Court thinks it well first of all to define what is, in its opinion, the nature of the rights which the German Government possesses in respect of the Chorzów undertaking under the contract of December 24th, 1919, the main features of which have been described above. Referring to this description, the Court points out that the Treuhand, and not the Reich, is legally the owner of the shares of the Oberschlesische. The Reich is the creditor of the Treuhand and in this capacity has a lien on the shares. It also has, besides this lien, all rights resulting from possession of the shares, including the right to the greater portion of the price in the event of the sale of these shares. This right, which may be regarded as preponderating, is, from an economic standpoint, very closely akin to ownership, but it is not ownership; and even from an economic point of view it is impossible to disregard the rights of the Treuhand.

Such being the situation at law, to endeavour now to identify the Oberschlesische with the Reich—the effect of which would be that the ownership of the factory would have passed to Poland under Article 256 of the Treaty of Versailles—would be in conflict with the view taken by the Court in Judgment No. 7 and reaffirmed above, on which view is based the decision to the effect that Poland's attitude as regards both the Oberschlesische and Bayerische was not in conformity with the provisions of the Geneva Convention.

The same applies in regard to the contention that the Oberschlesische is a company controlled not by German nationals but by the Reich. It is true, as the Polish Government has recalled, that the Court in Judgment No. 7 has declared

son Arrêt n° 7, a déclaré ne pas avoir besoin d'examiner la question de savoir si l'Oberschlesische, vu les droits que le contrat du 24 décembre 1919 confère au Reich, doit être considérée comme contrôlée par ce dernier et, au cas où cette hypothèse se trouverait réalisée, quelles conséquences pourraient en découler pour l'application de la Convention de Genève. Mais la raison en était que la Cour était d'avis que le Gouvernement polonais n'avait pas soulevé cette question et que, abstraction faite de sa thèse relative à la fictivité des actes du 24 décembre 1919, il ne paraissait pas avoir contesté que ladite Société fût contrôlée par des ressortissants allemands.

En tout cas, il est clair que c'est seulement en estimant que ladite Société est, au point de vue de l'article 6 de la Convention de Genève, à considérer comme une société contrôlée par des ressortissants allemands, que la Cour a pu constater que l'attitude du Gouvernement polonais vis-à-vis de cette Société n'était pas conforme aux dispositions des articles 6 et suivants de ladite Convention.

Même si la question n'était pas préjugée et si la Cour était libre de l'examiner à nouveau maintenant, elle devrait arriver à la conclusion que l'Oberschlesische était contrôlée par la Bayerische. Car, vu que, d'après le contrat du 24 décembre 1919, le Reich s'était déclaré d'accord pour maintenir la direction de l'entreprise de Chorzów entre les mains de la Bayerische aux conditions antérieurement convenues avec le Reich, et que, par le contrat ultérieur, conclu entre la Bayerische et la Treuhand à la date du 25 novembre 1920, il avait été stipulé qu'à cette fin la Bayerische désignerait au moins deux membres de sa propre direction comme membres de la direction de l'Oberschlesische, c'est, de l'avis de la Cour, la Bayerische plutôt que le Reich qui a le contrôle sur l'Oberschlesische.

La Cour conclut donc que n'est pas fondée la thèse polonaise suivant laquelle l'Oberschlesische n'a pas subi de dommage parce que cette Société doit être considérée comme s'identifiant avec le Reich, et suivant laquelle les biens dont ladite Société a été privée par l'acte du Gouvernement polonais sont acquis à la Pologne en vertu de l'article 256 du Traité de Versailles.

that there was no need for it to consider the question whether the Oberschlesische, having regard to the rights conferred by the contract of December 24th, 1919, on the Reich, should be considered as controlled by the Reich, and, should this be the case, what consequences would ensue as regards the application of the Geneva Convention. But the reason for this was that the Court held that the Polish Government had not raised this question, and that, apart from its contention as to the fictitious character of the instruments of December 24th, 1919, that Government did not seem to have disputed that the Company was controlled by German nationals.

At all events, it is clear that only by regarding the said Company as a company controlled by German nationals within the meaning of Article 6 of the Geneva Convention, was the Court able to declare that the attitude of the Polish Government towards that Company was not in conformity with the terms of Article 6 and the following articles of the said Convention.

Even if the question were still open and the Court were now free once more to consider it, it would be bound to conclude that the Oberschlesische was controlled by the Bayerische. For seeing that, under the contract of December 24th, 1919, the Reich had declared that it agreed to leave the management of the Chorzów undertaking in the hands of the Bayerische, under the conditions previously settled with the Reich, and that, under the subsequent contract concluded on November 25th, 1920, between the Bayerische and the Treuhand, it had been stipulated that for this purpose the Bayerische was to appoint at least two members of its own board as members of the board of the Oberschlesische, the Court considers that the Bayerische, rather than the Reich, controls the Oberschlesische.

The Court, therefore, arrives at the conclusion that the Polish contention to the effect that the Oberschlesische has not suffered damage, because that Company is to be regarded as identifiable with the Reich, and that the property of which the said Company was deprived by the action of the Polish Government has passed to Poland under Article 256 of the Treaty of Versailles, is not well founded.

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A titre subsidiaire, le Gouvernement polonais a allégué que, même si les droits que le Reich possède d'après le contrat du 24 décembre 1919 dans l'entreprise de Chorzów ne devaient pas être considérés comme comportant la propriété des actions de l'Oberschlesische, la valeur de ces droits, qui tomberaient sous le coup de l'article 256 du Traité de Versailles, devrait néanmoins être déduite de l'indemnité réclamée du chef de l'Oberschlesische. La Cour ne saurait davantage accepter cette thèse.

A ce sujet, il y a lieu de remarquer que l'article 256 pose deux conditions, savoir qu'il s'agisse de « biens et propriétés » appartenant à l'Empire ou aux États allemands, et que ces « biens et propriétés » soient « situés » dans un territoire allemand cédé en vertu du Traité.

Il s'agit donc de savoir, entre autres, si les droits du Reich selon le contrat du 24 décembre 1919 sont « situés » dans la partie de la Haute-Silésie cédée à la Pologne. En tant que créance contre la Treuhand, il est clair que cette créance ne peut être considérée comme située dans la Haute-Silésie polonaise, la Treuhand étant une société dont le siège social est en Allemagne et dont les parts appartiennent à des sociétés qui ont également leur siège en Allemagne, et sur lesquelles le contrôle appartient sans conteste à des ressortissants allemands. Le fait que cette créance est garantie par un droit de gage sur les actions, dont les bénéfices, de même que le prix obtenu en cas de vente, serviront à amortir la créance, ne peut, de l'avis de la Cour, justifier l'opinion suivant laquelle les droits du Reich seraient situés en Haute-Silésie polonaise où se trouve l'usine. Ce ne sont que des droits sur les actions, lesquels, si on ne veut pas les considérer comme situés là où se trouvent les actions, doivent être regardés comme étant localisés au siège de la société, siège qui, en l'espèce, est à Berlin et non en Haute-Silésie polonaise. Le transfert du siège de l'Oberschlesische de Chorzów à Berlin après l'entrée en vigueur du Traité de Versailles ne peut être considéré comme illégal et nul ; les motifs pour lesquels la Cour, dans son Arrêt n° 7,

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Alternatively, the Polish Government has contended that, even if the rights possessed by the Reich under the contract of December 24th, 1919, in the Chorzów undertaking are not to be considered as involving ownership of the shares of the Oberschlesische, the value of these rights, which fall within the scope of Article 256 of the Treaty of Versailles, should nevertheless be deducted from the indemnity claimed as regards the Oberschlesische. The Court is likewise unable to admit this contention.

In this respect, it should be noted that Article 256 contains two conditions, namely, that the "property and possessions" with which it deals must belong to the Empire or to the German States, and that such "property and possessions" must be "situated" in German territory ceded under the Treaty.

It must therefore be ascertained, amongst other things, whether the rights of the Reich under the contract of December 24th, 1919, are "situated" in the part of Upper Silesia ceded to Poland. In so far as these rights consist in a claim against the Treuhand, it is clear that this claim cannot be regarded as situated in Polish Upper Silesia, since the Treuhand is a company whose registered office is in Germany and whose shares belong to companies which also have their registered office in Germany and which are undeniably controlled by German nationals. The fact that this claim is guaranteed by a lien on the shares on which the profit, as well as the price obtained in the event of sale, is to be devoted to the payment of this claim, does not, in the Court's opinion, justify the view that the rights of the Reich are situated in Polish Upper Silesia where the factory is. These are only rights in respect of the shares; and these rights, if not regarded as situated where the shares are, must be considered as localized at the registered office of the Company which in this case in at Berlin and not in Polish Upper Silesia. The transfer of the registered office of the Oberschlesische from Chorzów to Berlin after the coming into force of the Treaty of Versailles cannot be regarded as illegal and null:

a considéré que des aliénations de biens publics sis dans la zone soumise au plébiscite n'étaient pas interdites par ledit Traité, s'appliquent à plus forte raison à l'acte par lequel une société anonyme a transféré son siège de cette zone en Allemagne.

C'est encore en vain que le Gouvernement polonais invoque le paragraphe 10 de l'annexe aux articles 297 et 298 du Traité de Versailles, paragraphe qui établit le devoir pour l'Allemagne de remettre « à chaque Puissance alliée ou associée tous les contrats, certificats, actes et autres titres de propriété se trouvant entre les mains de ses ressortissants et se rapportant à des biens, droits et intérêts situés sur le territoire de ladite Puissance alliée ou associée, y compris les actions, obligations ou autres valeurs mobilières de toutes sociétés autorisées par la législation de cette Puissance ». Même abstraction faite de la circonstance que l'Oberschlesische a été constituée sous le régime des lois allemandes et n'a pas été « autorisée » par la législation polonaise, ladite disposition est étrangère à l'article 256 et se réfère seulement aux articles en annexe auxquels elle se trouve.

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L'exposé qui précède ayant établi que, selon l'opinion de la Cour, l'article 256 du Traité de Versailles n'est pas applicable aux droits que le Reich possède en vertu du contrat du 24 décembre 1919, il s'ensuit qu'il faut rejeter la thèse polonaise basée sur l'applicabilité dudit article, et selon laquelle il est nécessaire d'éliminer du montant de l'indemnité à allouer la valeur de ces droits. Il en est de même en ce qui concerne la conclusion du Gouvernement polonais demandant la remise à la Pologne de la totalité des actions de l'Oberschlesische, conclusion dont le but exprès est d'aboutir à une telle élimination. Car cette conclusion, elle aussi, a pour seul fondement la prétendue applicabilité dudit article du Traité de Versailles.

the reasons for which the Court, in Judgment No. 7, held that alienations of public property situated in the plebiscite zone were not prohibited by that Treaty, apply *a fortiori* in respect of the transfer by a company of its registered office from this zone to Germany.

It is also in vain that the Polish Government cites paragraph 10 of the Annex to Articles 297 and 298 of the Treaty of Versailles, which paragraph lays down that Germany shall deliver "to each Allied or Associated Power all securities, certificates, deeds, or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power". Even disregarding the circumstances that the Oberschlesische was constituted under German law and has not been "incorporated" in accordance with the laws of Poland, the clause quoted has nothing to do with Article 256 and relates only to the articles to which it is annexed.

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Since, as has been shown above, Article 256 of the Treaty of Versailles is not, in the Court's opinion, applicable to the rights possessed by the Reich under the contract of December 24th, 1919, it follows that the Polish Government's contention—based on the applicability of that article—to the effect that the value of these rights should be eliminated from the amount of the indemnity to be awarded, must be rejected. The same is true as regards the Polish Government's submission that the whole of the shares of the Oberschlesische should be handed over to Poland, a submission the aim of which is precisely to bring about the elimination referred to. For this submission is likewise based solely on the alleged applicability of the same article of the Treaty of Versailles.

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A titre subsidiaire, également au sujet de la demande d'une indemnité fondée sur le préjudice subi par l'Oberschlesische, le Gouvernement polonais a prié la Cour de « surseoir provisoirement » sur ladite demande en indemnité.

Les raisons pour lesquelles il demande ce sursis paraissent être les suivantes :

Le Gouvernement polonais a notifié à la Commission des Réparations la prise de possession, en vertu de l'article 256 du Traité de Versailles, de l'usine de Chorzów, en la portant sur la liste des biens d'État allemands acquis conformément audit article. Il appartient à la Commission des Réparations de fixer la valeur de ces biens, valeur qui doit être payée à la Commission par l'État cessionnaire pour être portée au crédit de l'Allemagne à valoir sur les sommes dues au titre des réparations. Or, après que la Cour eut rendu son Arrêt n° 7, le Gouvernement allemand avait demandé à la Commission des Réparations de radier l'usine de Chorzów de la liste des biens transférés à la Pologne, sans que, cependant, la Commission eût encore pris de décision à cet égard. La question de savoir si la Pologne doit être débitée de la valeur de l'usine reste donc en suspens, et le Gouvernement polonais est d'avis que, tant que cette question n'est pas tranchée et que la Commission des Réparations n'a pas radié l'usine de Chorzów de la liste, le Gouvernement polonais ne peut être contraint à un paiement en faveur de l'Oberschlesische.

A côté de ces considérations, le Gouvernement polonais invoque encore la Convention d'armistice et l'article 248 du Traité de Versailles. Ce dernier établit que, « sous réserve des dérogations qui pourraient être accordées par la Commission des Réparations, un privilège de premier rang est établi sur tous les biens et ressources de l'Empire et des États allemands, pour le règlement des réparations et autres charges résultant du présent Traité, ou de tous autres traités et conventions complémentaires, ou des arrangements conclus entre l'Allemagne et les Puissances alliées ou associées pendant l'armistice et ses prorogations ». Le Gouvernement polonais constate que, dans son Arrêt n° 7, la Cour a jugé que la Pologne, n'ayant pas

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Alternatively, and also in regard to the claim for an indemnity based on the damage sustained by the Oberschlesische, the Polish Government has asked the Court "provisionally to suspend" its decision on the claim for indemnity.

The reasons for which it seeks this suspension appear to be as follows:

The Polish Government has notified the Reparation Commission of the taking over of the Chorzów factory, under Article 256 of the Treaty of Versailles, by entering it on the list of German State property acquired under that article. It is for the Reparation Commission to fix the value of such property, which value is to be paid to the Commission by the succession State and credited to Germany on account of the sums due for reparations. Now after the Court had delivered Judgment No. 7, the German Government asked the Reparation Commission to strike out the Chorzów factory from the list of property transferred to Poland, but the Commission has not yet taken any decision in regard to this. The question whether Poland is to be debited with the value of the factory therefore remains undecided, and the Polish Government considers that, until this question has been decided and the Reparation Commission has struck the Chorzów factory off the list, it—the Polish Government—cannot be compelled to make a payment in favour of the Oberschlesische.

In addition to these considerations, the Polish Government also cites the Armistice Convention and Article 248 of the Treaty of Versailles. The latter lays down that, "subject to such exceptions as the Reparation Commission may approve, a first charge upon all the assets and revenues of the German Empire and its constituent States shall be the cost of reparation and all other costs arising under the present Treaty or any treaties or agreements supplementary thereto or under arrangements concluded between Germany and the Allied and Associated Powers during the armistice or its extensions". The Polish Government says that in Judgment No. 7 the Court has decided first that Poland, not having been a party

pris part à la Convention d'armistice, n'a pas le droit de se prévaloir des stipulations de celle-ci pour considérer nulle et non avenue l'aliénation de l'usine, et qu'elle ne peut se réclamer individuellement, dans le même but, de l'article 248 du Traité de Versailles. Mais il semble soutenir que, vu le droit que les États signataires de la Convention d'armistice peuvent avoir à s'opposer à la vente de l'usine, et vu le droit de la Commission des Réparations à veiller sur l'acquittement de la dette de réparation en général, et vu spécialement le droit qui lui est réservé par l'article 248, l'obligation de la Pologne de payer à l'Allemagne une indemnité en faveur de l'Oberschlesische dépend d'une approbation préalable desdits États ainsi que de la Commission des Réparations.

De son côté, le Gouvernement allemand, tout en contestant le bien-fondé desdites objections du Gouvernement polonais, a déclaré admettre la compétence de la Cour pour statuer sur celles-ci « en tant que questions préalables, pour les questions de la forme, du montant et des modes du paiement des indemnités qu'il réclame, questions pour lesquelles la Cour a déjà affirmé sa compétence ». Il a prié la Cour de rejeter la conclusion subsidiaire polonaise et de dire et juger :

« que le Gouvernement polonais n'est pas autorisé à refuser le paiement au Gouvernement allemand des indemnités en raison d'arguments tirés de l'article 256 ou en raison d'égards vis-à-vis de la Commission des Réparations ou d'autres tierces personnes ».

La Cour est d'avis que sa compétence pour statuer sur la conclusion polonaise en question n'est pas douteuse, mais que cette conclusion doit être rejetée comme non fondée.

A ce sujet, il y a lieu de remarquer, tout d'abord, que les faits allégués par la Pologne ne peuvent empêcher la Cour, saisie maintenant d'une demande en indemnité sur la base de son Arrêt n° 7, de statuer sur cette demande en ce qui concerne la fixation d'une indemnité correspondant, entre autres, au montant du dommage subi par l'Oberschlesische, dommage dont l'élément le plus important est représenté par la perte de l'usine. Car, en constatant par son Arrêt n° 7 que l'attitude du Gouvernement polonais vis-à-vis de l'Oberschle-

to the Armistice Convention, is not entitled to avail itself of the terms of that instrument in order to establish that the alienation of the factory is null and void, and secondly, that that country cannot, on her own account, cite Article 248 of the Treaty of Versailles for the same purpose. It would seem, however, that the said Government contends that, in view of the right which the States signatory to the Armistice Convention may have to oppose the sale of the factory and in view of the right of the Reparation Commission to ensure the discharge of reparation debts in general and especially in view of the right reserved to it under Article 248, Poland's obligation to pay to Germany an indemnity in favour of the Oberschlesische is dependent on the previous approval of the said States and of the Reparation Commission.

The German Government, for its part, whilst disputing the justice of these objections of the Polish Government, has accepted the jurisdiction of the Court to decide upon them "as preliminary points in regard to the questions of form, amount and methods of payment of the indemnities claimed by it, questions with which the Court has already declared itself competent to deal". It has asked the Court to dismiss the Polish alternative submission and to decide:

"that the Polish Government is not justified in refusing to pay compensation to the German Government on the basis of arguments drawn from Article 256 or for motives of respect for the rights of the Reparation Commission or other third parties".

The Court considers that there is no doubt as to its jurisdiction to pass judgment upon the Polish submission in question, but that this submission must be rejected as not well-founded.

In this respect, it should be observed in the first place that the facts cited by Poland cannot prevent the Court, which now has before it a claim for indemnity based on its Judgment No. 7, from passing judgment upon this claim in so far as concerns the fixing of an indemnity corresponding, amongst other things, to the amount of the damage sustained by the Oberschlesische, of which damage the most important element is represented by the loss of the factory. For the Court, when it declared in Judgment No. 7 that the attitude

sische n'était pas conforme aux dispositions des articles 6 et suivants de la Convention de Genève, — attitude qui consistait à considérer et à traiter ladite usine comme acquise par la Pologne en vertu de l'article 256 du Traité de Versailles, — la Cour a écarté, avec effet entre les Parties, l'applicabilité dudit article à l'usine de Chorzów. D'autre part, il ressort des documents soumis à la Cour par les Parties que la Commission des Réparations ne revendique pas la compétence pour statuer sur la question de savoir si tel ou tel bien est, oui ou non, acquis par un État cessionnaire en vertu dudit article. Elle accepte à ce sujet la solution que la question a pu recevoir, soit par les moyens dont disposent les intéressés — négociations diplomatiques, arbitrages, etc. — soit par un acte unilatéral de l'État cessionnaire lui-même. Et si maintenant les Parties sont d'accord sur ce que la Pologne doit conserver l'usine, cela n'est pas à cause de l'article 256 du Traité de Versailles, mais en raison de l'impossibilité pratique de restituer l'usine. Il ne semble pas douteux, dans ces circonstances, que la Pologne ne court aucun risque de devoir payer à nouveau la valeur de l'usine à la Commission des Réparations, si, conformément à la demande de l'Allemagne, elle paie à cet État la valeur de l'usine.

En ce qui concerne la Convention d'armistice et l'article 248 du Traité de Versailles, la question se pose autrement. La Convention d'armistice semble avoir été invoquée dans le but de réserver la possibilité de faire invalider la vente de l'usine à l'Oberschlesische par une action que les États signataires de ladite Convention intenteraient à cet effet. Comme, cependant, la Cour, dans son Arrêt n° 7, a estimé que la Pologne ne peut pas se prévaloir des dispositions de cette Convention, à laquelle elle n'est pas partie, la Cour ne saurait, sans inconséquence, lui reconnaître le droit d'invoquer la Convention aux fins d'obtenir un sursis à la réparation du dommage qu'elle avait causé par une attitude non conforme aux obligations résultant pour elle de la Convention de Genève.

Comme il a déjà été dit, la Cour, dans son Arrêt n° 7, a déclaré que la Pologne ne peut pas se réclamer individuellement de l'article 248 du Traité de Versailles aux fins d'annuler

of the Polish Government in regard to the Oberschlesische was not in conformity with the provisions of Article 6 and the following articles of the Geneva Convention—which attitude consisted in considering and treating the Chorzów factory as acquired by Poland under Article 256 of the Treaty of Versailles—established that, as between the Parties, that article was not applicable to the Chorzów factory. Again it appears from the documents submitted to the Court by the Parties that the Reparation Commission does not claim to be competent to decide whether any particular property is or is not acquired by a succession State under the said article. The Commission accepts in this respect the solution arrived at in regard to this question either by the means at the disposal of those concerned—diplomatic negotiations, arbitration, etc.—or as the result of a unilateral act on the part of the succession State itself. The fact that the Parties are now agreed that Poland must retain the factory has nothing to do with Article 256 of the Treaty of Versailles, but is owing to the impracticability of returning it. In these circumstances there seems to be no doubt that Poland incurs no risk of having again to pay the value of the factory to the Reparation Commission, if, in accordance with Germany's claim, she pays this value to that State.

With regard to the Armistice Convention and Article 248 of the Treaty of Versailles, the question assumes a different aspect. The Armistice Convention appears to have been cited in order to reserve the possibility of getting the sale of the factory to the Oberschlesische declared invalid by means of an action to be brought to that end by the States signatory to that Convention. As, however, the Court, in Judgment No. 7, has held that Poland cannot avail itself of the provisions of the said Convention to which she is not a party, the Court cannot without inconsistency admit that country's right to invoke the Convention in order to delay making reparation for the damage resulting from her adoption of an attitude not in conformity with her obligations under the Geneva Convention.

As has already been said, the Court in Judgment No. 7 has declared that Poland cannot on her own account rely on Article 248 of the Treaty of Versailles in order to obtain the

la vente de l'usine ; en outre, la Cour a constaté que cet article ne comporte pas de défense d'aliénation et que les droits réservés aux Puissances alliées et associées dans ledit article sont exercés par l'intermédiaire de la Commission des Réparations. Mais il serait difficile de comprendre comment lesdits droits pourraient être lésés du fait du versement au Reich, à titre d'indemnité, de la valeur de l'usine, vu que, sans un tel versement, les droits du Reich dans l'entreprise perdraient probablement toute valeur. L'objection basée sur cet article doit donc, elle aussi, être écartée.

La Cour estime devoir se borner à rejeter la conclusion par laquelle le Gouvernement polonais demande un sursis, considérant que, par ce rejet, ainsi que par le rejet des exceptions présentées par le Gouvernement polonais sur la base de l'article 256 du Traité de Versailles, elle fait droit à la conclusion allemande, dans toute la mesure où cette conclusion est justifiée ; en effet, la Cour ne saurait examiner la conclusion dont il s'agit pour autant qu'elle se réfère à des tierces personnes qui ne sont pas spécifiées.

III.

L'existence d'un dommage à indemniser étant reconnue par la Partie défenderesse en ce qui concerne la Bayerische, et les objections soulevées par cette Partie contre l'existence d'un dommage justifiant une indemnisation de l'Oberschlesische étant écartées, la Cour doit maintenant fixer les critères d'après lesquels il y a lieu de procéder à la détermination du montant de l'indemnité due.

L'acte de la Pologne que la Cour a jugé être contraire à la Convention de Genève, n'est pas une expropriation à laquelle n'aurait manqué, pour être légitime, que le paiement d'une indemnité équitable ; c'est une mainmise sur des biens, droits et intérêts qui ne pouvaient être expropriés même contre indemnité, sauf dans les conditions exceptionnelles déterminées par l'article 7 de ladite Convention. Comme la Cour l'a expressément constaté dans son Arrêt n° 8, la réparation est, en l'espèce, la conséquence non pas de l'application des articles 6 à 22 de la Convention de Genève, mais d'actes qui sont contraires aux dispositions de ces articles.

annulment of the sale of the factory. Furthermore, the Court has stated that this article does not involve a prohibition of alienation, and that the rights reserved to the Allied and Associated Powers in the article are exercised through the Reparation Commission. But it would be difficult to understand how these rights could be affected by the payment to the Reich, as an indemnity, of the value of the factory, seeing that, without such a payment, the rights of the Reich in the enterprise would probably lose all value. The objection based on this article must therefore also be overruled.

The Court considers that it should confine itself to rejecting the submission whereby the Polish Government asks for a suspension, since by so doing and by overruling the objections raised by the Polish Government on the basis of Article 256 of the Treaty of Versailles, it is deciding in conformity with the German submission to the extent that that submission is well-founded; the Court cannot, in fact, consider the submission in question in so far as it relates to third parties who are not specified.

III.

The existence of a damage to be made good being recognized by the respondent Party as regards the Bayerische, and the objections raised by the same Party against the existence of any damage that would justify compensation to the Oberschlesische being set aside, the Court must now lay down the guiding principles according to which the amount of compensation due may be determined.

The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation—to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention. As the Court has expressly declared in Judgment No. 8, reparation is in this case the consequence not of the application of Articles 6 to 22 of the Geneva Convention, but of acts contrary to those articles.

Il s'ensuit que l'indemnité due au Gouvernement allemand n'est pas nécessairement limitée à la valeur qu'avait l'entreprise au moment de la dépossession, plus les intérêts jusqu'au jour du paiement. Cette limitation ne serait admissible que si le Gouvernement polonais avait eu le droit d'exproprier et que si son tort se réduisait à n'avoir pas payé aux deux Sociétés le juste prix des choses expropriées ; dans le cas actuel, elle pourrait aboutir à placer l'Allemagne et les intérêts protégés par la Convention de Genève, et pour lesquels le Gouvernement allemand a pris fait et cause, dans une situation plus défavorable que celle dans laquelle l'Allemagne et ces intérêts se trouveraient si la Pologne avait respecté ladite Convention. Une pareille conséquence serait non seulement inique, mais aussi et avant tout incompatible avec le but visé par les articles 6 et suivants de la Convention, voire la défense, en principe, de liquider des biens, droits et intérêts des ressortissants allemands et des sociétés contrôlées par des ressortissants allemands en Haute-Silésie, car elle équivaudrait à identifier la liquidation licite et la dépossession illicite en ce qui concerne leurs effets financiers.

Le principe essentiel, qui découle de la notion même d'acte illicite et qui semble se dégager de la pratique internationale, notamment de la jurisprudence des tribunaux arbitraux, est que la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis. Restitution en nature, ou, si elle n'est pas possible, paiement d'une somme correspondant à la valeur qu'aurait la restitution en nature ; allocation, s'il y a lieu, de dommages-intérêts pour les pertes subies et qui ne seraient pas couvertes par la restitution en nature ou le paiement qui en prend la place ; tels sont les principes desquels doit s'inspirer la détermination du montant de l'indemnité due à cause d'un fait contraire au droit international.

Cette conclusion s'impose avec une force toute particulière à l'égard de la Convention de Genève, qui a pour but d'assurer le maintien de la vie économique en Haute-Silésie sur la base du respect du *statu quo*. La dépossession d'une entreprise industrielle, que la Convention défendait d'exproprier, a donc

It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention—that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia—since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.

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.

This conclusion particularly applies as regards the Geneva Convention, the object of which is to provide for the maintenance of economic life in Upper Silesia on the basis of respect for the *status quo*. The dispossession of an industrial undertaking—the expropriation of which is prohibited by the

pour conséquence l'obligation de la restituer, et, si cela n'est pas possible, d'en payer la valeur à l'époque de l'indemnisation destinée à remplacer la restitution devenue impossible. A cette obligation s'ajoute, en vertu des principes généraux du droit international, celle d'indemniser les pertes éprouvées à la suite de la mainmise. L'impossibilité, constatée par un accord des Parties, de restituer l'usine de Chorzów ne saurait donc avoir d'autre effet que celui de remplacer la restitution par le paiement de la valeur de l'entreprise ; il ne serait conforme ni aux principes juridiques, ni à la volonté des Parties, d'en déduire que la question de l'indemnité doit désormais être traitée comme si l'on était sur le terrain d'une véritable expropriation.

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Tels étant les principes d'après lesquels il y a lieu de procéder à la détermination de l'indemnité due, il convient maintenant de rechercher si les dommages à indemniser doivent être évalués distinctement pour chacune des deux Sociétés, comme l'a fait la Partie demanderesse, ou s'il est préférable d'en déterminer la valeur globale.

Si la Cour était en présence de dommages qui, tout en étant causés par un même acte, auraient frappé des personnes indépendantes les unes des autres, la méthode qui s'imposerait naturellement serait l'évaluation séparée du dommage éprouvé par chacune d'elles ; la somme des indemnités ainsi évaluées constituerait alors le montant de la réparation due à l'État.

En l'espèce, la situation est différente. L'unité économique de l'entreprise de Chorzów, que la Cour a déjà fait remarquer dans son Arrêt n° 6, se manifeste surtout par le fait que les intérêts possédés par les deux Sociétés dans ladite entreprise sont interdépendants et complémentaires ; il s'ensuit qu'on ne saurait les additionner purement et simplement, sous peine d'indemniser deux fois le même dommage ; car tout ce que la Bayerische aurait retiré de sa participation à l'entreprise (redevances et parts des bénéfices) aurait été à la charge de l'Oberschlesische. La valeur du droit d'option de la Bayerische à

Geneva Convention—then involves 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. To this obligation, in virtue of the general principles of international law, must be added that of compensating loss sustained as the result of the seizure. The 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; it would not be in conformity either with the principles of law or with the wish of the Parties to infer from that agreement that the question of compensation must henceforth be dealt with as though an expropriation properly so called was involved.

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Such being the principles to be followed in fixing the compensation due, the Court may now consider whether the damage to be made good is to be estimated separately for each of the two Companies, as the Applicant has claimed, or whether it is preferable to fix a lump sum.

If the Court were dealing with damage which, though caused by a single act, had affected persons independent the one of the other, the natural method to be applied would be a separate assessment of the damage sustained by each of them; the total amount of compensation thus assessed would then constitute the amount of reparation due to the State.

In the present case, the situation is different. The economic unity of the Chorzów undertaking, pointed out by the Court in its Judgment No. 6, is shown above all in the fact that the interests possessed by the two Companies in the said undertaking are interdependent and complementary; it follows that they cannot simply be added together without running the risk of the same damage being compensated twice over; for all that the Bayerische would have obtained from its participation in the undertaking (sums due and shares in the profits) would have been payable by the Oberschlesische. The value

l'achat de l'usine dépendait également de la valeur de l'entreprise. Tous les dommages que l'une ou l'autre des Sociétés ont subis à la suite de la dépossession, pour autant qu'ils ont trait à la suppression de l'exploitation et à la perte des bénéfices qu'elle aurait rapportés, sont déterminés par la valeur de l'entreprise comme telle ; partant, les indemnités à fixer de ce chef doivent se tenir dans ce cadre.

D'autre part, il est clair que les rapports juridiques entre les deux Sociétés sont tout à fait étrangers à la procédure internationale et ne sauraient constituer un obstacle à ce que la Cour se place sur le terrain d'une évaluation globale, correspondant à la valeur de l'entreprise, si, comme elle l'estime, cette évaluation est plus simple et donne plus de garanties d'arriver à une juste appréciation du montant du dommage et d'éviter des doubles emplois.

Une réserve cependant s'impose. L'évaluation globale, ci-dessus visée, ne concerne que l'entreprise de Chorzów et n'exclut pas la possibilité de tenir compte d'autres dommages que les Sociétés auraient subis du fait de la dépossession, mais en dehors de l'entreprise elle-même. Aucun dommage de cette nature n'a été allégué en ce qui concerne l'Oberschlesische, et il ne semble guère concevable qu'il en existe, car toute l'activité de l'Oberschlesische était concentrée dans l'entreprise. Par contre, il est possible que des dommages de cet ordre se soient vérifiés pour ce qui est de la Bayerische, laquelle possède ou exploite d'autres usines du même genre que celle de Chorzów ; la Cour examinera plus tard si de tels dommages entrent en ligne de compte pour la fixation du montant de l'indemnité.

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Placée devant la nécessité de déterminer quelle est la somme qu'il convient d'allouer au Gouvernement allemand afin de lui permettre de remettre, autant que possible, les Sociétés dépossédées dans la situation économique dans laquelle elles se trouveraient vraisemblablement si la mainmise n'avait pas eu lieu, la Cour ne croit pas pouvoir se contenter des éléments d'évaluation qui lui ont été fournis par les Parties.

of the Bayerische's option on the factory depended also on the value of the undertaking. The whole damage suffered by the one or the other Company as the result of dispossession, in so far as concerns the cessation of the working and the loss of profit which would have accrued, is determined by the value of the undertaking as such; and, therefore, compensation under this head must remain within these limits.

On the other hand, it is clear that the legal relationship between the two Companies in no way concerns the international proceedings and cannot hinder the Court from adopting the system of a lump sum corresponding to the value of the undertaking, if, as is the Court's opinion, such a calculation is simpler and gives greater guarantees that it will arrive at a just appreciation of the amount, and avoid awarding double damages.

One reservation must, however, be made. The calculation of a lump sum referred to above concerns only the Chorzów undertaking, and does not exclude the possibility of taking into account other damage which the Companies may have sustained owing to dispossession, but which is outside the undertaking itself. No damage of such a nature has been alleged as regards the Oberschlesische, and it seems hardly conceivable that such damage should exist, for the whole activity of the Oberschlesische was concentrated in the undertaking. On the other hand, it is possible that damage of such a nature may be shown to exist as regards the Bayerische, which possesses or works other factories of the same nature as Chorzów; the Court will consider later whether such damage must be taken into account in fixing the amount of compensation.

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Faced with the task of determining what sum must be awarded to the German Government in order to enable it to place the dispossessed Companies as far as possible in the economic situation in which they would probably have been if the seizure had not taken place, the Court considers that it cannot be satisfied with the data for assessment supplied by the Parties.

Les frais de construction de l'usine de Chorzów, que le demandeur a pris pour base de son calcul en ce qui concerne l'indemnité de l'Oberschlesische, ont soulevé de la part du défendeur des objections et des critiques, qui ne sont peut-être pas dénuées de tout fondement. Sans entrer dans cette discussion et sans nier l'importance que les frais de construction pourront avoir dans la détermination de la valeur de l'entreprise, la Cour se borne à observer qu'il n'est certainement pas exclu que les frais encourus pour la construction d'une usine ne soient pas en rapport avec la valeur qu'aura l'usine une fois bâtie. Cette possibilité doit entrer particulièrement en ligne de compte lorsque, comme dans le cas présent, l'usine a été bâtie par l'État en vue de faire face à des exigences impérieuses d'intérêt public et au milieu de circonstances exceptionnelles comme celles créées par la guerre.

D'autre part, la Cour ne saurait pas non plus s'arrêter au prix stipulé dans le contrat du 24 décembre 1919 entre le Reich, l'Oberschlesische et la Treuhand, ou à l'offre de vente d'actions de l'Oberschlesische à la Compagnie de l'azote et des fertilisants de Genève faite le 26 mai 1922. Il a déjà été observé ci-dessus que la valeur de l'entreprise au moment de la dépossession ne constitue pas nécessairement la mesure pour la fixation de l'indemnité. Or, il est constant que le moment auquel remontent le contrat de vente et les négociations avec la Société genevoise appartient à une période de crise économique et monétaire profonde ; l'écart entre la valeur qu'avait alors l'entreprise et la valeur qu'elle aurait eu actuellement peut donc être fort considérable. Tout cela sans compter que le prix stipulé dans le contrat de 1919 était déterminé par des circonstances et accompagné de clauses qui, en réalité, ne permettent guère de le regarder comme la véritable expression de la valeur que les Parties attribuaient à l'usine ; et que l'offre à la Société genevoise s'explique probablement par la crainte de mesures du genre de celles que le Gouvernement polonais a effectivement prises peu après contre l'entreprise de Chorzów et que la Cour a jugé n'avoir pas été conformes à la Convention de Genève.

The cost of construction of the Chorzów factory, which the Applicant has taken as a basis for his calculation as regards compensation to the Oberschlesische, gave rise to objections and criticisms by the Respondent which are perhaps not without some foundation. Without entering into this discussion and without denying the importance which the question of cost of construction may have in determining the value of the undertaking, the Court merely observes that it is by no means impossible that the cost of construction of a factory may not correspond to the value which that factory will have when built. This possibility must more particularly be considered when, as in the present case, the factory was built by the State in order to meet the imperious demands of public necessity and under exceptional circumstances such as those created by the war.

Nor yet can the Court, on the other hand, be satisfied with the price stipulated in the contract of December 24th, 1919, between the Reich, the Oberschlesische and the Treuhand, or with the offer of sale of the shares of the Oberschlesische to the Geneva *Compagnie d'azote et de fertilisants* made on May 26th, 1922. It has already been pointed out above that the value of the undertaking at the moment of dispossession does not necessarily indicate the criterion for the fixing of compensation. Now it is certain that the moment of the contract of sale and that of the negotiations with the Genevese Company belong to a period of serious economic and monetary crisis; the difference between the value which the undertaking then had and that which it would have had at present may therefore be very considerable. And further, it must be considered that the price stipulated in the contract of 1919 was determined by circumstances and accompanied by clauses which in reality seem hardly to admit of its being considered as a true indication of the value which the Parties placed on the factory; and that the offer to the Genevese Company is probably to be explained by the fear of measures such as those which the Polish Government in fact adopted afterwards against the Chorzów undertaking, and which the Court has judged not to be in conformity with the Geneva Convention.

Pour ce qui est enfin de la somme sur laquelle les deux Gouvernements, à un moment donné, étaient tombés d'accord au cours des négociations qui suivirent l'Arrêt n° 7 — somme, d'ailleurs, à laquelle ni l'une ni l'autre Partie n'a cru devoir se référer au cours de la présente procédure —, il suffit de rappeler que la Cour ne saurait faire état des déclarations, admissions ou propositions qu'ont pu faire les Parties au cours des négociations directes qui ont eu lieu entre elles, lorsque ces négociations n'ont pas abouti à un accord complet.

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Dans ces circonstances, la Cour, afin d'éclairer sa religion, avant toute détermination de l'indemnité que le Gouvernement polonais doit payer au Gouvernement allemand, fera procéder, conformément à l'article 50 de son Statut et aux suggestions mêmes de la Partie demanderesse, à une expertise. Cette expertise, dont les modalités sont déterminées par une Ordonnance en date de ce jour d'hui, portera sur les questions suivantes :

I. — A. Quelle était la valeur, exprimée en Reichsmarks actuels, au 3 juillet 1922, de l'entreprise pour la fabrication de produits azotés dont l'usine était sise à Chorzów, en Haute-Silésie polonaise, telle que cette entreprise (y compris les terrains, bâtiments, outillage, stocks, procédés dont elle disposait, contrats de fourniture et de livraison, clientèle et chances d'avenir) se trouvait à la date indiquée entre les mains des Bayerische et Oberschlesische Stickstoffwerke ?

B. Quels auraient été les résultats financiers, exprimés en Reichsmarks actuels (profits ou pertes), que l'entreprise ainsi constituée aurait vraisemblablement donnés depuis le 3 juillet 1922 jusqu'à la date du présent arrêt, entre les mains desdites Sociétés ?

II. — Quelle serait la valeur, exprimée en Reichsmarks actuels, à la date du présent arrêt, de ladite entreprise de Chorzów, si cette entreprise (y compris les terrains, bâtiments, outillage, stocks, procédés disponibles, contrats de fourniture et de livraison, clientèle et chances d'avenir), étant restée entre les mains des Bayerische et Oberschlesische Stickstoffwerke, soit était demeurée essentiellement en l'état de 1922, soit avait reçu, toutes proportions gardées, un développement analogue à

And finally as regards the sum agreed on at one moment by the two Governments during the negotiations which followed Judgment No. 7—which sum, moreover, neither Party thought fit to rely on during the present proceedings—it may again be pointed out that the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement.

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This being the case, and in order to obtain further enlightenment in the matter, the Court, before giving any decision as to the compensation to be paid by the Polish Government to the German Government, will arrange for the holding of an expert enquiry, in conformity with Article 50 of its Statute and actually with the suggestions of the Applicant. This expert enquiry, directions for which are given in an Order of Court of to-day's date, will refer to the following questions:

I.—A. What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzów in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?

B. What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?

II.—What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionately on

celui d'autres entreprises du même genre, dirigées par la Bayerische, par exemple l'entreprise dont l'usine est sise à Piesteritz ?

La question I a pour but d'établir la valeur en argent, tant de l'objet qui aurait dû être restitué en nature que du dommage supplémentaire, sur la base de la valeur estimée de l'entreprise, y compris les stocks, au moment de la prise de possession par le Gouvernement polonais, augmentée du profit éventuel présumable de cette entreprise entre la date de la prise de possession et celle de l'expertise.

D'autre part, la question II vise à arriver à la valeur actuelle en se fondant sur la situation au moment de l'expertise et en laissant de côté la situation présumée en 1922.

Cette question envisage la valeur actuelle de l'entreprise à deux points de vue : en premier lieu, on suppose que l'usine serait restée essentiellement dans l'état où elle se trouvait à la date du 3 juillet 1922, et en second lieu on envisage l'usine telle que celle-ci aurait hypothétiquement, mais raisonnablement, dû être entre les mains de l'Oberschlesische et de la Bayerische, si, au lieu d'être prise en 1922 par la Pologne, l'entreprise avait pu poursuivre son développement présumé normal à partir de cette époque. Le caractère hypothétique de cette question est atténué considérablement par la possibilité de la comparaison avec d'autres entreprises du même genre, dirigées par la Bayerische, et surtout avec l'usine de Piesteritz, dont l'analogie avec l'usine de Chorzów, de même d'ailleurs que certaines différences entre les deux, ont été signalées à maintes reprises au cours de la présente procédure.

A cet égard, il y a lieu d'observer que l'agent du Gouvernement allemand a déposé, au cours de la séance publique du 21 juin 1928, deux certificats notariés contenant un résumé des contrats passés le 16 avril 1925 et le 27 août 1927 entre la *Mitteldeutsche Stickstoffwerke A.-G.* et la Bayerische avec adhésion des *Vereinigte Industrie-Unternehmungen A.-G.*, contrats moyennant lesquels les Mitteldeutsche donnent en bail à la Bayerische les biens-fonds à Piesteritz leur appartenant avec toutes les installations et pertinences y afférentes. L'agent du Gouvernement polonais cependant, dans sa plaidoirie du 25 juin,

lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?

The purpose of question I is to determine the monetary value, both of the object which should have been restored in kind and of the additional damage, on the basis of the estimated value of the undertaking including stocks at the moment of taking possession by the Polish Government, together with any probable profit that would have accrued to the undertaking between the date of taking possession and that of the expert opinion.

On the other hand, question II is directed to the ascertainment of the present value on the basis of the situation at the moment of the expert enquiry and leaving aside the situation presumed to exist in 1922.

This question contemplates the present value of the undertaking from two points of view: firstly, it is supposed that the factory had remained essentially in the state in which it was on July 3rd, 1922, and secondly, the factory is to be considered in the state in which it would (hypothetically but probably) have been in the hands of the Oberschlesische and Bayerische, if, instead of being taken in 1922 by Poland, it had been able to continue its supposedly normal development from that time onwards. The hypothetical nature of this question is considerably diminished by the possibility of comparison with other undertakings of the same nature directed by the Bayerische, and, in particular, with the Piesteritz factory, the analogy of which with Chorzów, as well as certain differences between the two, have been many times pointed out during the present proceedings.

In regard to this, it should be observed that the Agent for the German Government, at the public sitting of June 21st, 1928, handed in two certificates by notaries containing a summary of contracts concluded on April 16th, 1925, and August 27th, 1927, between the *Mitteldeutsche Stickstoffwerke A.-G.* and the Bayerische, and adhered to by the *Vereinigte Industrie-Unternehmungen A.-G.*, under which contracts the Mitteldeutsche leased to the Bayerische the landed properties at Piesteritz belonging to it, together with all installations, etc., connected therewith. The Agent for the Polish Govern-

a déclaré que, ne connaissant pas les contrats, et ne pouvant nullement apprécier si les résumés en question contiennent tous les éléments nécessaires pour faire des calculs exacts, il s'opposait formellement à ce que lesdits résumés fussent pris pour base des présents débats.

En ce qui concerne le *lucrum cessans,* par rapport à la question II, il convient d'observer que les dépenses d'entretien des choses corporelles faisant partie de l'entreprise et même les dépenses d'amélioration et de développement normal des installations et de la propriété industrielle y incorporée, doivent absorber en première ligne les profits, présumables ou réels, de l'entreprise. Il y a donc lieu de faire abstraction, jusqu'à un certain point, des profits éventuels, car ils se trouveront être compris dans la valeur hypothétique ou réelle de l'entreprise au moment actuel. Si, cependant, de la réponse que les experts donneront à la question I B, il devait résulter qu'après compensation des déficits des années pendant lesquelles l'usine a fonctionné à perte et après application aux dépenses d'entretien et d'amélioration normale pendant les années suivantes, il reste une marge de profits, le montant de cette marge devrait être additionné à l'indemnité à allouer.

D'autre part, si le développement normal présupposé par la question II représentait un élargissement de l'entreprise et un investissement de capitaux nouveaux, leur montant devrait être déduit de la valeur recherchée.

La Cour ne manque pas de se rendre compte des difficultés que présentent ces deux questions : difficultés d'ailleurs inhérentes au cas spécial dont il s'agit et liées avec le temps qui s'est écoulé entre la dépossession et la demande en indemnité et avec les transformations de l'usine et les progrès de l'industrie qui en forme l'objet. C'est en vue de ces difficultés qu'elle estime préférable de chercher à arriver par des méthodes différentes à la valeur recherchée, afin de permettre une comparaison et de pouvoir éventuellement compléter les résultats de l'une par ceux des autres. Partant, la Cour se réserve toute liberté d'apprécier les évaluations visées par les diverses formules ; c'est sur la base des résultats desdites évaluations, ainsi que des faits et documents qui lui ont été soumis, qu'elle procédera à la fixation de la somme qu'il convient d'allouer

ment, however, in his speech on June 25th, said that, not being acquainted with the contracts and being entirely unable to form an opinion as to whether the summaries in question contained all the data necessary for accurate calculations, he formally objected to the said summaries being taken as a basis in the present proceedings.

As regards the *lucrum cessans*, in relation to question II, it may be remarked that the cost of upkeep of the corporeal objects forming part of the undertaking and even the cost of improvement and normal development of the installation and of the industrial property incorporated therein, are bound to absorb in a large measure the profits, real or supposed, of the undertaking. Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment. If, however, the reply given by the experts to question I B should show that after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years, there remains a margin of profit, the amount of such profit should be added to the compensation to be awarded.

On the other hand, if the normal development presupposed by question II represented an enlargement of the undertaking and an investment of fresh capital, the amount of such sums must be deducted from the value sought for.

The Court does not fail to appreciate the difficulties presented by these two questions, difficulties which are however inherent in the special case under consideration, and closely connected with the time that elapsed between the dispossession and the demand for compensation, and with the transformations of the factory and the progress made in the industry with which the factory is concerned. In view of these difficulties, the Court considers it preferable to endeavour to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others. The Court, therefore, reserves every right to review the valuations referred to in the different formulæ; basing itself on the results of the said valuations and of facts and documents submitted to it, it will then

au Gouvernement allemand, conformément aux principes de droit qui ont été résumés ci-dessus.

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Il convient de constater que l'usine de Chorzów, à évaluer par les experts, comprend aussi l'usine chimique.

Le Gouvernement polonais, à côté des arguments qui, dans son opinion, auraient pour effet de démontrer que l'exploitation de ladite usine n'aurait pu être profitable — arguments qu'il appartiendra aux experts d'apprécier —, a fait valoir que l'exploitation dépendait d'une autorisation spéciale, et que les autorités polonaises étaient en droit de la refuser. Mais la Cour est d'avis que cette thèse n'est pas fondée.

L'autorisation visée semble être celle dont il est question dans le paragraphe 18 de la loi prussienne de 1861, aux termes duquel, sauf dispositions contraires d'un traité international, les personnes morales étrangères ne peuvent exercer une industrie sans l'autorisation du Gouvernement. Or, dans le cas dont il s'agit, il est certain que la Convention de Genève constitue bien le traité international qui, garantissant aux entreprises industrielles la continuation de leur activité, exclut toute nécessité de l'autorisation spéciale requise par la loi de 1861.

Le fait que l'usine chimique non seulement ne fonctionnait pas, mais encore n'était pas même achevée lors du transfert du territoire à la Pologne, ne saurait entrer en ligne de compte ; en effet, l'industrie chimique de toute espèce était expressément mentionnée dans les statuts de l'Oberschlesische comme un des buts de l'activité de cette Société, et les sections et installations de l'usine chimique, d'ailleurs étroitement liées aux sections et installations où était produite la chaux azotée, avaient été déjà prévues et mentionnées dans le contrat de construction et d'exploitation du 5 mars 1915 ; de la sorte, l'entrée en fonctionnement de l'usine n'était que le développement normal et prévu de l'activité industrielle que l'Oberschlesische avait le droit d'exercer en Haute-Silésie polonaise.

proceed to determine the sum to be awarded to the German Government, in conformity with the legal principles set out above.

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It must be stated that the Chorzów factory to be valued by the experts includes also the chemical factory.

Besides the arguments which, in the Polish Government's opinion, tend to show that the working of the said factory was not established on a profitable basis—arguments which it will be for the experts to consider—that Government has claimed that the working depended on a special authorization, which the Polish authorities were entitled to refuse. But the Court is of opinion that this argument is not well-founded.

The authorization referred to seems to be that envisaged by paragraph 18 of the Prussian law of 1861, under which, failing international treaty provisions to the contrary, moral persons of foreign nationality cannot engage in industry without the authorization of the Government. In the present case, it is certain that the Geneva Convention does actually constitute the international treaty which, guaranteeing to industrial undertakings the continuation of their activities, does away with any necessity for the special authorization required by the law of 1861.

The fact that the chemical factory was not only not working, but not even completed, at the time of transfer of the territory to Poland, can be of no importance; for chemical industry of all kinds was expressly mentioned in the articles of the Oberschlesische Company as one of the objects of that Company's activities, and the sections and plant of the chemical factory, which were, moreover, closely connected with the sections and plant producing nitrate of lime, had already been provided for and mentioned in the contract for construction and exploitation of March 5th, 1915; thus, the entry into working of the factory was only the normal and duly foreseen development of the industrial activity which the Oberschlesische had the right to exercise in Polish Upper Silesia.

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De l'avis de la Cour, la valeur envisagée par les questions formulées ci-dessus suffira pour lui permettre de fixer, en connaissance de cause, le montant de l'indemnité à laquelle a droit le Gouvernement allemand, en prenant comme mesure les dommages subis par les deux Sociétés dans l'entreprise de Chorzów.

Il est vrai que le Gouvernement allemand a fait valoir à plusieurs reprises, au cours de la procédure écrite et orale, qu'une indemnisation équitable du dommage éprouvé par la Bayerische ne saurait se borner au montant de la valeur de ce qu'on a appelé les « droits contractuels », savoir, la rémunération stipulée dans les contrats entre le Reich ou l'Oberschlesische et ladite Société, pour la mise à disposition de ses brevets, licences, expériences, etc., ainsi que pour la direction et l'organisation de la vente des produits finis. La raison en serait que cette rémunération, acceptée en vue des rapports particuliers qui liaient les Parties, ne correspondrait guère à la rémunération équitable à laquelle la Bayerische aurait pu, pour les mêmes prestations, prétendre d'un tiers quelconque, comme le Gouvernement polonais. C'est en partant de ce point de vue que le Gouvernement allemand a proposé de prendre pour base de l'évaluation du dommage souffert par la Bayerische, un contrat de licence, qui serait supposé conclu entre un tiers et ladite Société, dans des conditions normales et équitables.

Le point de vue auquel s'est placée la Cour en posant aux experts les questions indiquées ci-dessus, donne cependant satisfaction à la thèse du Gouvernement allemand pour autant qu'elle est justifiée. Car, si la Bayerische avait demandé une redevance plus élevée ou des paiements supplémentaires en sa faveur, ou bien si elle avait stipulé d'autres conditions à son profit, la valeur de son apport pour l'Oberschlesische en serait diminuée dans la même mesure, ce qui prouve que la relation entre prestation et contre-prestation n'entre pas en ligne de compte pour la valeur de l'entreprise dans son ensemble. Si la Bayerische avait eu, non seulement la direction, mais aussi la propriété de l'entreprise, cette valeur serait encore la même ;

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In the Court's opinion, the value to which the above questions relate will be sufficient to permit it with a full knowledge of the facts to fix the amount of compensation to which the German Government is entitled, on the basis of the damage suffered by the two Companies in connection with the Chorzów undertaking.

It is true that the German Government has pointed out several times during the written and oral proceedings that fair compensation for damage suffered by the Bayerische could not be limited to the value of what has been called the "contractual rights", namely, the remuneration provided for in the contracts between the Reich or the Oberschlesische and the said Company for having made available its patents, licences and experience gained, for the management and for the organization of the sale of the finished products. The reason given is that this remuneration, which was accepted in view of the special relationship between the Parties, would hardly correspond to the fair remuneration which the Bayerische might have claimed from any third party, like the Polish Government, for the same consideration. It was on these grounds that the German Government proposed to take as a basis for the calculation of damage suffered by the Bayerische a licence supposed to be granted by the said Company to a third party under fair and normal conditions.

The method adopted by the Court in putting the questions set out above to the experts meets the German Government's contention, in so far as that contention is justified. For if the Bayerische had demanded a larger sum or additional payments in its favour, or if it had stipulated for other conditions to its advantage, the value to the Oberschlesische of its participation would to the same extent be diminished; this shows that the relation between value given and value received does not enter into consideration in calculating the worth of the enterprise as a whole. If the Bayerische had not merely managed but also owned the undertaking, this amount would still be the same; in fact, all the elements constituting the

en effet, tous les éléments qui constituent l'entreprise — l'usine avec ses accessoires, d'une part, l'apport incorporel et autre de la Bayerische, d'autre part — sont indépendants des avantages qu'aux termes de ses contrats chacune des deux Sociétés peut retirer de l'entreprise.

Pour cette raison, la différence qui pourrait exister entre les conditions stipulées dans les contrats de 1915, 1919 et 1920 et celles d'un supposé contrat de licence avec un tiers, est sans importance pour l'évaluation du dommage.

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Il ne reste alors qu'à examiner si, conformément à la réserve faite ci-dessus, la Bayerische a subi, par suite de la dépossession, des dommages autres que ceux qu'a subis l'entreprise et qui pourraient entrer en ligne de compte aux fins de l'indemnisation demandée par le Gouvernement allemand.

Bien que la position prise à cet égard par ledit Gouvernement ne lui semble pas claire, la Cour peut constater qu'il n'a pas manqué d'appeler l'attention sur certaines circonstances qui seraient de nature à démontrer l'existence de dommages de cet ordre. La possibilité d'une concurrence nuisible aux usines de la Bayerische par une tierce personne qui, moyennant un fait illicite, se serait procurée la connaissance et l'utilisation des procédés de fabrication de cette Société, est certainement la circonstance la plus importante et la plus facile à saisir dans cet ordre d'idées.

La Cour doit cependant observer qu'elle ne se trouve pas en possession d'éléments permettant de déterminer l'existence et l'étendue du dommage qui résulterait de la concurrence que l'usine de Chorzów aurait faite aux usines de la Bayerische ; la Cour ne saurait pas même dire, en connaissance de cause, si l'on a employé et si l'on emploie encore à Chorzów les méthodes de la Bayerische, ni si les produits de cette usine se trouvent sur les marchés où la Bayerische vend ou pourrait vendre les produits de ses usines. Dans ces conditions, la Cour ne peut que constater le fait que le dommage qui aurait résulté de la concurrence est insuffisamment établi.

undertaking—the factory and its accessories on the one hand, the non-corporeal and other values supplied by the Bayerische on the other—are independent of the advantages which, under its contracts, each of the two Companies may derive from the undertaking.

For this reason, any difference which might exist between the conditions fixed in the contracts of 1915, 1919 and 1920 and those laid down in a contract supposed to be concluded with a third party, is of no importance in estimating the damage.

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It therefore only remains to be considered whether, in conformity with the reservation made above, the Bayerische has, owing to the dispossession, suffered damage, other than that sustained by the undertaking, such as might be considered in calculating the compensation demanded by the German Government.

Although the position taken up on this subject by the German Government does not seem clear to it, the Court is in a position to state that this Government has not failed to draw attention to certain circumstances which are said to prove the existence of damage of such a nature. The possibility of competition injurious to the Bayerische's factories by a third party, alleged to have unlawfully become acquainted with and have obtained means of making use of that Company's processes, is certainly the circumstance which is most important and easiest to appreciate in this connection.

The Court must however observe that it has not before it the data necessary to enable it to decide as to the existence and extent of damage resulting from alleged competition of the Chorzów factory with the Bayerische factories; the Court is not even in a position to say for certain whether the methods of the Bayerische have been or are still being employed at Chorzów, nor whether the products of that factory are to be found in the markets in which the Bayerische sells or might sell products from its own factories. In these circumstances, the Court can only observe that the damage alleged to have resulted from competition is insufficiently proved.

Il rentrerait en outre dans la catégorie des dommages possibles mais éventuels et indéfinis dont, conformément à la jurisprudence arbitrale, il n'y a pas lieu de tenir compte.

Il en est de même, à plus forte raison, du dommage qui pourrait résulter du fait que la Bayerische a vu restreindre le champ où elle peut faire des expériences, perfectionner ses procédés et en trouver des nouveaux, ainsi que du dommage qui pourrait résulter du fait qu'elle n'est plus à même de faire sentir son influence sur le marché dans la mesure où elle aurait pu le faire si elle était restée à la direction de l'usine de Chorzów.

La Cour ayant écarté, faute de preuves suffisantes, les dommages que la Bayerische aurait subis hors de l'entreprise, il n'est pas nécessaire d'examiner si les intérêts dont il s'agit seraient protégés par les articles 6 à 22 de la Convention de Genève.

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En plus de l'*indemnité en argent* au bénéfice de la Bayerische, le Gouvernement allemand demande à la Cour de dire et juger :

« que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie ;

subsidiairement, que le Gouvernement polonais est obligé de cesser l'exploitation de l'usine, respectivement des installations chimiques pour produire le nitrate d'ammoniaque, etc. »

Au sujet de ces conclusions, il convient de constater, tout d'abord, qu'elles ne sauraient viser le dommage qui s'est déjà produit, mais uniquement celui que pourrait souffrir la Bayerische à l'avenir.

Si la défense d'exportation a pour objet le dommage résultant de la concurrence que l'usine de Chorzów serait à même de faire aux usines de la Bayerische, elle doit être écartée sans autre, en vertu du résultat auquel la Cour est arrivée ci-dessus. Aux raisons sur lesquelles se fondait ce résultat s'ajoute, en ce qui concerne la défense d'exportation, que la Partie demanderesse n'a fourni aucun renseignement qui permette à

Moreover, it would come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account.

This is more especially the case as regards damage which might arise from the fact that the field in which the Bayerische can carry out its experiments, perfect its processes and make fresh discoveries has been limited, and from the fact that the Company can no longer influence the market in the manner that it could have done if it had continued to work the Chorzów factory.

As the Court has discarded for want of evidence, indemnity for damage alleged to have been sustained by the Bayerische outside the undertaking, it is not necessary to consider whether the interests in question would be protected by Articles 6 to 22 of the Geneva Convention.

* * *

In addition to pecuniary damages for the benefit of the Bayerische, the German Goverment asks the Court to give judgment:

"that, until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy;

in the alternative, that the Polish Government should be obliged to cease working the factory or the chemical equipment for the production of nitrate of ammonia, etc."

In regard to these submissions, it should be observed in the first place that they cannot contemplate damage already sustained, but solely damage which the Bayerische might suffer in the future.

If the prohibition of export is designed to prevent damage arising from the competition which the Chorzów factory might offer to the Bayerische factories, this claim must be at once dismissed, in view of the result arrived at above by the Court. To the reasons on which this result was based, it is to be added, in so far as the prohibition of export is concerned, that the Applicant has furnished no information

la Cour d'admettre le bien-fondé de la conclusion allemande relativement à la désignation de certains pays dans lesquels aucune exportation ne devrait avoir lieu, et à une durée déterminée de cette défense.

Il convient encore d'observer que si la défense avait pour but de protéger les droits de propriété industrielle de la Bayerische et d'exclure le dommage que celle-ci pourrait éprouver par l'usage de ces droits par la Pologne en contradiction avec des licences accordées par la Bayerische à d'autres personnes ou sociétés, le Gouvernement allemand aurait dû fournir des renseignements précis en ce qui concerne l'existence et la durée des brevets et licences en question. Mais, malgré les demandes expresses formulées à ce sujet par le Gouvernement polonais, le Gouvernement allemand n'en a pas présenté. Cela s'explique, d'ailleurs, par le fait que le Gouvernement allemand ne paraît pas vouloir fonder sur l'existence de ces brevets et licences sa demande visant une défense d'exportation.

Par contre, la demande du Gouvernement allemand semble envisager la défense d'exportation sous la forme d'une clause qui aurait dû se trouver dans un contrat de licence juste et équitable, conclu entre la Bayerische et une tierce personne quelconque ; à ce sujet, il y a lieu de faire les observations suivantes :

Le simple fait d'exclure de tel ou tel marché les produits d'une entreprise déterminée ne saurait évidemment en lui-même être dans l'intérêt ni de cette entreprise, ni, en tant que telles, des personnes qui y sont intéressées. Si la Bayerische — qui, tout en participant avec l'Oberschlesische dans l'entreprise de Chorzów, constitue une entreprise absolument distincte de celle de Chorzów et pouvant même avoir des intérêts contraires, dans une certaine mesure, à ceux de Chorzów — limitait par une clause contractuelle les débouchés de l'usine en sa faveur, il s'ensuivrait que les bénéfices qu'elle retirerait de sa participation à l'entreprise de Chorzów se trouveraient éventuellement diminués dans une mesure correspondante. La Cour ayant, comme il est dit plus haut, adopté pour le calcul de l'indemnité à allouer au Gouvernement allemand une méthode suivant laquelle cette indemnité comprendra la valeur globale de l'entreprise, il s'ensuit que les bénéfices de la Bayerische seront évalués sans déduction des avantages qui pourraient résulter pour elle d'une clause limitant la faculté d'ex-

enabling the Court to satisfy itself as to the justification for the German submission naming certain countries to which export should not be allowed and stating a definite period for which this prohibition should be in force.

It must further be observed that if the object of the prohibition were to protect the industrial property rights of the Bayerische and to prevent damage which the latter might suffer as a result of the use of these rights by Poland, in conflict with licences granted by the Bayerische to other persons or companies, the German Government should have furnished definite data as regards the existence and duration of the patents or licences in question. But notwithstanding the express requests made in this respect by the Polish Government, the German Government has produced no such data. The explanation no doubt is that the German Government does not appear to wish to base its claim respecting a prohibition of export upon the existence of these patents and licences.

On the contrary, the German Government's claim seems to present the prohibition of export as a clause which should have been included in a fair and equitable licensing contract concluded between the Bayerische and any third party; in this connection the following remarks should be made:

The mere fact that the produce of any particular undertaking is excluded from any particular market cannot evidently in itself be in the interests of such undertaking, nor of the persons who, as such, are interested therein. If the Bayerische —which, whilst participating with the Oberschlesische in the Chorzów undertaking, constitutes an entirely separate undertaking from that of Chorzów and one that may even to a certain extent have interests conflicting with those of Chorzów —were to limit in its own favour, by contract, the number of the markets of that factory, it would follow that the profit which it would draw from its share in the Chorzów undertaking might be correspondingly diminished. The Court having, as is said above, adopted, in calculating the compensation to be awarded to the German Government, a method by which such compensation shall include the total value of the undertaking, it follows that the profits of the Bayerische will be estimated without deducting the advantages which that Company might draw from a clause limiting export. The

portation. La défense d'exportation demandée par le Gouvernement allemand ne saurait donc être accordée sous peine de donner deux fois la même indemnité.

Dès lors, la Cour n'a pas besoin de s'occuper de la question de savoir si une telle défense, tout en étant usitée dans les contrats entre particuliers, pourrait faire l'objet d'une injonction adressée par la Cour à un gouvernement, même si ce gouvernement, en tant que fisc, exploitait l'usine dont les exportations devraient être limitées, ni si la défense demandée serait équitable et appropriée dans les circonstances.

Pour ce qui est de la défense d'exploitation, subsidiairement demandée par le Gouvernement allemand, il y a lieu d'ajouter qu'elle ne semble guère compatible avec l'allocation d'une indemnité représentant la valeur actuelle de l'entreprise, car, lorsqu'aura été versée cette indemnité qui comprendra les chances d'avenir et sera constituée par une somme d'argent portant intérêts, le Gouvernement polonais aura acquis le droit de continuer l'exploitation de l'entreprise telle qu'elle aura été évaluée, d'autant plus qu'il y a accord entre les Parties pour reconnaître que l'usine doit rester entre les mains du Gouvernement polonais. Cet accord ne saurait être interprété dans ce sens que l'usine devrait rester une usine morte ou être adaptée à une destination différente, si la réparation envisagée ne comprenait pas, en dehors d'une indemnité pécuniaire, la défense d'exportation demandée. Il est d'ailleurs fort douteux que, abstraction faite de toute autre considération, une défense d'exploitation soit admissible sous l'empire de la Convention de Genève, laquelle a pour but d'assurer le maintien des entreprises industrielles, et qui, à cet effet, en permet même exceptionnellement l'expropriation (article 7).

IV.

La Cour estime préférable de ne pas examiner dès maintenant les conclusions des Parties concernant certaines conditions et modalités du paiement de l'indemnité à allouer, qui sont étroitement liées, soit au montant de la somme à payer, soit aux circonstances qui pourront exister au moment où le paiement devra être fait. Il en est ainsi notamment de la conclusion allemande n° 4 *a*) — *b*) — *c*) et des conclusions

prohibition of export asked for by the German Government cannot therefore be granted, or the same compensation would be awarded twice over.

This being so, the Court need not deal with the question whether such a prohibition, although customary in contracts between individuals, might form the subject of an injunction issued by the Court to a government, even if that government were working, as a State enterprise, the factory of which export was to be limited, nor if the prohibition asked for would be fair and appropriate in the circumstances.

As regards the German Government's alternative claim for a prohibition of exploitation, it may be added that this seems hardly compatible with the award of compensation representing the present value of the undertaking; for when that compensation, which is to cover future prospects and will consist in a sum of money bearing interest, has been paid, the Polish Government will have acquired the right to continue working the undertaking as valued, more especially as the Parties agree that the factory shall remain in the hands of the Polish Government. This agreement cannot, in fact, be construed as meaning that the factory should remain inoperative or be adapted to some other purpose, if the reparation contemplated did not include, in addition to a pecuniary indemnity, the prohibition of export sought for. It is moreover very doubtful whether, apart from any other consideration, prohibition of exploitation is admissible under the Geneva Convention, the object of which is to provide for the maintenance of industrial undertakings, and which, for this purpose, even permits them, in exceptional cases, to be expropriated (Article 7).

IV.

The Court thinks it preferable not to proceed at this stage to consider the Parties' submissions concerning certain conditions and methods in regard to the payment of the indemnity to be awarded, which conditions and methods are closely connected either with the amount of the sum to be paid or with circumstances which may exist when the time comes for payment. This applies more especially as regards the

polonaises A 3 et B I *c*), sur lesquelles, partant, la Cour se réserve de statuer dans l'arrêt qui fixera l'indemnité.

Il est, par contre, possible et convenable de trancher dès à présent la question dite de la compensation, à laquelle ont trait respectivement la conclusion n° 4 *d*) de la Partie demanderesse et la conclusion C de la Partie défenderesse.

La demande du Gouvernement allemand à cet égard a pris finalement la forme suivante :

« Dire et juger, que le Gouvernement polonais n'est pas autorisé à compenser contre la créance susdite du Gouvernement allemand d'être indemnisé, sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité ; subsidiairement, qu'une compensation n'est autorisée que lorsque le Gouvernement polonais invoque à cette fin une créance reconnue par le Gouvernement allemand ou constatée par un arrêt rendu entre les deux Gouvernements. »

Quant au Gouvernement polonais, il s'est borné à demander le rejet de la susdite conclusion.

Si l'on prend la conclusion allemande au pied de la lettre, on peut croire qu'elle vise en premier lieu à exclure un cas de compensation concret, savoir la compensation qui résulterait de la créance que le Gouvernement polonais prétend avoir en vertu des assurances sociales en Haute-Silésie, et qui fut cause de l'échec des négociations entre les deux Gouvernements à la suite de l'Arrêt n° 7. Mais, si l'on examine la conclusion à la lumière des observations contenues dans le Mémoire et surtout dans la Réplique, il est facile de constater que la créance résultant des assurances sociales en Haute-Silésie n'est visée qu'à titre d'exemple. En réalité, le Gouvernement allemand demande à la Cour une décision de principe, dont l'effet serait, soit d'exclure toute compensation de la créance résultant du futur arrêt de la Cour, soit, subsidiairement, de n'admettre pareille compensation que dans des circonstances déterminées.

Quant au Gouvernement polonais, s'il se borne, comme on l'a vu plus haut, à demander dans sa conclusion le rejet de la conclusion allemande, il résulte avec certitude des motifs à

German submission No. 4 (*a*)—(*b*)—(*c*), and the Polish submissions A 3 and B I (*c*), which the Court therefore reserves for the judgment fixing the indemnity.

On the other hand, it is possible and convenient at once to decide the so-called question of set-off to which submission No. 4 (*d*) of the Applicant and submission C of the Respondent respectively relate.

The claim of the German Government in regard to this matter has, in the last instance, been couched in the following terms:

[*Translation.*]

"It is submitted that the Polish Government is not entitled to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the above-mentioned claim for indemnity; in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments."

The Polish Government, for its part, has simply asked for the rejection of this submission.

If the German submission is read literally, it is possible to regard it as mainly designed to prevent a specific case of set-off, that is to say, the setting-off in this case of the claim which the Polish Government contends that it possesses in respect of social insurances in Upper Silesia, and which was the cause of the failure of the negotiations between the two Governments following Judgment No. 7. But, if we consider the submission in the light of the observations contained in the Case and more especially in the Reply, it is easy to see that the claim in respect of social insurances in Upper Silesia is only taken as an example. In reality, the German Government asks the Court for a decision of principle the effect of which would be either to prevent the set-off of any counter-claim against the indemnity fixed in the judgment to be given by the Court, or, alternatively, only to allow such set-off in certain defined circumstances.

Though, as has been seen, the Polish Government for its part confines itself in its submission to asking the Court to reject the German submission, the arguments advanced in

l'appui de sa demande qu'à son avis, ladite conclusion allemande est à la fois prématurée et inadmissible et que, par conséquent, la Cour n'a pas le pouvoir de s'en occuper.

Dès lors, la question de la compétence de la Cour se trouve posée. Un accord des Parties pour soumettre à la Cour la question dite de la compensation étant exclu, il convient d'examiner avant tout si la Cour est compétente pour statuer sur la conclusion allemande n° 4 *d*) en vertu d'un autre titre qui, en l'espèce, ne saurait être que l'article 23 de la Convention de Genève.

Il est évident que la question de savoir si le droit international admet la compensation des créances, et, dans l'affirmative, quelles sont les conditions dans lesquelles la compensation est admise, est, comme telle, en dehors de la compétence que la Cour puise dans ledit article. Mais le Gouvernement allemand prétend que la question posée par lui ne concerne qu'une modalité du paiement que le Gouvernement polonais devra faire, et que, de ce chef, elle constitue une divergence d'opinions comprise dans la clause compromissoire de l'article.

La Cour croit devoir interpréter cette thèse dans le sens que l'exclusion de la compensation est demandée dans le but d'assurer, en l'espèce, l'effectivité et l'efficacité de la réparation.

On peut admettre, comme la Cour l'a dit dans son Arrêt n° 8, que la compétence pour statuer sur la réparation, due à raison de la violation d'une convention internationale, implique la compétence pour statuer sur les formes et modalités de la réparation. Si la réparation consiste dans le paiement d'une somme d'argent, la Cour peut donc fixer les modalités de ce paiement. C'est pourquoi elle peut bien déterminer à qui le paiement doit être fait, dans quel endroit, et à quel moment ; si le paiement doit être intégral ou peut avoir lieu par tranches ; qui doit en supporter les frais, etc. Il s'agit alors de l'application au cas d'espèce des règles générales relatives aux paiements, et la compétence de la Cour découle tout naturellement de sa compétence pour allouer une indemnité en argent.

Mais on étendrait d'une manière injustifiée la portée de ce principe si on l'entendait dans le sens que la Cour pourrait connaître de n'importe quelle question de droit international,

support of its claim clearly show that it considers the said German submission to be both premature and inadmissible, and that the Court has therefore no power to deal with it.

The question of the Court's jurisdiction is thus clearly raised. Since there is no agreement between the Parties to submit to the Court the so-called question of set-off, it remains first of all to be considered whether the Court has jurisdiction to pass judgment on the German submission No. 4 (*d*) in virtue of any other provision, which, in the present case, could only be Article 23 of the Geneva Convention.

It is clear that the question whether international law allows claims to be set-off against each other, and if so, under what conditions such set-off is permitted, is, in itself, outside the jurisdiction derived by the Court from the said article. But the German Government contends that the question raised by it only relates to one aspect of the payment which the Polish Government must make and that, this being so, it constitutes a difference of opinion covered by the arbitration clause contained in the article.

The Court considers that this argument must be interpreted in the sense that the prohibition of set-off is asked for in order to ensure that in the present case reparation shall be really effective.

It may be admitted, as the Court has said in Judgment No. 8, that jurisdiction as to the reparation due for the violation of an international convention involves jurisdiction as to the forms and methods of reparation. If the reparation consists in the payment of a sum of money, the Court may therefore determine the method of such payment. For this reason it may well determine to whom the payment shall be made, in what place and at what moment; in a lump sum or maybe by instalments; where payment shall be made; who shall bear the costs, etc. It is then a question of applying to a particular case the general rules regarding payment, and the Court's jurisdiction arises quite naturally out of its jurisdiction to award monetary compensation.

But this principle would be quite unjustifiably extended if it were taken as meaning that the Court might have cognizance of any question whatever of international law.

même tout à fait étrangère à la convention dont il s'agit, pour le seul motif que la manière dont cette question est résolue peut avoir une influence sur l'efficacité de la réparation demandée. Pareille thèse ne semble guère conciliable avec les principes qui sont à la base de la compétence de la Cour, compétence limitée aux cas spécialement prévus dans les traités et conventions en vigueur.

Le point de vue du Gouvernement allemand est cependant que le pouvoir pour la Cour de statuer sur l'exclusion de la compensation découlerait du pouvoir qu'elle a d'assurer l'efficacité de la réparation. Or, il semble clair que cette thèse ne peut se référer qu'à une exception de compensation opposée au bénéficiaire par le débiteur, et qui serait de nature à dénuer la réparation de son efficacité. Tel serait notamment le cas si la créance opposée à la créance de réparation était contestée et devait donner lieu à un procès qui aurait en tout cas pour effet de retarder l'entrée en possession par l'intéressé de l'indemnité qui lui a été reconnue. Au contraire, si à la créance de réparation était opposée une créance liquide et non contestée, on ne voit pas pourquoi une exception de compensation fondée sur cette demande affecterait nécessairement l'efficacité de la réparation. Il s'ensuit que la compétence de la Cour, fondée sur l'article 23 de la Convention de Genève, ne pourrait en tout cas être invoquée qu'à l'égard d'une exception soulevée par la Partie défenderesse.

Or, il est constant que la Pologne n'a soulevé aucune exception de compensation ayant trait à telle ou telle créance déterminée qu'elle prétendrait avoir envers le Gouvernement allemand.

Il est vrai que, dans les négociations qui suivirent l'Arrêt n° 7, la Pologne avait avancé la prétention de compenser une partie de l'indemnité qu'elle se serait obligée de verser au Gouvernement allemand contre sa prétendue créance résultant des assurances sociales en Haute-Silésie. Mais la Cour a déjà eu l'occasion de constater qu'elle ne saurait faire état des déclarations, admissions ou propositions qu'ont pu faire les Parties au cours de négociations directes qui ont eu lieu entre elles. Rien, d'ailleurs, n'autorise la Cour à penser que le Gouvernement polonais voudrait faire valoir, à l'encontre d'un arrêt de la Cour, des prétentions qu'il a cru pouvoir avancer,

even quite foreign to the convention under consideration, for the sole reason that the manner in which such question is decided may have an influence on the effectiveness of the reparation asked for. Such an argument seems hardly reconcilable with the fundamental principles of the Court's jurisdiction, which is limited to cases specially provided for in treaties and conventions in force.

The German Government's standpoint however is that the power of the Court to decide on the exclusion of set-off is derived from the power which it has to provide that reparation shall be effective. Now, it seems clear that this argument can only refer to a plea of set-off raised against the beneficiary by the debtor, of such a nature as to deprive reparation of its effectiveness. Such for instance would be the case if the claim put forward against the claim on the score of reparation was in dispute and was to lead to proceedings which would in any case have resulted in delaying the entry into possession by the person concerned of the compensation awarded to him. On the contrary, if a liquid and undisputed claim is put forward against the reparation claim, it is not easy to see why a plea of set-off based on this demand should necessarily prejudice the effectiveness of the reparation. It follows that the Court's jurisdiction under Article 23 of the Geneva Convention could in any case only be relied on in regard to a plea raised by the respondent Party.

Now it is admitted that Poland has raised no plea of set-off in regard to any particular claim asserted by her against the German Government.

It is true that in the negotiations which followed Judgment No. 7 Poland had put forward a claim to set off a part of the indemnity which she would have undertaken to pay the German Government, against the claim which she put forward in regard to social insurances in Upper Silesia. But the Court has already had occasion to state that it can take no account of declarations, admissions or proposals which the Parties may have made during direct negotiations between them. Moreover, there is nothing to justify the Court in thinking that the Polish Government would wish to put forward, against a judgment of the Court, claims which it may have thought

au cours d'une négociation amiable destinée, dans l'intention des Parties, à aboutir à une transaction. La Cour doit aussi rappeler à ce propos ce qu'elle a déjà dit dans son Arrêt n° 1, savoir qu'elle ne peut ni ne doit envisager l'éventualité que l'arrêt resterait inexécuté après l'expiration du délai fixé pour son exécution.

Dans ces conditions, la Cour doit s'abstenir de statuer sur les conclusions dont il s'agit.

* * *

PAR CES MOTIFS,

La Cour,

statuant contradictoirement,

par neuf voix contre trois,

1) décide et juge que, en raison de l'attitude prise par le Gouvernement polonais vis-à-vis des Sociétés anonymes Oberschlesische Stickstoffwerke et Bayerische Stickstoffwerke et constatée par la Cour comme n'étant pas conforme aux dispositions des articles 6 et suivants de la Convention de Genève, le Gouvernement polonais est tenu de payer, à titre de réparation, au Gouvernement allemand une indemnité correspondant au préjudice subi par lesdites Sociétés du chef de ladite attitude ;

2) rejette les exceptions du Gouvernement polonais, tendant à exclure de l'indemnité à payer tout montant correspondant à tout ou partie du dommage subi par les Oberschlesische Stickstoffwerke, et fondées soit sur le jugement rendu par le Tribunal de Katowice, le 12 novembre 1927, soit sur l'article 256 du Traité de Versailles ;

3) rejette la conclusion formulée par le Gouvernement polonais tendant à ce que le Gouvernement allemand, en premier lieu, livre au Gouvernement polonais la totalité des actions de la Société anonyme Oberschlesische Stickstoffwerke, de la valeur nominale de 110.000.000 de marks, dont le Gouverne-

fit to raise during friendly negotiations which the Parties intended should lead to a compromise. The Court must also draw attention in this connection to what it has already said in Judgment No. 1 to the effect that it neither can nor should contemplate the contingency of the judgment not being complied with at the expiration of the time fixed for compliance.

In these circumstances the Court must abstain from passing upon the submissions in question.

* * *

FOR THESE REASONS,

The Court,

having heard both Parties,

by nine votes to three,

(1) gives judgment to the effect that, by reason of the attitude adopted by the Polish Government in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to pay, as reparation to the German Government, a compensation corresponding to the damage sustained by the said Companies as a result of the aforesaid attitude;

(2) dismisses the pleas of the Polish Government with a view to the exclusion from the compensation to be paid of an amount corresponding to all or a part of the damage sustained by the Oberschlesische Stickstoffwerke, which pleas are based either on the judgment given by the Tribunal of Katowice on November 12th, 1927, or on Article 256 of the Treaty of Versailles;

(3) dismisses the submission formulated by the Polish Government to the effect that the German Government should in the first place hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of 110,000,000

ment allemand dispose en vertu du contrat en date du 24 décembre 1919 ;

4) rejette la conclusion formulée subsidiairement par le Gouvernement polonais tendant à faire surseoir provisoirement sur la demande en indemnité pour ce qui concerne la Société Oberschlesische Stickstoffwerke ;

5) rejette les conclusions du Gouvernement allemand tendant à ce qu'il soit dit et jugé que, jusqu'au 30 juin 1931, aucune exportation de chaux azotée et de nitrate d'ammoniaque n'aura lieu en Allemagne, dans les États-Unis d'Amérique, en France et en Italie ; et, subsidiairement, que le Gouvernement polonais est obligé de cesser l'exploitation de l'usine de Chorzów, respectivement, des installations chimiques pour produire le nitrate d'ammoniaque, etc. ;

6) décide et juge qu'il n'y a pas lieu de statuer sur les conclusions formulées par le Gouvernement allemand et tendant à ce qu'il soit dit et jugé que le Gouvernement polonais n'est pas autorisé à compenser contre la créance susdite du Gouvernement allemand d'être indemnisé sa créance résultant des assurances sociales en Haute-Silésie ; qu'il ne peut se prévaloir d'aucune autre compensation contre ladite créance d'indemnité, et, subsidiairement, qu'une compensation n'est autorisée que lorsque le Gouvernement polonais invoque à cette fin une créance reconnue par le Gouvernement allemand ou constatée par un arrêt rendu entre les deux Gouvernements ;

7) décide et juge que l'indemnité à payer par le Gouvernement polonais au Gouvernement allemand sera fixée à une somme globale ;

8) se réserve de déterminer, dans un futur arrêt, le montant de ladite indemnité, après avoir reçu le rapport des experts qu'elle nommera pour éclairer sa religion sur les questions formulées dans le présent arrêt et après avoir entendu les Parties au sujet de ce rapport ;

9) réserve également, pour ce futur arrêt, les conditions et modalités du paiement de l'indemnité en ce qui concerne les points qui ne sont pas tranchés par le présent arrêt.

marks, which are in the hands of the German Government under the contract of December 24th, 1919;

(4) dismisses the alternative submission formulated by the Polish Government to the effect that the claim for indemnity, in so far as the Oberschlesische Stickstoffwerke Company is concerned, should be provisionally suspended;

(5) dismisses the submission of the German Government asking for judgment to the effect that, until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy, or, in the alternative, that the Polish Government should be obliged to cease working the factory or the chemical equipment for the production of nitrate of ammonia, etc.;

(6) gives judgment to the effect that no decision is called for on the submissions of the German Government asking for judgment to the effect that the Polish Government is not entitled to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the said claim for indemnity, and, in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments;

(7) gives judgment to the effect that the compensation to be paid by the Polish Government to the German Government shall be fixed as a lump sum;

(8) reserves the fixing of the amount of this compensation for a future judgment, to be given after receiving the report of experts to be appointed by the Court for the purpose of enlightening it on the questions set out in the present judgment and after hearing the Parties on the subject of this report;

(9) also reserves for this future judgment the conditions and methods for the payment of the compensation in so far as concerns points not decided by the present judgment.

Le présent arrêt ayant été rédigé en français et en anglais, c'est le texte français qui fait foi.

Fait au Palais de la Paix, à La Haye, le treize septembre mil neuf cent vingt-huit, en trois exemplaires, dont l'un restera déposé aux archives de la Cour et dont les autres seront transmis aux agents des Gouvernements des Puissances requérante et défenderesse respectivement.

Le Président :

(*Signé*) D. ANZILOTTI.

Le Greffier-adjoint :

(*Signé*) PAUL RUEGGER.

M. de Bustamante, juge, déclare ne pouvoir se rallier à l'arrêt rendu par la Cour, en ce qui concerne le n° 8 du dispositif, en ce sens qu'il est d'avis que les questions indiquées sous les numéros I B et II dans l'arrêt ne devraient pas être posées aux experts.

M. Altamira, juge, déclare ne pouvoir se rallier à l'arrêt rendu par la Cour en ce qui concerne le n° 6 du dispositif.

M. Rabel, juge national, désire ajouter à l'arrêt les observations qui suivent.

Lord Finlay, juge, et M. Ehrlich, juge national, déclarant ne pouvoir se rallier à l'arrêt rendu par la Cour et se prévalant du droit que leur confère l'article 57 du Statut, ont joint audit arrêt les exposés suivants de leur opinion individuelle.

M. Nyholm, juge, ne pouvant se rallier au résultat de l'arrêt, désire y ajouter les observations suivantes.

(*Paraphé*) D. A.
(*Paraphé*) P. R.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this thirteenth day of September nineteen hundred and twenty-eight, in three copies, one of which is to be placed in the archives of the Court, and the others to be forwarded to the Agents of the applicant and respondent Parties respectively.

(*Signed*) D. ANZILOTTI,
President.

(*Signed*) PAUL RUEGGER,
Deputy-Registrar.

M. de Bustamante, Judge, declares that he is unable to concur in the judgment of the Court as regards No. 8 of the operative portion; he considers that the questions numbered I B and II in the judgment should not be put to the experts.

M. Altamira, Judge, declares that he is unable to concur in the judgment of the Court as regards No. 6 of the operative portion.

M. Rabel, National Judge, desires to add to the judgment the remarks which follow hereafter.

Lord Finlay, Judge, and M. Ehrlich, National Judge, declaring that they cannot concur in the judgment of the Court and availing themselves of the right conferred on them by Article 57 of the Statute, have delivered the separate opinions which follow hereafter.

M. Nyholm, Judge, being unable to concur in the result arrived at by the judgment, desires to add the remarks which follow hereafter.

(*Initialled*) D. A.
(*Initialled*) P. R.

Annex 116

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

CERTAINES ACTIVITÉS MENÉES PAR LE NICARAGUA DANS LA RÉGION FRONTALIÈRE

(COSTA RICA c. NICARAGUA)

INDEMNISATION DUE PAR LA RÉPUBLIQUE DU NICARAGUA
À LA RÉPUBLIQUE DU COSTA RICA

ARRÊT DU 2 FÉVRIER 2018

2018

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA

(COSTA RICA *v.* NICARAGUA)

COMPENSATION OWED BY THE REPUBLIC OF NICARAGUA
TO THE REPUBLIC OF COSTA RICA

JUDGMENT OF 2 FEBRUARY 2018

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JUDGMENT

Present: *President* ABRAHAM; *Vice-President* YUSUF; *Judges* OWADA, TOMKA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, GEVORGIAN; *Judges* ad hoc GUILLAUME, DUGARD; *Registrar* COUVREUR.

In the case concerning certain activities carried out by Nicaragua in the border area,

between

the Republic of Costa Rica,

represented by

H.E. Mr. Edgar Ugalde Alvarez, Ambassador on Special Mission,

as Agent;

H.E. Mr. Sergio Ugalde, Ambassador of Costa Rica to the Kingdom of the Netherlands, member of the Permanent Court of Arbitration,

as Co-Agent,

and

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands, member of the International Law Commission,

as Agent,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By an Application filed in the Registry of the Court on 18 November 2010, the Republic of Costa Rica (hereinafter "Costa Rica") instituted proceedings

against the Republic of Nicaragua (hereinafter "Nicaragua") for "the incursion into, occupation of and use by Nicaragua's army of Costa Rican territory", as well as for "serious damage inflicted to its protected rainforests and wetlands" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, hereinafter referred to as the "*Costa Rica* v. *Nicaragua* case").

2. By an Order dated 8 March 2011 (hereinafter referred to as the "2011 Order"), the Court indicated provisional measures addressed to both Parties in the *Costa Rica* v. *Nicaragua* case (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, pp. 27-28, para. 86).

3. By an Application filed in the Registry on 22 December 2011, Nicaragua instituted proceedings against Costa Rica for "violations of Nicaraguan sovereignty and major environmental damages on its territory", resulting from the road construction works being carried out by Costa Rica in the border area between the two countries along the San Juan River (*Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, hereinafter referred to as the "*Nicaragua* v. *Costa Rica* case").

4. By two separate Orders dated 17 April 2013, the Court joined the proceedings in the *Costa Rica* v. *Nicaragua* and *Nicaragua* v. *Costa Rica* cases.

5. By an Order of 22 November 2013 (hereinafter referred to as the "2013 Order"), the Court indicated further provisional measures in the *Costa Rica* v. *Nicaragua* case (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, pp. 369-370, para. 59).

6. Public hearings were held in the joined cases between 14 April 2015 and 1 May 2015.

7. In its Judgment dated 16 December 2015 on the merits, issued in the joined cases, the Court found, *inter alia*, with regard to the *Costa Rica* v. *Nicaragua* case, that Costa Rica had sovereignty over the "disputed territory", as defined by the Court in paragraphs 69-70 (*I.C.J. Reports 2015 (II)*, p. 740, para. 229, subpara. (1) of the operative part), and that, by excavating three *caños* and establishing a military presence on Costa Rican territory, Nicaragua had violated the territorial sovereignty of Costa Rica (*ibid.*, subpara. (2) of the operative part). The Court also found that, by excavating two *caños* in 2013 and establishing a military presence in the disputed territory, Nicaragua had breached the obligations incumbent upon it under the 2011 Order (*ibid.*, subpara. (3) of the operative part).

8. In the same Judgment, the Court found that Nicaragua had "the obligation to compensate Costa Rica for material damages caused by Nicaragua's unlawful activities on Costa Rican territory" (*ibid.*, p. 740, para. 229, subpara. (5) *(a)* of the operative part).

9. With respect to the question of compensation owed by Nicaragua to Costa Rica, the Court decided that "failing agreement between the Parties on this matter within 12 months from the date of [the] Judgment, [this] question . . . [would], at the request of one of the Parties, be settled by the Court" (*ibid.*, p. 741, para. 229, subpara. (5) *(b)* of the operative part).

10. Paragraph 142 of the same Judgment provided that the Court would, in such a case, determine the amount of compensation on the basis of further written pleadings limited to this issue.

11. By means of a letter dated 16 January 2017, the Co-Agent of Costa Rica, referring to paragraph 229, subparagraph (5) *(b)* of the operative part of the Court's Judgment of 16 December 2015, noted that "[r]egrettably, the Parties ha[d] been unable to agree on the compensation due to Costa Rica for material damages caused by Nicaragua's unlawful activities" as determined by the Court in the *Costa Rica* v. *Nicaragua* case. The Government of Costa Rica accordingly requested the Court "to settle the question of the compensation" due to Costa Rica.

12. At a meeting held by the President of the Court with the representatives of the Parties on 26 January 2017, pursuant to Article 31 of the Rules of Court, the latter expressed the views of their respective Governments regarding the time-limits required in order to prepare written pleadings. The Co-Agent of Costa Rica indicated that his Government wished to have at its disposal a period of two months for the preparation of its Memorial on the question of compensation. The Agent of Nicaragua stated that his Government would agree to a period of two months for the preparation of its Counter-Memorial on the same question.

13. Having ascertained the views of the Parties, and taking into account their agreement, by an Order of 2 February 2017, the Court fixed 3 April 2017 and 2 June 2017 as the respective time-limits for the filing of a Memorial by Costa Rica and a Counter-Memorial by Nicaragua on the question of compensation due to Costa Rica.

14. The Memorial and Counter-Memorial on compensation were filed within the time-limits thus fixed.

15. By a letter dated 20 June 2017, Costa Rica stated that, in its Counter-Memorial, Nicaragua had introduced evidence, and raised a number of arguments, in particular in respect of Costa Rica's expert evidence, which Costa Rica "ha[d] not yet had [the] opportunity to address". In the same letter, Costa Rica, *inter alia*, contested the methodology used by Nicaragua for the assessment of environmental harm and requested the Court that it be given an opportunity to respond by way of a short reply.

16. By a letter dated 23 June 2017, Nicaragua objected to Costa Rica's request and asked the Court "to proceed and assess the relevant material damage and the amount of compensation based on the evidence that the Parties have provided in their Memorial and Counter-Memorial".

17. The Court, noting that the Parties held different views as to the methodology for the assessment of environmental harm, considered it necessary for them to address that issue in a brief second round of written pleadings.

18. By an Order dated 18 July 2017, the President of the Court accordingly authorized the submission of a Reply by Costa Rica and a Rejoinder by Nicaragua on the sole question of the methodology adopted in the expert reports presented by the Parties in the Memorial and Counter-Memorial, respectively, on the question of compensation. By the same Order, the President fixed 8 August 2017 and 29 August 2017 as the respective time-limits for the filing of a Reply by Costa Rica and a Rejoinder by Nicaragua.

19. The Reply and Rejoinder were filed within the time-limits thus fixed.

20. In the written proceedings relating to compensation, the following submissions were presented by the Parties:

On behalf of the Government of the Republic of Costa Rica,

in the Memorial:

"1. Costa Rica respectfully requests the Court to order Nicaragua to pay immediately to Costa Rica:

(a) US$6,708,776.96; and
(b) pre-judgment interest in a total amount of US$522,733.19 until 3 April 2017, which amount should be updated to reflect the date of the Court's Judgment on this claim for compensation.

2. In the event that Nicaragua does not make immediate payment, Costa Rica respectfully requests the Court to order Nicaragua to pay post-judgment interest at an annual rate of 6 per cent."

in the Reply:

"1. Costa Rica respectfully requests the Court to reject Nicaragua's submissions and to order Nicaragua to pay immediately to Costa Rica:

(a) US$6,711,685.26; and
(b) pre-judgment interest in a total amount of US$501,997.28 until 3 April 2017, which amount should be updated to reflect the date of the Court's Judgment on this claim for compensation.

2. In the event that Nicaragua does not make immediate payment, Costa Rica respectfully requests the Court to order Nicaragua to pay post-judgment interest at an annual rate of 6 per cent."

On behalf of the Government of the Republic of Nicaragua,

in the Counter-Memorial:

"For the reasons given herein, the Republic of Nicaragua requests the Court to adjudge and declare that the Republic of Costa Rica is not entitled to more than $188,504 for material damages caused by Nicaragua's wrongful acts."

in the Rejoinder:

"For the reasons given herein, the Republic of Nicaragua requests the Court to adjudge and declare that the Republic of Costa Rica is not entitled to more than $188,504 for material damages caused by the actions of Nicaragua in the Disputed Area that the Court adjudged unlawful."

* * *

I. Introductory Observations

21. In view of the lack of agreement between the Parties and of the request made by Costa Rica, it falls to the Court to determine the amount of compensation to be awarded to Costa Rica for material damage caused by Nicaragua's unlawful activities on Costa Rican territory, pursuant to

the findings of the Court set out in its Judgment of 16 December 2015. The Court begins by recalling certain facts on which it based that Judgment.

22. The issues before the Court have their origin in a territorial dispute between Costa Rica and Nicaragua over an area abutting the easternmost stretch of the Parties' mutual land boundary. This area, referred to by the Court as the "disputed territory", was defined by the Court as follows: "the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the [2010] disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 19, para. 55).

23. On 18 October 2010, Nicaragua started dredging the San Juan River in order to improve its navigability. It also carried out works in the northern part of Isla Portillos, excavating a channel (*"caño"*) on the disputed territory between the San Juan River and Harbor Head Lagoon (hereinafter referred to as the "2010 *caño*"). Nicaragua also sent some military units and other personnel to that area (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 694, para. 63; p. 703, paras. 92-93).

24. By its 2011 Order, the Court indicated the following provisional measures:

"(1) Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security;

(2) Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect;

(3) Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve;

(4) Each Party shall inform the Court as to its compliance with the above provisional measures." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, pp. 27-28, para. 86.)

25. In its 2013 Order, the Court found that two new *caños* had been constructed by Nicaragua in the disputed territory (hereinafter referred to as the "2013 *caños*") (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 364, para. 44). Both Costa Rica and Nicaragua acknowledged that the excavation of the 2013 *caños* took place after the 2011 Order on provisional measures had been adopted, that this activity was attributable to Nicaragua, and that a military encampment had been installed on the disputed territory as defined by the Court. Nicaragua also acknowledged that the excavation of the *caños* represented an infringement of its obligations under the 2011 Order (*ibid., Judgment, I.C.J. Reports 2015 (II)*, p. 713, para. 125).

26. In its 2013 Order, the Court stated that

> "[f]ollowing consultation with the Secretariat of the Ramsar Convention [Convention on Wetlands of International Importance especially as Waterfowl Habitat, signed at Ramsar on 2 February 1971 (hereinafter the 'Ramsar Convention')] and after giving Nicaragua prior notice, Costa Rica may take appropriate measures related to the two new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory" (*ibid., Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 370, para. 59, subpara. (2) (E)).

After consultation with the Secretariat, Costa Rica constructed, during a short period in late March and early April 2015, a dyke across the eastern of the two 2013 *caños* (hereinafter referred to as the "2013 eastern *caño*").

27. In its Judgment of 16 December 2015, the Court found that sovereignty over the "disputed territory" belonged to Costa Rica and that consequently Nicaragua's activities, including the excavation of three *caños* and the establishment of a military presence in that territory, were in breach of Costa Rica's sovereignty. Nicaragua therefore incurred the obligation to make reparation for the damage caused by its unlawful activities (*I.C.J. Reports 2015 (II)*, p. 703, para. 93). The Court found that its declaration that Nicaragua had breached Costa Rica's territorial sovereignty provided adequate satisfaction for the non-material damage suffered. However, it held that Costa Rica was entitled to receive compensation for material damage caused by those breaches of obligations by Nicaragua that had been ascertained by the Court (*ibid.*, pp. 717-718, paras. 139 and 142). The present Judgment determines the amount of compensation due to Costa Rica.

28. The sketch-map below shows the approximate locations of the three *caños* in the northern part of Isla Portillos as excavated in 2010 and 2013.

Sketch-map
The three *caños* in the northern part of Isla Portillos

II. Legal Principles Applicable to the Compensation Due to Costa Rica

29. Before turning to the consideration of the issue of compensation due in the present case, the Court will recall some of the principles relevant to its determination. It is a well-established principle of international law that "the breach of an engagement involves an obligation to make reparation in an adequate form" (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21). The Permanent Court elaborated on this point as follows:

> "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." (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47; see also *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 59, para. 119.)

30. The obligation to make full reparation for the damage caused by a wrongful act has been recognized by the Court in other cases (see for example, *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 691, para. 161; *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 59, para. 119; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 80, para. 150).

31. The Court has held that compensation may be an appropriate form of reparation, particularly in those cases where restitution is materially impossible or unduly burdensome (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 103-104, para. 273). Compensation should not, however, have a punitive or exemplary character.

32. In the present case, the Court has been asked to determine compensation for the damage caused by Nicaragua's unlawful activities, in accordance with its Judgment of 16 December 2015 (see paragraph 27 above). In order to award compensation, the Court will ascertain whether, and to what extent, each of the various heads of damage claimed by the Applicant can be established and whether they are the consequence of wrongful conduct by the Respondent, by determining "whether there is a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant". Finally, the Court will determine the amount of compensation due (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 332, para. 14).

33. The Court recalls that, "as a general rule, it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact". Nevertheless, the Court has recognized that this general rule may be applied flexibly in certain circumstances, where, for example, the respondent may be in a better position to establish certain facts (*ibid.*, p. 332, para. 15, referring to the Judgment on the merits of 30 November 2010, *I.C.J. Reports 2010 (II)*, pp. 660-661, paras. 54-56).

34. In cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered.

35. In respect of the valuation of damage, the Court recalls that the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage. For example, in the *Ahmadou Sadio Diallo* case, the Court determined the

amount of compensation due on the basis of equitable considerations (see *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 337, para. 33). A similar approach was adopted by the Tribunal in the *Trail Smelter* case, which, quoting the Supreme Court of the United States of America in *Story Parchment Company* v. *Paterson Parchment Paper Company* (*United States Reports*, 1931, Vol. 282, p. 555), stated:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." (*Trail Smelter case (United States, Canada), 16 April 1938 and 11 March 1941*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. III, p. 1920.)

* *

36. In the present case, Costa Rica claims compensation for two categories of damage. First, Costa Rica claims compensation for quantifiable environmental damage caused by Nicaragua's excavation of the 2010 *caño* and the 2013 eastern *caño*. It makes no claim in respect of the 2013 western *caño*. Secondly, Costa Rica claims compensation for costs and expenses incurred as the result of Nicaragua's unlawful activities, including expenses incurred to monitor or remedy the environmental damage caused.

37. Nicaragua argues that Costa Rica is entitled to compensation for "material damages", the scope of which is limited to "damage to property or other interests of the State . . . which is assessable in financial terms". Nicaragua contends that the 2015 Judgment of the Court in this case further limits the scope *ratione materiae* and *ratione loci* of compensation to losses or expenses caused by the activities that the Court determined were unlawful.

38. The Court will address the Parties' submissions related to environmental damage in Section III. The Parties' submissions on costs and expenses incurred as a result of Nicaragua's activities are addressed in Section IV. The issue of interest is dealt with in Section V. The total sum awarded is stated in Section VI.

III. Compensation for Environmental Damage

1. The Compensability of Environmental Damage

39. Costa Rica argues that it is "settled" that environmental damage is compensable under international law. It notes that other international adjudicative bodies have awarded compensation for environmental damage, including for harm to environmental resources that have no commercial value. Costa Rica contends that its position is supported by the practice of the United Nations Compensation Commission ("UNCC"), which awarded compensation to several States for environmental damage caused by Iraq's illegal invasion and occupation of Kuwait in 1990 and 1991.

40. Nicaragua does not contest Costa Rica's contention that damage to the environment is compensable. In this connection, Nicaragua also refers to the approach adopted by the UNCC panels with respect to environmental claims arising from the first Gulf War. However, Nicaragua contends that, following that approach, Costa Rica is entitled to compensation for "restoration costs" and "replacement costs". According to Nicaragua, "restoration costs" comprise the costs that Costa Rica reasonably incurred in the construction of a dyke across the 2013 eastern *caño* while remediating the impact of Nicaragua's works. Nicaragua also recognizes that Costa Rica is entitled to "replacement costs" for the environmental goods and services that either have been or may be lost prior to the recovery of the impacted area.

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41. The Court has not previously adjudicated a claim for compensation for environmental damage. However, it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage. The Parties also agree on this point.

42. The Court is therefore of the view that damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law. Such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and payment for the restoration of the damaged environment.

43. Payment for restoration accounts for the fact that natural recovery may not always suffice to return an environment to the state in which it

was before the damage occurred. In such instances, active restoration measures may be required in order to return the environment to its prior condition, in so far as that is possible.

2. Methodology for the Valuation of Environmental Damage

44. Costa Rica accepts that there is no single method for the valuation of environmental damage and acknowledges that a variety of techniques have been used in practice at both the international and national level. It concludes that the appropriate method of valuation will depend, *inter alia*, on the nature, complexity, and homogeneity of the environmental damage sustained.

45. In the present case, the methodology that Costa Rica considers most appropriate, which it terms the "ecosystem services approach" (or "environmental services framework"), follows the recommendations of an expert report commissioned from Fundación Neotrópica, a Costa Rican non-governmental organization. Costa Rica claims that the valuation of environmental damage pursuant to an ecosystem services approach is well recognized internationally, up-to-date, and is also appropriate for the wetland protected under the Ramsar Convention that Nicaragua has harmed.

46. In Costa Rica's view, the ecosystem services approach finds support in international and domestic practice. First, Costa Rica notes that the "Guidelines for the Development of Domestic Legislation on Liability, Response Action and Compensation for Damage Caused by Activities Dangerous to the Environment" of the United Nations Environment Programme ("UNEP"), which were adopted by its Governing Council in 2010, recognize that environmental damage may be calculated on the basis of factors such as the "reduction or loss of the ability of the environment to provide goods and services". Secondly, Costa Rica highlights that Decision XII/14 of the Conference of the Parties to the Convention on Biological Diversity invites parties to take into account, as appropriate, the above-mentioned UNEP Guidelines. Furthermore, Decision XII/14 invites parties to take into account a "synthesis report" on technical information, which states that "[l]iability and redress rules might also address . . . the loss of [the ecosystem's] ability to provide actual or potential goods and services". Thirdly, Costa Rica notes that the ecosystem services methodology is employed by several States in the context of their domestic legislation on environmental damage. Finally, Costa Rica argues that the Report of the Ramsar Advisory Mission No. 69, which assessed environmental damage resulting from the excavation of the 2010 *caño*, adopted the ecosystem services approach.

47. Costa Rica explains that, according to the ecosystem services approach, the value of an environment is comprised of goods and services

that may or may not be traded on the market. Goods and services that are traded on the market (such as timber) have a "direct use value" whereas those that are not (such as flood prevention or gas regulation) have an "indirect use value". In Costa Rica's view, the valuation of environmental damage must take into account both the direct and indirect use values of environmental goods and services in order to provide an accurate reflection of the value of the environment. In order to ascribe a monetary value to the environmental goods and services that Nicaragua purportedly damaged, Costa Rica uses a value transfer approach for most of the goods and services affected. Under the value transfer approach, the damage caused is assigned a monetary value by reference to a value drawn from studies of ecosystems considered to have similar conditions to the ecosystem concerned. However, Costa Rica uses a direct valuation approach where the data for such valuation is available.

48. Costa Rica claims that the methodology adopted by Nicaragua is the same as that used by the UNCC in relation to environmental claims, which dealt with a subject-matter that was radically different to that of the present case. Costa Rica argues that valuation practices have evolved since the UNCC concluded claims processing in 2005, and that more recent methodologies, such as the ecosystem services approach, "recognize the full and potentially long lasting extent of harm to the environment".

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49. For its part, Nicaragua considers that Costa Rica is entitled to compensation "to replace the environmental services that either have been or may be lost prior to recovery of the impacted area", which it terms the "ecosystem service replacement cost" or "replacement costs". According to Nicaragua, the proper method for calculating this value is by reference to the price that would have to be paid to preserve an equivalent area until the services provided by the impacted area have recovered.

50. Nicaragua considers its methodology to be the standard approach to natural resource damage assessment. In particular, it notes that this was one of the methodologies followed by the UNCC when assessing claims for environmental damage. Nicaragua argues that there is no merit to Costa Rica's claim that this methodology has been displaced by more recent methods of valuation of environmental damage.

51. Nicaragua contends that the methodology that Costa Rica adopts is a "benefits transfer" approach, which seeks to value the damaged environmental services by reference to values assigned to such services in other places and in other contexts. In Nicaragua's view, such an approach is unreliable and has not been used widely in practice. Furthermore,

Nicaragua argues that the UNCC declined to accept the "benefits transfer" approach, even though it was asked to do so.

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52. The Court notes that the valuation methods proposed by the Parties are sometimes used for environmental damage valuation in the practice of national and international bodies, and are not therefore devoid of relevance to the task at hand. However, they are not the only methods used by such bodies for that purpose, nor is their use limited to valuation of damage since they may also be used to carry out cost/benefit analysis of environmental projects and programmes for the purpose of public policy setting (see for example UNEP, "Guidance Manual on Valuation and Accounting of Ecosystem Services for Small Island Developing States" (2014), p. 4). The Court will not therefore choose between them or use either of them exclusively for the purpose of valuation of the damage caused to the protected wetland in Costa Rica. Wherever certain elements of either method offer a reasonable basis for valuation, the Court will nonetheless take them into account. This approach is dictated by two factors: first, international law does not prescribe any specific method of valuation for the purposes of compensation for environmental damage; secondly, it is necessary, in the view of the Court, to take into account the specific circumstances and characteristics of each case.

53. In its analysis, the Court will be guided by the principles and rules set out in paragraphs 29 to 35 above. In determining the compensation due for environmental damage, the Court will assess, as outlined in paragraph 42, the value to be assigned to the restoration of the damaged environment as well as to the impairment or loss of environmental goods and services prior to recovery.

3. Determination of the Extent of the Damage Caused to the Environment and of the Amount of Compensation Due

54. The Court notes that, for both Costa Rica and Nicaragua, the size of the area affected by the unlawful activities of Nicaragua was 6.19 hectares.

55. Although Costa Rica identifies 22 categories of goods and services that could have been impaired or lost as a result of Nicaragua's wrongful actions, it claims compensation in respect of only six of them: standing timber; other raw materials (fibre and energy); gas regulation and air quality; natural hazards mitigation; soil formation and erosion control; and biodiversity, in terms of habitat and nursery.

56. Costa Rica claims that it is appropriate to calculate the total loss sustained as the result of Nicaragua's actions over a period of 50 years, which it considers to be a conservative estimate of the time required for the affected area to recover. Consequently, it provides a net present value for the total loss on the basis of a recovery period of 50 years with a discount rate of 4 per cent. According to Fundación Neotrópica, the discount rate is representative of the rate at which the ecosystem will recover. In its view, as the ecosystem goods and services recover, the yearly value of the environmental damage caused will gradually decrease.

57. Based on the above approach, Costa Rica claims, as compensation for the impairment or loss of environmental goods and services as a result of Nicaragua's activities, payment of US$2,148,820.82 in respect of the 2010 *caño* and US$674,290.92 in respect of the 2013 eastern *caño*. Costa Rica also claims US$57,634.08 for restoration costs, comprising US$54,925.69 for the cost of replacement soil in the 2010 *caño* and the 2013 eastern *caño* and US$2,708.39 for the restoration of the wetland. Costa Rica claims a total amount of compensation of US$2,880,745.82 for the environmental damage sustained as the result of Nicaragua's actions.

58. For its part, Nicaragua asserts, on the basis of its own method (see paragraph 49 above), that Costa Rica is entitled to replacement costs of US$309 per hectare per year, the figure which Costa Rica pays landowners and communities as an incentive to protect habitat under its domestic environmental conservation scheme (adjusted to 2017 prices). Over a reasonable period for full recovery, which it estimates to be 20 to 30 years, and taking into account a 4 per cent discount rate, Nicaragua concludes that the present value of the replacement costs amounts to between US$27,034 and US$34,987.

59. Nicaragua argues that even if, *quod non*, the ecosystem services approach proposed by Costa Rica was an appropriate method for quantifying environmental damage, Costa Rica implemented it incorrectly in ways that create a dramatic overvaluation of the impairment or loss of environmental goods and services as a result of the damage caused. In particular, Nicaragua claims that: Costa Rica wrongly assumes the presence of environmental services that were not provided by the area impacted by Nicaragua's activities; Costa Rica incorrectly values the gas regulation and air quality services provided by the area; and Costa Rica erroneously assumes that all goods and services will be impacted for 50 years.

60. Costa Rica claims, following the six categories of environmental goods and services that it contends have been lost, under a first head of

damage, compensation for trees that were felled in the construction of the 2010 *caño* and the 2013 eastern *caño*. The valuation it provides is based on the average price of standing timber for the species that were present in the 2010 *caño* (US$64.65 per cubic metre) and the 2013 eastern *caño* (US$40.05 per cubic metre), using figures taken from the Costa Rican National Forestry Office. Using these figures, Costa Rica values the eliminated stock and the growth potential of that stock over 50 years, assuming a volume of standing timber of 211 cubic metres per hectare, a harvest rate of 50 per cent per year, and a growth rate of 6 cubic metres per hectare per year. Fundación Neotrópica, whose figures Costa Rica adopts, explains that it does not assume, by referring to a harvest rate of 50 per cent per year, that it is possible to remove half of the annual growth of the trees each year. It maintains that it does this because the asset degradation caused by Nicaragua's unlawful activities will be reflected in Costa Rica's physical, natural, and economic accounts every year as a decrease in the monetary value of the country's natural assets until it has fully recovered.

61. Nicaragua contests Costa Rica's valuation of the trees felled in the excavation of the 2010 *caño* and the 2013 eastern *caño*. First, it claims that the only material damage caused by Nicaragua's activities was the felling of trees in the vicinity of the 2010 *caño*. It argues that the 2013 eastern *caño* has quickly revegetated and is now virtually indistinguishable from the surrounding areas. Secondly, Nicaragua contends that Costa Rica is mistaken in its calculation of the value of the felled trees over a period of 50 years, because trees can only be harvested once. Thirdly, Nicaragua claims that Costa Rica's figures do not demonstrate that it has accounted for the cost that would be required to harvest the timber and transport it to market, thus contravening accepted valuation methodology.

62. Costa Rica claims compensation, under a second head of damage, for "other raw materials" (namely, fibre and energy) that Nicaragua allegedly removed from the affected area in the course of its excavation works. The figures that Costa Rica adopts are based on studies that quantify the value of raw materials in other ecosystems (namely, in Mexico and the Philippines), from which a unit price is constructed (US$175.76 per hectare for the first year after the loss was caused, adjusted to 2016 prices). It uses this unit price to estimate the loss of raw materials in an area of 5.76 hectares (the area cleared during excavation of the 2010 *caño*) and 0.43 hectares (the area damaged in the construction of the 2013 eastern *caño*).

63. With regard to "other raw materials" (namely, fibre and energy), Nicaragua argues that, due to its rapid recovery, the area impacted by its activities has regained the ability to provide those goods and services.

In the alternative, Nicaragua contends that, even if Fundación Neotrópica had accurately assigned a unit value to other raw materials, it vastly inflated the valuation by assuming that the losses will extend for 50 years.

64. Thirdly, Costa Rica claims compensation for the impaired ability of the affected area to provide gas regulation and air quality services, such as carbon sequestration, which was allegedly caused by Nicaragua's unlawful activities. Costa Rica's estimate for the loss of this service is based on an academic study that values carbon stocks and flows in Costa Rican wetlands. Drawing on this study, Costa Rica estimates the loss of gas regulation and air quality services to amount to US$14,982.06 per hectare (for the first year after the loss was caused, adjusted to 2016 prices). Costa Rica argues that the fact that some of the gas regulation and air quality services impaired or lost may also have benefitted the citizens of other countries is irrelevant to Nicaragua's liability to provide compensation for the unlawful harm caused to Costa Rica on its own territory.

65. Nicaragua contests Costa Rica's valuation of the gas regulation and air quality services in several respects. First, Nicaragua argues that the benefits from gas regulation and air quality services are distributed across the entire world, and thus that Costa Rica is entitled only to a small share of the value of this service. Secondly, it criticizes the study upon which Costa Rica's figures are based, arguing that Costa Rica does not demonstrate why that study is relevant to the affected area and does not explain why it ignores studies that assign lower values to the services. Thirdly, Nicaragua notes that the figure used by Costa Rica is a stock value, which reflects the total value of all carbon sequestered in the vegetation, soil, leaf litter, and organic debris in one hectare. In Nicaragua's view, this carbon stock can only be released once into the atmosphere. Nicaragua argues that it is therefore incorrect for Costa Rica to calculate its loss on the basis of the value of carbon stock each year for 50 years.

66. Under the fourth head of damage, Costa Rica contends that freshwater wetlands, such as the affected area, are valuable assets to mitigate natural hazards, such as coastal flooding, saline intrusion and coastal erosion. In Costa Rica's view, the ability of the affected area to provide such services has been impaired by Nicaragua's actions. It argues that this conclusion is supported by the Report of the Ramsar Advisory Mission No. 69, which explains that changes in the pattern of freshwater flow in wetlands can impact both the salinity of the water and flood control capacity of the area. Costa Rica values this service at US$2,949.74 per hectare (for the first year after the loss was caused, adjusted to 2016 prices), based on the selection of a "low value" from a range of studies from Belize, Thailand and Mexico.

67. In Nicaragua's view, Costa Rica identifies no natural hazards that the affected area mitigated nor does it explain how Nicaragua's works impacted any natural hazard mitigation services provided. Furthermore, Nicaragua argues that Costa Rica's valuation is based entirely on a value transferred from a study that is irrelevant to the present case (namely, a study on the hazard mitigation services provided by coastal mangroves in Thailand).

68. Under the fifth head of damage, Costa Rica claims that the sediment that has refilled the 2010 *caño* and the 2013 eastern *caño* is both of a poorer quality and is more susceptible to erosion. It thus claims for the cost of replacement soil, which it values at US$5.78 per cubic metre.

69. Nicaragua argues that the 2010 *caño* and the 2013 eastern *caño* have refilled rapidly with sediment and are now covered with vegetation. In Nicaragua's view, Costa Rica has not presented any evidence that the new soil is of a poorer quality nor has it demonstrated that the soil is more vulnerable to erosion as a result of Nicaragua's actions. Moreover, it notes that Costa Rica has not presented any indication of its intention to carry out further restoration work on the two *caños*.

70. Finally, Costa Rica claims compensation for the loss of biodiversity services in the affected area, both in terms of habitat and nursery services. Costa Rica's valuation of biodiversity services is based on studies that quantify the value of biodiversity in other ecosystems (namely, in Mexico, Thailand and the Philippines), from which it constructs a unit price (US$855.13 per hectare for the first year after the loss was caused, adjusted to 2016 prices).

71. Nicaragua argues that, due to its rapid recovery, the affected area has regained the ability to provide biodiversity services. In the alternative, Nicaragua contends that, even if Fundación Neotrópica had accurately assigned a unit value to such services, it vastly inflated the valuation by assuming that the losses will extend for 50 years.

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72. Before assigning a monetary value to the damage to the environmental goods and services caused by Nicaragua's wrongful activities, the Court will determine the existence and extent of such damage, and whether there exists a direct and certain causal link between such damage and Nicaragua's activities. It will then establish the compensation due.

73. In this context, the Court notes that the Parties disagree on two issues: first, whether certain environmental goods and services have been impaired or lost, namely natural hazards mitigation and soil formation/erosion control; and secondly, the valuation of the environmental goods and services, which they consider have been impaired or lost, taking into account the length of the period necessary for their recovery.

74. In relation to the first of these issues, the Court is of the view that Costa Rica has not demonstrated that the affected area, due to a change in its ecological character, has lost its ability to mitigate natural hazards or that such services have been impaired. As regards soil formation and erosion control, Nicaragua does not dispute that it removed approximately 9,500 cubic metres of soil from the sites of the 2010 *caño* and the 2013 eastern *caño*. However, the evidence before the Court establishes that both *caños* have subsequently refilled with soil and there has been substantial revegetation. Accordingly, Costa Rica's claim for the cost of replacing all of the soil removed by Nicaragua cannot be accepted. There is some evidence that the soil which was removed by Nicaragua was of a higher quality than that which has now refilled the two *caños* but Costa Rica has not established that this difference has affected erosion control and the evidence before the Court regarding the quality of the two types of soil is not sufficient to enable the Court to determine any loss which Costa Rica might have suffered.

75. Concerning the four other categories of environmental goods and services for which Costa Rica claims compensation (namely, trees, other raw materials, gas regulation and air quality services, and biodiversity), the evidence before the Court indicates that, in excavating the 2010 *caño* and the 2013 eastern *caño*, Nicaragua removed close to 300 trees and cleared 6.19 hectares of vegetation. These activities have significantly affected the ability of the two impacted sites to provide the above-mentioned environmental goods and services. It is therefore the view of the Court that impairment or loss of these four categories of environmental goods and services has occurred and is a direct consequence of Nicaragua's activities.

76. With regard to the second issue, relating to the valuation of the damage caused to environmental goods and services, the Court cannot accept the valuations proposed by the Parties. In respect of the valuation proposed by Costa Rica, the Court has doubts regarding the reliability of certain aspects of its methodology, particularly in light of the criticism raised by Nicaragua and its experts in the written pleadings. Costa Rica assumes, for instance, that a 50-year period represents the time necessary for recovery of the ecosystem to the state prior to the damage caused. However, in the first instance, there is no clear evidence before the Court of the baseline condition of the totality of the environmental goods and services that existed in the area concerned prior to Nicaragua's activities. Secondly, the Court observes that different components of the ecosystem

require different periods of recovery and that it would be incorrect to assign a single recovery time to the various categories of goods and services identified by Costa Rica.

77. In the view of the Court, Nicaragua's valuation of US$309 per hectare per year must also be rejected. This valuation is based on the amount of money that Costa Rica pays landowners and communities as an incentive to protect habitat under its domestic environmental conservation scheme. Compensation for environmental damage in an internationally protected wetland, however, cannot be based on the general incentives paid to particular individuals or groups to manage a habitat. The prices paid under a scheme such as that employed by Costa Rica are designed to offset the opportunity cost of preserving the environment for those individuals and groups, and are not necessarily appropriate to reflect the value of the goods and services provided by the ecosystem. Accordingly, the Court is of the view that Nicaragua's proposed valuation does not provide an adequate reflection of the value of the environmental goods and services impaired or lost in the affected area.

78. The Court considers, for the reasons specified below, that it is appropriate to approach the valuation of environmental damage from the perspective of the ecosystem as a whole, by adopting an overall assessment of the impairment or loss of environmental goods and services prior to recovery, rather than attributing values to specific categories of environmental goods and services and estimating recovery periods for each of them.

79. First, the Court observes, in relation to the environmental goods and services that have been impaired or lost, that the most significant damage to the area, from which other harms to the environment arise, is the removal of trees by Nicaragua during the excavation of the *caños*. An overall valuation can account for the correlation between the removal of the trees and the harm caused to other environmental goods and services (such as other raw materials, gas regulation and air quality services, and biodiversity in terms of habitat and nursery).

80. Secondly, an overall valuation approach is dictated by the specific characteristics of the area affected by the activities of Nicaragua, which is situated in the Northeast Caribbean Wetland, a wetland protected under the Ramsar Convention, where there are various environmental goods and services that are closely interlinked. Wetlands are among the most diverse and productive ecosystems in the world. The interaction of the physical, biological and chemical components of a wetland enable it to perform many vital functions, including supporting rich biological diversity, regulating water régimes, and acting as a sink for sediments and pollutants.

81. Thirdly, such an overall valuation will allow the Court to take into account the capacity of the damaged area for natural regeneration. As stated by the Secretariat of the Ramsar Convention, the area in the vicinity of the 2010 *caño* demonstrates a "high capability for natural regeneration of the vegetation . . . provided the physical conditions of the area are maintained".

82. These considerations also lead the Court to conclude, with regard to the length of the period of recovery, that a single recovery period cannot be established for all of the affected environmental goods and services. Despite the close relationship between these goods and services, the period of time for their return to the pre-damage condition necessarily varies.

83. In its overall valuation, the Court will take into account the four categories of environmental goods and services the impairment or loss of which has been established (see paragraph 75).

84. The Court recalls that, in addition to the two valuations considered above, respectively submitted by Costa Rica and Nicaragua, Nicaragua also provides an alternative valuation of damage, calculated on the basis of the four categories of environmental goods and services. This valuation adopts Costa Rica's ecosystems services approach but makes significant adjustments to it. Nicaragua refers to this valuation as a "corrected analysis" and assigns a total monetary value of US$84,296 to the damage caused to the four categories of environmental goods and services.

85. The Court considers that Nicaragua's "corrected analysis" underestimates the value to be assigned to certain categories of goods and services prior to recovery. First, for other raw materials (fibre and energy), the "corrected analysis" assigns a value that is based on the assumption that there will be no loss in those goods and services after the first year. Such an assumption is not supported by any evidence before the Court. Secondly, with respect to biodiversity services (in terms of nursery and habitat), the "corrected analysis" does not sufficiently account for the particular importance of such services in an internationally protected wetland where the biodiversity was described to be of high value by the Secretariat of the Ramsar Convention. Whatever regrowth may occur naturally is unlikely to match in the near future the pre-existing richness of biodiversity in the area. Thirdly, in relation to gas regulation and air quality services, Nicaragua's "corrected analysis" does not account for the loss of future annual carbon sequestration ("carbon flows"), since it characterizes the loss of those services as a one-time loss. The Court does not consider that the impairment or loss of gas regulation and air quality services can be valued as a one-time loss.

86. The Court recalls, as outlined in paragraph 35 above, that the absence of certainty as to the extent of damage does not necessarily pre-

clude it from awarding an amount that it considers approximately to reflect the value of the impairment or loss of environmental goods and services. In this case, the Court, while retaining some of the elements of the "corrected analysis", considers it reasonable that, for the purposes of its overall valuation, an adjustment be made to the total amount in the "corrected analysis" to account for the shortcomings identified in the preceding paragraph. The Court therefore awards to Costa Rica the sum of US$120,000 for the impairment or loss of the environmental goods and services of the impacted area in the period prior to recovery.

87. In relation to restoration, the Court rejects Costa Rica's claim of US$54,925.69 for replacement soil for the reasons given in paragraph 74. The Court, however, considers that the payment of compensation for restoration measures in respect of the wetland is justified in view of the damage caused by Nicaragua's activities. Costa Rica claims compensation in the sum of US$2,708.39 for this purpose. The Court upholds this claim.

IV. Compensation Claimed by Costa Rica for Costs and Expenses

88. In addition to its claims of compensation for environmental damage, Costa Rica requested that the Court award it compensation for costs and expenses incurred as a result of Nicaragua's unlawful activities.

89. On the basis of the principles described above (see paragraphs 29 to 35), the Court must determine whether the costs and expenses allegedly incurred by Costa Rica are supported by the evidence, and whether Costa Rica has established a sufficiently direct and certain causal nexus between the internationally wrongful conduct of Nicaragua identified by the Court in its 2015 Judgment and the heads of expenses for which Costa Rica seeks compensation.

1. Costs and Expenses Incurred in relation to Nicaragua's Unlawful Activities in the Northern Part of Isla Portillos between October 2010 and April 2011

90. Costa Rica alleges that between October 2010 (when it became aware of Nicaragua's military presence on its territory) and April 2011 (when Nicaragua's military withdrew from Costa Rica's territory following the Court's 2011 Order on provisional measures), it has incurred a range of expenses in relation to Nicaragua's presence and unlawful activities, in the total amount of US$80,926.45. Costa Rica provides the following breakdown of these expenses: *(a)* cost of fuel and maintenance services for police aircraft used to reach and to overfly the "disputed ter-

ritory" (US$37,585.60); *(b)* salaries of Air Surveillance Service personnel required to attend access flights and overflights of the "disputed territory" (US$1,044.66); *(c)* purchase of satellite images to verify Nicaragua's presence and unlawful activities in the "disputed territory" (US$17,600); *(d)* cost of obtaining a report from the United Nations Institute for Training and Research/United Nations Operational Satellite Applications Programme (UNITAR/UNOSAT) to verify Nicaragua's unlawful activities in the "disputed territory" (US$15,804); *(e)* salaries of National Coast Guard Service personnel required to provide water transportation to the area near the "disputed territory" (US$6,780.60); *(f)* salaries of Tortuguero Conservation Area (ACTo) personnel required to attend missions in or near the "disputed territory" (US$1,309.90); *(g)* food and water supplies for ACTo personnel required to attend environmental monitoring missions in or near the "disputed territory" (US$446.12); *(h)* fuel for fluvial transportation for ACTo personnel required to attend missions in or near the "disputed territory" (US$92); and *(i)* fuel for land transportation for ACTo personnel required to attend missions in or near the "disputed territory" (US$263.57).

91. Nicaragua asserts that Costa Rica's claims for expenses allegedly incurred in connection with its police deployment are not compensable. Indeed, in its view, Costa Rican security forces were not employed to prevent or remedy any of the material damage caused by Nicaragua between October 2010 and January 2011. Nicaragua is also of the opinion that the flights allegedly carried out by Costa Rica were not related to its monitoring activities in the "disputed territory", nor were they substantiated by documentation. Nicaragua further argues that the salaries of Air Surveillance Service personnel, National Coast Guard Service personnel and ACTo personnel are not compensable as these staff were already employed as government officials. Finally, Nicaragua argues that the claims for satellite imagery and reports are "non-compensable litigation expenses" since they were largely commissioned by Costa Rica in connection with the presentation of its case on the merits. Moreover, Nicaragua asserts that they cover not only the "disputed territory" but also other areas.

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92. The Court now turns to its assessment of the compensation due for costs and expenses incurred by Costa Rica as a consequence of Nicaragua's presence and unlawful activities in the northern part of Isla Portillos between October 2010 and April 2011. Upon examination of all the relevant evidence and documents, the Court considers that Costa Rica has, with reference to two heads of expenses relating to the cost of fuel and maintenance services and the cost of obtaining a UNITAR/UNOSAT report, provided adequate evidence demonstrating that some of these costs have a sufficiently direct and certain causal nexus with the internationally wrongful conduct of Nicaragua identified by the Court in its 2015 Judgment.

93. With regard to the first head of expenses relating to fuel and maintenance services for police aircraft used to reach and overfly the northern part of Isla Portillos, the Court finds part of these expenses compensable. It appears from the evidence submitted to the Court that the Costa Rican Air Surveillance Service carried out several overflights of the relevant area in the period in question. The Court is satisfied that some of these flights were undertaken in order to ensure effective inspection of the northern part of Isla Portillos, and thus considers that these ancillary costs are directly connected to the monitoring of that area that was made necessary as a result of Nicaragua's wrongful conduct.

94. Turning to the quantification of the amount of compensation with respect to that first head of expenses, the Court notes that Costa Rica claims US$37,585.60 "for fuel and maintenance services for the police aircraft used" to reach and to overfly the "disputed territory" on 20, 22, 27 and 31 October 2010 and on 1 and 26 November 2010.

95. Costa Rica has presented evidence in the form of relevant flight logs, and an official communication dated 2 March 2016 (from the Administrative Office of the Air Surveillance Service of the Department of Air Operations of the Ministry of Public Security) with regard to the cost of overflights performed by the Air Surveillance Service on, *inter alia*, 20, 22, 27 and 31 October 2010 (US$31,740.60), as well as on 1 and 26 November 2010 (US$5,845), totalling US$37,585.60. The Court notes that Costa Rica calculated these expenses on the basis of the operating costs for the hourly use of each aircraft deployed; these operating costs included expenses for "fuel", "overhaul", "insurance" and "miscellaneous". With regard to the "insurance" costs, the Court considers that Costa Rica has failed to demonstrate that it incurred any additional expense as a result of the specific missions of the police aircraft over the northern part of Isla Portillos. This insurance expense is thus not compensable. As to the "miscellaneous" costs, Costa Rica has failed to specify the nature of this expense. Thus, the evidence before the Court is not sufficient to show that this expense relates to the operating costs of the aircraft used. Moreover, the Court observes that Costa Rica itself has specified in its Memorial on compensation that it claimed expenses only

for fuel and maintenance services. The Court therefore considers that these miscellaneous expenses are not compensable.

96. The Court also excludes the cost of flights to transport cargo or members of the press, the cost of flights with a destination other than the northern part of Isla Portillos, as well as the cost of flights for which, in the relevant flight logs, no indication of the persons on board has been given. Costa Rica has failed to demonstrate why these missions were necessary to respond to Nicaragua's unlawful activities and has therefore not established the requisite causal nexus between Nicaragua's unlawful activities and the expenses relating to these flights. In addition, the Court has corrected a mistake in Costa Rica's calculations for October 2010 in the list attached to the above-mentioned communication of 2 March 2016 concerning the duration of a flight on 22 October 2010. The compensation claim was calculated by Costa Rica on the basis of the duration of the flight indicated as 11.6 hours (aircraft registration number MSP018, Soloy), while the flight log indicates an actual duration of 4.6 hours.

97. The Court considers it necessary to recalculate the compensable expenses based on the information provided in the above official communication of 2 March 2016 and in the flight logs, by reference to the number and duration of the flights actually conducted in October and November 2010 in connection with the inspection of the northern part of Isla Portillos, and only taking into account the costs of "fuel" and "overhaul". The Court therefore finds that, under this head of expenses, Costa Rica is entitled to compensation in the amount of US$4,177.30 for October 2010, and US$1,665.90 for November 2010, totalling US$5,843.20.

98. The second head of expenses that the Court finds compensable relates to Costa Rica's claim for the cost of obtaining a report from UNITAR/UNOSAT dated 4 January 2011. The evidence shows that Costa Rica incurred this expense in order to detect and assess the environmental impact of Nicaragua's presence and unlawful activities in Costa Rican territory. The Court has reviewed this UNITAR/UNOSAT report (entitled "Morphological and Environmental Change Assessment: San Juan River Area (including Isla Portillos and Calero), Costa Rica") and is satisfied that the analysis given in this report provides a technical evaluation of the damage that has occurred as a consequence of Nicaragua's unlawful activities in the northern part of Isla Portillos. In particular, the report states that, based on high-resolution satellite imagery acquired on 8 August 2010, there are "strong signature indicators of recent tree cover removal", with "hundreds of fallen or cut trees [being] visible". According to the report, it is likely that the removal of this tree cover occurred "during the period of May-August 2010". The report also states that, "[b]ased on an analysis of satellite imagery recorded on 19 November and 14 December 2010, there is strong evidence to suggest that a new river

channel leading from the San Juan River to the Los Portillos Lagoon was constructed between August and November 2010".

99. Turning to the quantification of the amount of compensation, the Court notes that Costa Rica has presented evidence in the form of a numbered and dated invoice from UNITAR/UNOSAT, with an annexed cost breakdown, where reference is made to "Satellite-based assessment of environmental and geomorphological changes in Costa Rica". The invoice for this report totals US$15,804. In light of the Court's finding that the analysis contained in the UNITAR/UNOSAT report is directly relevant to Nicaragua's unlawful activities, the Court considers that there is a sufficiently direct and certain causal nexus between those activities and the cost of commissioning the report. The Court therefore finds that Costa Rica is entitled to full compensation in the sum of US$15,804.

100. The Court now turns to those heads of expenses with reference to which it considers that Costa Rica has failed to meet its burden of proof.

101. The Court notes that three heads of expenses (incurred between October 2010 and April 2011) for which Costa Rica seeks compensation relate to salaries of Costa Rican personnel allegedly involved in monitoring activities in the northern part of Isla Portillos, namely, the salaries of personnel employed with the Air Surveillance Service, the National Coast Guard Service and ACTo. The total amount claimed by Costa Rica for this category of expense is US$9,135.16. In this regard, the Court considers that salaries of government officials dealing with a situation resulting from an internationally wrongful act are compensable only if they are temporary and extraordinary in nature. In other words, a State is not, in general, entitled to compensation for the regular salaries of its officials. It may, however, be entitled to compensation for salaries in certain cases, for example, where it has been obliged to pay its officials over the regular wage or where it has had to hire supplementary personnel, whose wages were not originally envisaged in its budget. This approach is in line with international practice (see UNCC, Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "F2" Claims, United Nations doc. S/AC.26/1999/23, 9 December 1999, para. 101; UNCC, Report and Recommendations made by the Panel of Commissioners concerning the Second Instalment of "F2" Claims, United Nations doc. S/AC.26/2000/26, 7 December 2000, paras. 52-58; see also *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 67, para. 177).

102. The Court observes that, in the present proceedings, Costa Rica has not produced evidence that, between October 2010 and April 2011, it incurred any extraordinary expenses in terms of the payment of salaries

of government officials. There is some indication in the evidence adduced that Costa Rican government officials were assigned functions and duties in connection with Costa Rica's response to Nicaragua's wrongful conduct. For example, Annex 7 to the Memorial includes a document from the Department of Salaries and Wages of the National Coast Guard Service, entitled "Report on working hours by personnel . . . in missions that took place on [the] occasion of Nicaragua's occupation of Costa Rican territory — 21 October 2010 to 19 January 2015". There is no evidence, however, that any of these functions and duties were carried out by personnel other than regular government officials. The Court therefore finds that Costa Rica is not entitled to compensation for the salaries of personnel employed by the Air Surveillance Service, the National Coast Guard Service and ACTo.

103. The Court further observes that three other heads of expenses are closely related to the functions of those personnel employed by ACTo (to conduct environmental monitoring missions in or near the northern part of Isla Portillos), for which Costa Rica claims costs totalling US$801.69 incurred in connection with food and water supplies (US$446.12), fuel for fluvial transportation (US$92) and fuel for land transportation (US$263.57). As evidence of the costs incurred under these heads of expenses, Costa Rica refers to Annex 6 to its Memorial. This annex is comprised of a letter (with attachment) dated 6 January 2016 from the National System of Conservation Areas (Tortuguero Conservation Area Natural Resource Management) of the Costa Rican Ministry of the Environment and Energy, and addressed to the Ministry of Foreign Affairs of Costa Rica. It is stated in the letter that the purpose of the communication is "the formal transmittal of two binders containing printed information" including "copies of logs, reports, among other documents, which provide evidence of the participation of government officials and ACTo teams in addressing the problems arising from the Nicaraguan invasion of Isla Calero". However, Annex 6 to the Memorial does not contain any such "logs" or "reports"; it only contains two tables which, for evidentiary purposes, are difficult to follow. The Court notes that, in terms of entries for costs related to land transportation, and to food and water, no specific information is provided to show in what way these expenses were connected to Costa Rica's monitoring activities undertaken as a direct consequence of Nicaragua's unlawful activities in the northern part of Isla Portillos in the period between October 2010 and April 2011. Moreover, these tables do not provide any information whatsoever regarding costs incurred in connection with fluvial transportation.

104. In light of the above, the Court considers that Costa Rica has failed to provide sufficient evidence to support its claims for the expenses under these three heads.

105. The Court finally turns to Costa Rica's claim that it be compensated in the amount of US$17,600 for the cost of purchasing two satellite images, which, in its view, were necessary in order to verify Nicaragua's presence and unlawful activities in the northern part of Isla Portillos. The Court considers that, to the extent that such images did provide information as to Nicaragua's conduct in the northern part of Isla Portillos, this head of expenses could be compensable on the ground that there was a sufficiently direct and certain causal nexus between Nicaragua's unlawful activities and the cost thus incurred. However, having reviewed the evidence adduced by Costa Rica in support of this claim — in the form of two invoices dated 1 and 10 December 2010 (invoice Nos. 106 and 108), respectively, from INGEO innovaciones geográficas S.A. — the Court notes that neither of these invoices provides any indication as to the area covered by the two satellite images. It follows that the Court cannot conclude, on the basis of these documents, that these images related to the northern part of Isla Portillos, and that they were used for the verification of Nicaragua's presence and unlawful activities in that area. The Court therefore finds that Costa Rica has not provided sufficient evidence in support of its claim for compensation under this head of expenses.

106. In conclusion, the Court finds that Costa Rica is entitled to compensation in the amount of US$21,647.20 for the expenses it incurred in relation to Nicaragua's presence and unlawful activities in the northern part of Isla Portillos between October 2010 and April 2011. This figure is made up of US$5,843.20 for the cost of fuel and maintenance services for police aircraft used to reach and to overfly the northern part of Isla Portillos, and US$15,804 for the cost of obtaining a report from UNITAR/UNOSAT to verify Nicaragua's unlawful activities in that area.

2. Costs and Expenses Incurred in Monitoring the Northern Part of Isla Portillos following the Withdrawal of Nicaragua's Military Personnel and in Implementing the Court's 2011 and 2013 Orders on Provisional Measures

107. Costa Rica recalls that the Court, in its 2011 Order, stated that

> "in order to prevent the development of criminal activity in the disputed territory in the absence of any police or security forces of either Party, each Party has the responsibility to monitor [the disputed] territory from the territory over which it unquestionably holds sovereignty" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 25, para. 78).

Costa Rica adds that the Court, in operative paragraph 59, subparagraph (1) of its 2013 Order, reaffirmed the measures indicated in its 2011 Order. Costa Rica states that, in fulfilment of its obligations under the Court's 2011 and 2013 Orders, it incurred expenses in monitoring the "disputed territory" following the withdrawal of Nicaragua's military personnel, so as to avoid irreparable prejudice being caused to the protected wetland. These expenses related, *inter alia*, to visits and overflights of the "disputed territory"; establishment and staffing of new police posts in close proximity to the area; transportation; instruments, tools, materials and supplies; salaries of monitoring personnel; food and water supplies; and the purchase of satellite images and a report from UNITAR/UNOSAT. According to Costa Rica, the total amount of these expenses is US$3,551,433.67.

108. Costa Rica gives the following individual breakdown of the expenses it has incurred as a result of Nicaragua's unlawful activities: *(a)* cost of fuel and maintenance services of police aircraft and salaries of Air Surveillance Service personnel for the inspection carried out in co-ordination with the Secretariat of the Ramsar Convention on 5 and 6 April 2011 (US$21,128.55); *(b)* cost of equipment and repairs to equipment for the two new police posts established at Laguna de Agua Dulce and Isla Portillos (US$24,065.87); *(c)* staffing of police posts in Laguna de Agua Dulce and Isla Portillos (US$3,092,834.17); *(d)* cost of fluvial transportation provided by the National Coast Guard Service to the Public Force personnel and the Border Police (US$22,678.80); *(e)* cost of four all-terrain vehicles (ATVs) for the police posts in Laguna de Agua Dulce and Isla Portillos (US$81,208.40); *(f)* cost of a tractor for the equipment and maintenance of the biological station at Laguna Los Portillos to allow monitoring of the environment of the "disputed territory" (US$35,500); *(g)* salaries of ACTo personnel taking part in monitoring activities in different site visits (US$25,161.41); *(h)* cost of food and water supplies for ACTo personnel (US$8,412.55); *(i)* cost of fuel for transportation of ACTo personnel (US$3,213.04); *(j)* acquisition price of two ATVs and three cargo trailers, dedicated to the biological station (US$42,752.76); *(k)* cost of fuel for transportation of personnel and supplies to the biological station (US$6,435.12); *(l)* purchase of satellite images of the "disputed territory" (US$160,704); and *(m)* cost of obtaining a report from UNITAR/UNOSAT to assess damage caused in the "disputed territory" as a consequence of Nicaragua's unlawful activities (US$27,339).

109. Nicaragua contends that nearly all of Costa Rica's "purported 'monitoring' expenses" (US$3,092,834.17) are salaries of Costa Rican

security personnel deployed between March 2011 and December 2015 to police newly constructed posts in order to "protect against the imagined threat of Nicaragua reoccupying the disputed area and, especially, occupying other parts of Costa Rica". As such, it maintains, they are unrelated to the material damage caused by Nicaragua's works in the "disputed territory" and are thus "inappropriate claims" for compensation. Nicaragua argues that even if the salaries of the Costa Rican police were, in principle, compensable, a State is only entitled to compensation for extraordinary expenses, such as costs of hiring new personnel or the payment of overtime. According to Nicaragua, Costa Rica, however, simply redeployed existing personnel from elsewhere. Moreover, Nicaragua contends that Costa Rica's compensation claim for the wages it paid to its security personnel is not substantiated by appropriate evidence.

110. Nicaragua asserts that Costa Rica's claims for expenses it allegedly incurred in connection with its police deployment — such as the wages paid to personnel who provided fluvial transport for the police deployment and the purchase of various items of equipment — are not compensable because the deployment of Costa Rican security forces was not to prevent or remedy any of the material damage caused by Nicaragua between October 2010 and January 2011 and in September 2013. Furthermore, according to Nicaragua, none of these expenses were extraordinary, nor were they supported by evidence.

111. Nicaragua maintains that claims for compensation for satellite images taken between September 2011 and September 2015 and for reports prepared by UNITAR/UNOSAT are "non-compensable litigation expenses" since they were largely commissioned by Costa Rica in connection with the presentation of its case on the merits. Moreover, Nicaragua asserts that they cover not only the "disputed territory" but also other areas.

* *

112. With regard to compensation for monitoring activities claimed to have been carried out in implementation of the Court's 2011 and 2013 Orders, the Court considers that Costa Rica has, with reference to three heads of expenses, provided adequate evidence demonstrating that some of these expenses have a sufficiently direct and certain causal nexus with the internationally wrongful conduct of Nicaragua identified by the Court in its 2015 Judgment.

113. First, the Court finds partially compensable Costa Rica's expenses for its two-day inspection of the northern part of Isla Portillos on 5 and 6 April 2011, both in co-ordination and together with the Secretariat of

the Ramsar Convention. This mission was carried out by Costa Rican technical experts accompanied by the technical experts of the Secretariat for the purposes of making an assessment of the environmental situation in the area and of identifying actions to prevent further irreparable damage in that part of the wetland as a consequence of Nicaragua's unlawful activities. In particular, according to the technical report produced by the officials of the Secretariat of the Ramsar Convention,

> "[t]he main aims of the visit to the site were the identification and technical evaluation of the environmental situation of the study area to determine the consequences of the works carried out, the impact chains initiated, their implications and the preventive, corrective, mitigating or compensatory environmental measures that would need to be implemented to restore the natural environmental balance of the site to avoid new, irreparable changes to the wetland".

In the view of the Court, the inspection carried out by Costa Rica on 5 and 6 April 2011 was therefore directly connected to the monitoring of the northern part of Isla Portillos that was made necessary as a result of Nicaragua's wrongful conduct.

114. Turning to the quantification of the amount of compensation, the Court notes that Costa Rica claims US$20,110.84 "for fuel and maintenance services on the police aircrafts used" and US$1,017.71 "for the salaries of air surveillance service personnel".

115. As evidence, Costa Rica has presented relevant flight logs and an official communication dated 2 March 2016 from the Administrative Office of the Air Surveillance Service of the Department of Air Operations of the Ministry of Public Security (as already referred to above in paragraph 95) which includes details of the cost of overflights performed by the Air Surveillance Service on 5 and 6 April 2011 totalling US$20,110.84. The Court observes that there are shortcomings similar to those it identified earlier in paragraphs 95 and 96 when it reviewed Costa Rica's evidentiary approach in establishing the cost of fuel and maintenance services for police aircraft. In particular, regarding the expenses linked to its monitoring activities for the period now under review, the Court notes that Costa Rica calculated these expenses on the basis of the operating costs for the hourly use of each aircraft deployed; these operating costs included expenses for "fuel", "overhaul", "insurance" and "miscellaneous". As already noted above (see paragraph 95), the Court considers that such insurance cannot be a compensable expense. As to the "miscellaneous" costs, Costa Rica has failed to specify the nature of this expense. Moreover, the Court observes that Costa Rica itself has specified in its Memorial on compensation that it claimed expenses only for fuel and maintenance services. The Court therefore

considers that this head of expenses is not compensable. The Court also excludes the cost of flights to transport members of the press, for the same reasons given in paragraph 96 above.

116. The Court considers it necessary to evaluate the compensable expenses based on the information provided in the above official communication of 2 March 2016, and in the flight logs, by reference to the number and duration of the flights conducted on 5 and 6 April 2011 in connection with the inspection of the northern part of Isla Portillos, and only taking into account the costs of "fuel" and "overhaul". The Court therefore finds that, under this head of expenses, Costa Rica is entitled to compensation in the amount of US$3,897.40.

117. The Court notes that Costa Rica has also advanced a claim of US$1,017.71 for salaries of Air Surveillance Service personnel involved in aircraft missions. The Court does not however find that Costa Rica is entitled to claim the cost of salaries for the April 2011 inspection mission. As already noted above (see paragraph 101), a State cannot recover salaries for government officials that it would have paid regardless of any unlawful activity committed on its territory by another State.

118. Secondly, the Court finds partially compensable Costa Rica's claim for the purchase, in the period running from September 2011 to October 2015, of satellite images effectively to monitor and verify the impact of Nicaragua's unlawful activities. To the extent that these satellite images cover the northern part of Isla Portillos, the Court considers that there is a sufficiently direct and certain causal nexus between the internationally wrongful conduct of Nicaragua identified by the Court in its Judgment on the merits and the head of expenses for which Costa Rica seeks compensation.

119. Turning to the quantification of the amount of compensation, the Court notes that Costa Rica has presented evidence in the form of numbered and dated invoices and delivery reports corresponding to the purchase of satellite images from INGEO innovaciones geográficas S.A. and from GeoSolutions Consulting, Inc. S.A. Under this head of expenses, Costa Rica claims a total of US$160,704. Having carefully reviewed these invoices and delivery reports, the Court notes that, by reference to the area covered by the satellite images, these invoices can be divided into three sets. The first set relates to the satellite images that cover the northern part of Isla Portillos (see invoice Nos. 204, 205, 215, 216, 218, 219, 224, 62, 65, 70, 73 and 86); the second set relates to the satellite images that cover the general area of the northern border with Nicaragua (see invoice Nos. 172, 174, 179, 188, 189, 191 and 90); and the third set provides no indication of the area covered by the satellite images (invoice Nos. 144, 150, 157, 163, 164, 169 and 171).

120. The Court considers that, as the satellite images contained in the first and second sets of invoices all cover the northern part of Isla Portillos, their purchase is, in principle, compensable. However, the Court notes that most of these satellite images cover an area that extends beyond the northern part of Isla Portillos, often covering an area of around 200 square kilometres. Moreover, these images are charged by unit price per square kilometre, mostly at the rate of US$28. The Court finds that it would not be reasonable to award compensation to Costa Rica for these images in full. Given the size of the northern part of Isla Portillos, the Court is of the view that a coverage area of 30 square kilometres was sufficient for Costa Rica effectively to monitor and verify Nicaragua's unlawful activities. The Court therefore awards Costa Rica, for each of the invoices in the first and second sets, compensation for one satellite image covering an area of 30 square kilometres at a unit price of US$28 per square kilometre.

121. With regard to the third set of invoices, the Court considers that Costa Rica has not established the necessary causal nexus between Nicaragua's unlawful activities and the purchase of the satellite images in question.

122. Consequently, the Court finds that Costa Rica is entitled to compensation in the amount of US$15,960 for the expenses incurred in purchasing the satellite images corresponding to the first and second sets of invoices, within the limits specified in paragraph 120.

123. Thirdly, the Court finds partially compensable Costa Rica's claim for the cost of obtaining a report from UNITAR/UNOSAT dated 8 November 2011. Costa Rica incurred this expense in order to detect and assess the environmental impact of Nicaragua's presence and unlawful activities in Costa Rican territory. The Court has reviewed this UNITAR/UNOSAT report and observes that the analysis given in Section 1 (entitled "Review of dredging activities at divergence of Río San Juan and Río Colorado (maps 2-3)") and in Section 3 (entitled "Review of meander cut sites (maps 5-6)") does not have any bearing on Costa Rica's efforts to detect and assess the environmental damage caused in its territory by Nicaragua. It notes, however, that the analysis given in Section 2, entitled "Updated status of the new channel along [the] Río San Juan (map 4)", provides a technical evaluation of the damage that occurred as a consequence of Nicaragua's unlawful activities in the northern part of Isla Portillos. The Court concludes that Costa Rica has proven that there exists a sufficiently direct and certain causal nexus between the internationally wrongful conduct of Nicaragua identified by the Court in its Judgment on the merits and the purchase of the UNITAR/UNOSAT report.

124. Turning to the quantification of the amount of compensation, the Court notes that Costa Rica has presented evidence in the form of a numbered and dated invoice from UNITAR/UNOSAT, with an annexed cost breakdown, where reference is made to "Satellite-based assessment of environmental and geomorphological changes in Costa Rica". The invoice for this report, which includes the cost of analysis, satellite imagery, procurement processing of imagery, operating expenses and programme support costs, totals US$27,339. In light of the fact that only the content of Section 2 of the UNITAR/UNOSAT report is directly relevant, and given that the three sections of the report are separable (in the sense that each section is self-standing), the Court considers that the total amount of compensation should be limited to one-third of the total cost of the report. On that basis, the Court finds that Costa Rica is entitled to compensation under this head of expenses in the amount of US$9,113.

125. With regard to the other heads of expenses for compensation, Costa Rica's claims can be separated into three categories: (i) those claims which relate to two new police stations in Laguna Los Portillos and Laguna de Agua Dulce, (ii) those claims which relate to a biological station at Laguna Los Portillos, and (iii) those claims which relate to the salaries of personnel involved in monitoring activities, as well as the ancillary costs of supplying food and water, and the costs of fuel for transportation of ACTo personnel.

126. The Court notes that Costa Rica has made it clear that it does not seek to claim compensation for the construction of the police posts or the biological station. With regard to the first category, however, Costa Rica has advanced a claim for the costs of some equipment, as well as for operational expenses. For the two police posts, Costa Rica claims expenses covering equipment costs (US$24,065.87), staffing (US$3,092,834.17), fluvial transportation of personnel and supplies provided by the National Coast Guard (US$22,678.80); and the purchase of four all-terrain vehicles for the police posts (US$81,208.40).

127. The Court finds that none of the costs incurred in connection with the equipment and operation of the police stations are compensable because the purpose of the said stations was to provide security in the border area, and not in particular to monitor Nicaragua's unlawful activities in the northern part of Isla Portillos. Moreover, Costa Rica has not presented any evidence to demonstrate that the equipment purchased and the operational costs were sufficiently linked with the implementation of the provisional measures ordered by the Court.

128. With regard to the second category relating to the biological station, the Court recalls that Costa Rica has claimed expenses covering the cost of a tractor for the equipment and maintenance of the biological station (US$35,500), the acquisition price of two all-terrain vehicles and

three cargo trailers (US$42,752.76), and the cost of fuel for the transportation of personnel and supplies (US$6,435.12).

129. As to the costs incurred in connection with the maintenance of the biological station, the Court similarly finds that none of the expenses incurred under this head are compensable because there was no sufficiently direct causal link between the maintenance of this station and Nicaragua's wrongful conduct in the northern part of Isla Portillos. In particular, the Court observes that in the Report for the Executive Secretariat of the Ramsar Convention on Wetlands, dated July 2013 and entitled "New Works in the Northeast Caribbean Wetland", prepared by the Costa Rican Ministry of Foreign Affairs, it is stated that the purpose of the biological station was to "[c]onsolidate the management of the Northeast Caribbean Wetland through a research program[me]", to "[c]reate an appropriate programme for biological monitoring of the status of existing resources", and to "[c]onsolidate a prevention and control programme to prevent the alteration of the existing natural resources".

130. With reference to the third category, as already explained earlier in the context of similar claims for compensation made by Costa Rica (see paragraphs 101 and 117), the Court does not accept that a State is entitled to compensation for the regular salaries of its officials. With regard to the other two heads of expenses within this category, the Court considers that Costa Rica has not provided any specific information to show in what way the expenses claimed for food and water, and for fuel for transportation of ACTo personnel, were connected with Costa Rica's monitoring of the northern part of Isla Portillos following the withdrawal of Nicaragua's military personnel.

131. In conclusion, the Court finds that Costa Rica is entitled to compensation in the amount of US$28,970.40 for the expenses it incurred in relation to the monitoring of the northern part of Isla Portillos following the withdrawal of Nicaragua's military personnel and in implementing the Court's 2011 and 2013 Orders on provisional measures. This figure is made up of US$3,897.40 for the cost of overflights performed by the Air Surveillance Service on 5 and 6 April 2011, US$15,960 for the purchase, in the period running from September 2011 to October 2015, of satellite images of the northern part of Isla Portillos, and US$9,113 for the cost of obtaining a report from UNITAR/UNOSAT providing, *inter alia*, a technical evaluation of the damage that occurred as a consequence of Nicaragua's unlawful activities in the northern part of Isla Portillos.

3. Costs and Expenses Incurred in Preventing Irreparable Prejudice to the Environment (The Construction of a Dyke and Assessment of Its Effectiveness)

132. According to Costa Rica, it incurred a third category of expenses when implementing the Court's 2013 Order on provisional measures, in

terms of works carried out to prevent irreparable prejudice to the environment of the "disputed territory". Costa Rica argues that, in accordance with the Order, after consultation with the Secretariat of the Ramsar Convention, it carried out the necessary works on the 2013 eastern *caño* (namely, the construction of a dyke) over a period of seven days, from 31 March to 6 April 2015. Subsequently, Costa Rica carried out overflights of the "disputed territory" in June, July and October 2015 in order to assess the effectiveness of the works that had been completed to construct the dyke across the 2013 eastern *caño*. Costa Rica states that the expenses thus incurred amounted to US$195,671.02.

133. Nicaragua accepts that compensation may be appropriate for costs reasonably incurred by Costa Rica in 2015 in connection with the construction of the dyke across the 2013 eastern *caño*. It nevertheless argues that the amount of US$195,671.02 claimed by Costa Rica is inflated because certain materials charged were not actually used for the construction of the dyke and certain overflights were made for purposes unrelated to activities that the Court found to be unlawful. Thus, according to Nicaragua's evaluation, Costa Rica is entitled to no more than US$153,517 which represents the real figure for the expenses incurred in connection with the construction of the dyke in 2015.

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134. The Court recalls that in its Order of 22 November 2013 on the request presented by Costa Rica for the indication of new provisional measures, it indicated, in particular, that

> "[f]ollowing consultation with the Secretariat of the Ramsar Convention and after giving Nicaragua prior notice, Costa Rica may take appropriate measures related to the two new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 370, para. 59, subpara. (2) (E)).

135. From 10 to 13 March 2013, the Secretariat of the Ramsar Convention carried out an onsite visit to the northern part of Isla Portillos to assess the damage caused by Nicaragua's constructions of the two new *caños*. Following this site visit, in August 2014, the Secretariat produced a report (Ramsar Advisory Mission No. 77) with recommendations on mitigation measures focused on the 2013 eastern *caño*. It requested that Costa Rica submit an implementation plan and recommended that it commence a monitoring programme. In accordance with that request, Costa Rica's Ministry of the Environment and Energy formulated an implementation

plan, dated 12 August 2014. That plan set out in detail the proposed measures, consisting of the construction of a dyke to ensure that the waters of the San Juan River were not diverted through the 2013 eastern *caño*.

136. Costa Rica proposed to begin works in September 2014 and requested that Nicaragua grant it access to the San Juan River to facilitate the undertaking. Since no agreement had been reached between the Parties, Costa Rica made arrangements to contract a private civilian helicopter for the purposes of the construction works. According to Costa Rica, this was necessary because its Air Surveillance Service did not possess any type of aircraft with the capacity to carry out such works. Costa Rica states that its police and ACTo personnel provided ground support for the operation. The works to construct the dyke were carried out over a period of seven days, from 31 March to 6 April 2015. Costa Rican personnel charged with the protection of the environment monitored the works by means of periodic inspections. Costa Rica also carried out overflights of the northern part of Isla Portillos in June, July and October 2015, in order to assess the effectiveness of the works that had been completed to construct the dyke.

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137. The Court observes that with regard to this category of expenses incurred by Costa Rica, Nicaragua "accepts that compensation may be appropriate for costs that were reasonably incurred". The Parties however differ as to the amount of compensation owed by Nicaragua to Costa Rica under this head. In particular, Nicaragua asserts that the amount claimed by Costa Rica should be reduced by excluding the cost of surplus materials (which it estimates at US$9,112.50) and the cost of three overflights (which it estimates at US$33,041.75) carried out on 9 June, 8 July and 3 October 2015, after the construction of the dyke across the 2013 eastern *caño*. According to Nicaragua, these overflights were, at least in part, "for purposes unrelated to the activities that the Court determined were wrongful".

138. The Court finds that the costs incurred by Costa Rica in connection with the construction in 2015 of a dyke across the 2013 eastern *caño* are partially compensable. Costa Rica has provided evidence that it incurred expenses that were directly related to the remedial action it undertook in order to prevent irreparable prejudice to the environment of the northern part of Isla Portillos following Nicaragua's unlawful activities. In this regard, Costa Rica advances three heads of expenses: (i) overflight costs prior to the construction of the dyke; (ii) costs connected with the actual construction of the dyke; and (iii) overflight costs subsequent to the construction of the dyke.

139. With reference to the first head of expenses, Costa Rica states that on 25 July 2014, it hired a private civilian helicopter to conduct a site visit to the northern part of Isla Portillos, in order to assess the situation of the two 2013 *caños* for the purposes of determining the measures required to

prevent irreparable prejudice to the environment of that area. According to Costa Rica, the cost of the flight for this mission amounted to US$6,183. The invoice submitted by Costa Rica for the cost of this flight indicates that the purpose of the flight was "for transportation of staff on observation and logistics flight to Isla Calero". The flight description also shows that this flight was nowhere near the construction site. In light of this evidence, the Court considers that Costa Rica has not proven that the 2014 helicopter mission was directly connected with the intended construction of the dyke across the 2013 eastern *caño*. Therefore, the expenses for this flight are not compensable.

140. With reference to the second head of expenses, Costa Rica refers to the costs incurred in terms of the purchase of construction materials and the hiring of a private civilian helicopter to transport personnel and materials required to construct the dyke across the 2013 eastern *caño*.

141. Costa Rica has divided these costs under the second head of expenses into two categories, namely, helicopter flight hours (US$131,067.50) and "purchase of billed supplies" (US$26,378.77). With regard to the first category, the Court is satisfied that the evidence adduced fully supports Costa Rica's claim.

142. In so far as the second category is concerned, the Court is of the view that the purchase of construction materials should, in principle, be fully compensated. With regard to the surplus construction materials, the Court considers that, given the difficulty of access to the construction site of the dyke, located in the wetlands, it was justified for Costa Rica to adopt a cautious approach and to ensure, at the start, that the construction materials it purchased and transported were sufficient for the completion of the work. The costs incurred for the purchase of construction materials which turned out to be more than what was actually used are, in the present circumstances, compensable. What matters, for the consideration of the claim, is reasonableness. The Court does not consider the amount of materials purchased by Costa Rica unreasonable or disproportionate to the actual needs of the construction work.

143. The Court notes, however, that in the "Breakdown of Invoices for Calero — Billed Supplies and Expenses" which gives a total amount of the expenses for the construction of the dyke, Costa Rica included an entry which refers to "Boarding — CNP and El Dólar", with a claim for compensation totalling US$3,706.41. It does not provide clarification as to the nature of this expense in any of its pleadings or annexes, including the "Report of works carried out from 26 March to 10 April 2015" prepared by the Costa Rican Ministry of Environment and Energy. The Court thus finds this expense to be non-compensable. The Court also points out that there is a mistake in the calculation of the item "fuel for boat". Costa Rica is claiming a total of US$5,936.54 whereas the calcula-

tion of the quantity (5,204) multiplied by the price of the unit (US$1.07) equals US$5,568.28. The Court has also corrected other minor miscalculations. Thus the Court, after recalculation, finds that Costa Rica should be compensated in the total amount of US$152,372.81 for the costs of the construction of the dyke (made up of the cost for the helicopter flight hours in the amount of US$131,067.50 and the purchase of billed supplies in the amount of US$21,305.31).

144. With reference to the third head of expenses, the Court recalls that Costa Rica is claiming expenses in connection with overflights made on 9 June, 8 July and 3 October 2015 for the purposes of monitoring the effectiveness of the completed dyke. The Court considers that these expenses are compensable as there is a sufficiently direct causal nexus between the damage caused to the environment of the northern part of Isla Portillos, as a result of Nicaragua's unlawful activities, and the overflight missions undertaken by Costa Rica to monitor the effectiveness of the newly constructed dyke. Costa Rica has also discharged its burden of proof in terms of providing evidence of the cost of flight hours incurred in respect of the hired private civilian helicopter used to access the northern part of Isla Portillos. Costa Rica has submitted three invoices, accompanied by flight data which indicated that the flight route took the aircraft over the dyke. In the Court's view, it is evident that the helicopter hired for these missions had to overfly other parts of Costa Rican territory in order to reach the construction site of the dyke. Moreover, the Court observes that there is nothing on the record to show that these overflights were not en route to the dyke area, nor that the helicopter missions were unrelated to the purpose of monitoring the effectiveness of the dyke.

145. For the flight of 9 June 2015, Costa Rica has produced an invoice in the amount of US$11,070.75, for the flight of 8 July 2015 an invoice for US$10,689, and for the flight of 3 October 2015 an invoice for US$11,282. The Court finds that the total expense incurred by Costa Rica under this head of expenses, totalling US$33,041.75, is therefore compensable.

146. In conclusion, the Court finds that Costa Rica is entitled to compensation in the amount of US$185,414.56 for the expenses it incurred in connection with the construction in 2015 of a dyke across the 2013 eastern *caño*. This figure is made up of US$152,372.81 for the costs of the construction of the dyke, and US$33,041.75 for the monitoring overflights made once the dyke was completed.

4. Conclusion

147. It follows from the Court's analysis of the compensable costs and expenses incurred by Costa Rica as a direct consequence of Nicaragua's

unlawful activities in the northern part of Isla Portillos (see paragraphs 106, 131 and 146 above), that Costa Rica is entitled to total compensation in the amount of US$236,032.16.

V. Costa Rica's Claim for Pre-Judgment and Post-Judgment Interest

148. Costa Rica maintains that in view of the extent of damage Costa Rica has suffered, full reparation cannot be achieved without payment of interest. It claims both pre-judgment and post-judgment interest. With regard to pre-judgment interest, Costa Rica states that such interest should cover its entire compensation for losses it incurred as a direct consequence of Nicaragua's unlawful activities. However, it makes what it considers to be a "conservative claim", whereby pre-judgment interest would accrue from the date of the Court's Judgment on the merits of 16 December 2015 until the date of the Judgment on compensation. As for post-judgment interest, Costa Rica argues that, should Nicaragua fail to pay the compensation immediately after the delivery of the Judgment, interest on the principal sum of compensation as determined by the Court should be added. It proposes that the annual rate of interest be set at 6 per cent for both pre-judgment and post-judgment interest.

149. Nicaragua maintains that an injured State has no automatic entitlement to the payment of interest and specifies that the awarding of interest depends on the circumstances of each case and, in particular, on whether an award of interest is necessary in order to ensure full reparation. Nicaragua observes that Costa Rica has not explained why the circumstances of the present case warrant the award of interest, nor has it attempted to justify the 6 per cent interest rate it requests.

* *

150. With regard to Costa Rica's claim for pre-judgment interest, the Court recalls that, in its 2015 Judgment, the actual amount of compensation due to Costa Rica was not determined; instead, the Court decided that the Parties were first required to seek a settlement of the question through negotiations. Only in the event that the question was not settled within 12 months could a Party refer it back to the Court for resolution (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 741, para. 229 (5) *(b)*). The Court notes, not without regret, that no agreement was reached between the Parties on the question of compensation within the time-limit fixed by the Court. Consequently, at the request of Costa Rica, the matter is now before the Court for decision.

151. The Court recalls that in the practice of international courts and tribunals, pre-judgment interest may be awarded if full reparation for injury caused by an internationally wrongful act so requires. Nevertheless, interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case (see Commentary to Article 38, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 107).

152. The Court observes that, in the present case, the compensation to be awarded to Costa Rica is divided into two parts: compensation for environmental damage and compensation for costs and expenses incurred by Costa Rica in connection with Nicaragua's unlawful activities. The Court considers that Costa Rica is not entitled to pre-judgment interest on the amount of compensation for environmental damage; in determining the overall valuation of environmental damage, the Court has taken full account of the impairment or loss of environmental goods and services in the period prior to recovery.

153. With regard to the costs and expenses incurred by Costa Rica as a result of Nicaragua's unlawful activities, the Court notes that most of such costs and expenses were incurred in order to take measures for preventing further harm. The Court awards Costa Rica pre-judgment interest on the costs and expenses found compensable, accruing, as requested by Costa Rica, from 16 December 2015, the date on which the Judgment on the merits was delivered, until 2 February 2018, the date of delivery of the present Judgment. The annual interest rate is fixed at 4 per cent. The amount of interest is US$20,150.04.

154. With regard to Costa Rica's claim for post-judgment interest, the Court recalls that in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, the Court awarded post-judgment interest, observing that "the award of post-judgment interest is consistent with the practice of other international courts and tribunals" (*Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 343, para. 56). The Court sees no reason in the current case to adopt a different approach.

155. Thus, although it has every reason to expect timely payment by Nicaragua, the Court decides that, in the event of any delay in payment, post-judgment interest shall accrue on the total amount of compensation. This interest shall be paid at an annual rate of 6 per cent.

VI. Total Sum Awarded

156. The total amount of compensation awarded to Costa Rica is US$378,890.59 to be paid by Nicaragua by 2 April 2018. This amount includes the principal sum of US$358,740.55 and pre-judgment interest on the compensable costs and expenses in the amount of US$20,150.04.

Should payment be delayed, post-judgment interest on the total amount will accrue as from 3 April 2018.

* * *

157. For these reasons,

THE COURT,

(1) *Fixes* the following amounts for the compensation due from the Republic of Nicaragua to the Republic of Costa Rica for environmental damage caused by the Republic of Nicaragua's unlawful activities on Costa Rican territory:

(a) By fifteen votes to one,

US$120,000 for the impairment or loss of environmental goods and services;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judge* ad hoc Guillaume;

AGAINST: *Judge* ad hoc Dugard;

(b) By fifteen votes to one,

US$2,708.39 for the restoration costs claimed by the Republic of Costa Rica in respect of the internationally protected wetland;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judges* ad hoc Guillaume, Dugard;

AGAINST: *Judge* Donoghue;

(2) Unanimously,

Fixes the amount of compensation due from the Republic of Nicaragua to the Republic of Costa Rica for costs and expenses incurred by Costa Rica as a direct consequence of the Republic of Nicaragua's unlawful activities on Costa Rican territory at US$236,032.16;

(3) Unanimously,

Decides that, for the period from 16 December 2015 to 2 February 2018, the Republic of Nicaragua shall pay interest at an annual rate of 4 per cent on the amount of compensation due to the Republic of Costa Rica under point 2 above, in the sum of US$20,150.04;

(4) Unanimously,

Decides that the total amount due under points 1, 2 and 3 above shall be paid by 2 April 2018 and that, in case it has not been paid by that date, interest on the total amount due from the Republic of Nicaragua to the Republic of Costa Rica will accrue as from 3 April 2018 at an annual rate of 6 per cent.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this second day of February, two thousand and eighteen, 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 Costa Rica and the Government of the Republic of Nicaragua, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judges CANÇADO TRINDADE, DONOGHUE and BHANDARI append separate opinions to the Judgment of the Court; Judge GEVORGIAN appends a declaration to the Judgment of the Court; Judge *ad hoc* GUILLAUME appends a declaration to the Judgment of the Court; Judge *ad hoc* DUGARD appends a dissenting opinion to the Judgment of the Court.

(Initialled) R.A.
(Initialled) Ph.C.

Annex 117

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE
AHMADOU SADIO DIALLO

(RÉPUBLIQUE DE GUINÉE c. RÉPUBLIQUE
DÉMOCRATIQUE DU CONGO)

INDEMNISATION DUE PAR LA RÉPUBLIQUE DÉMOCRATIQUE
DU CONGO À LA RÉPUBLIQUE DE GUINÉE

ARRÊT DU 19 JUIN 2012

2012

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
AHMADOU SADIO DIALLO

(REPUBLIC OF GUINEA *v.* DEMOCRATIC
REPUBLIC OF THE CONGO)

COMPENSATION OWED BY THE DEMOCRATIC REPUBLIC
OF THE CONGO TO THE REPUBLIC OF GUINEA

JUDGMENT OF 19 JUNE 2012

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COMPENSATION OWED BY THE DEMOCRATIC REPUBLIC OF THE CONGO TO THE REPUBLIC OF GUINEA

19 JUNE 2012

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(REPUBLIC OF GUINEA *v.* DEMOCRATIC REPUBLIC OF THE CONGO)

COMPENSATION OWED BY THE DEMOCRATIC REPUBLIC OF THE CONGO TO THE REPUBLIC OF GUINEA

Introductory observations.

Object of the present proceedings pursuant to Court's Judgment of 30 November 2010 — Determination of amount of compensation — Injury resulting from unlawful detentions and expulsion of Mr. Diallo — Guinea's exercise of diplomatic protection — General rules governing compensation — Establishment of injury and causal nexus between the wrongful acts and that injury — Valuation of the injury — General rule that it is for the party which alleges a particular fact to prove existence of that fact — That rule to be applied flexibly in this case as Respondent may be in a better position to establish certain facts — Evidence adduced by Guinea as starting point of the Court's inquiry — Assessment in light of evidence introduced by the Democratic Republic of the Congo (DRC) — Allowance for the difficulty in providing certain evidence because of abruptness of Mr. Diallo's expulsion — The Court's inquiry limited to the injury resulting from the breach of Mr. Diallo's rights as an individual.

*

Claim for compensation for non-material injury suffered by Mr. Diallo.

Non-material injury may take various forms — Establishment of non-material injury even without specific evidence — Non-material injury of Mr. Diallo as an inevitable consequence of the wrongful acts of the DRC already ascertained by the Court in its Judgment on the merits — Reasonable to conclude that the wrongful conduct of the DRC caused Mr. Diallo significant psychological suffering and loss of reputation — Number of days for which Mr. Diallo was detained, as well as fact that he was not mistreated, taken into account — Context in which the wrongful

detentions and expulsion occurred, as well as their arbitrary nature, as factors aggravating Mr. Diallo's non-material injury — Importance of equitable considerations in the quantification of compensation for non-material injury — US$85,000 in compensation awarded.

*

Claim for compensation for material injury suffered by Mr. Diallo.

Alleged loss of personal property.

Property of the two companies not taken into account given the Court's prior decision that claims related thereto were inadmissible — Personal property located in Mr. Diallo's apartment appearing on an inventory prepared 12 days after his expulsion — Failure of Guinea to prove extent of loss of Mr. Diallo's personal property listed on inventory and extent to which any such loss was caused by the unlawful conduct of the DRC — Lack of any evidence regarding value of items on inventory — Mr. Diallo nevertheless required to transport his personal property to Guinea or to arrange for its disposition in the DRC — US$10,000 awarded based on equitable considerations.

High-value items not specified on the inventory — No evidence put forward by Guinea that Mr. Diallo owned these items at the time of his expulsion; that they were in his apartment if he did own them; or that they were lost as a result of Mr. Diallo's treatment by the DRC — No compensation awarded.

Assets alleged to have been contained in bank accounts — No information provided by Guinea about total sum held in bank accounts, the amount of any particular account or the name(s) of bank(s) in which account(s) were held — No evidence put forward by Guinea demonstrating that the unlawful detentions and expulsion of Mr. Diallo caused the loss of any assets held in bank accounts — No compensation awarded.

Alleged loss of remuneration during Mr. Diallo's unlawful detentions and following his expulsion.

Cognizable character, as a component of compensation, of claim for income lost as a result of unlawful detention — Estimation may be appropriate where amount of lost income cannot be calculated precisely — No evidence however offered by Guinea to support the claim that Mr. Diallo was earning US$25,000 per month as gérant *of Africom-Zaire and Africontainers-Zaire — Evidence, on the contrary, that neither of the companies was conducting business during the years immediately prior to Mr. Diallo's detentions — Failure of Guinea to prove how Mr. Diallo's unlawful detentions would have caused him to lose any remuneration he could have been receiving — Guinea's claim for loss of remuneration during period of Mr. Diallo's detention rejected — Reasons for rejecting claim equally applicable to Guinea's highly speculative claim relating to the period following Mr. Diallo's expulsion — No compensation awarded.*

Alleged deprivation of potential earnings.

Guinea's claim concerning "potential earnings" as beyond the scope of the proceedings, given the Court's prior decision on the inadmissibility of Guinea's claims relating to the injuries alleged to have been caused to the companies — No compensation awarded.

*

Total sum awarded and post-judgment interest.

The total sum awarded to Guinea is US$95,000 to be paid by 31 August 2012 — Should payment be delayed, post-judgment interest on the principal sum due to accrue as from 1 September 2012 at an annual rate of 6 per cent — Sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo intended to provide reparation for the latter's injury.

*

Procedural costs.

Article 64 of the Statute of the Court as implying that there may be circumstances which would make it appropriate for the Court to allocate costs in favour of one of the parties — No such circumstances exist in the present case.

JUDGMENT

Present: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; *Judges* ad hoc Mahiou, Mampuya; *Registrar* Couvreur.

In the case concerning Ahmadou Sadio Diallo,

between

the Republic of Guinea,

represented by

Mr. Mohamed Camara, First Counsellor for Political Affairs, Embassy of Guinea in the Benelux countries and in the European Union,

as Agent;

Mr. Hassane II Diallo, Counsellor and *chargé de mission* at the Ministry of Justice,

as Co-Agent,

and

the Democratic Republic of the Congo,

represented by

H.E. Mr. Henri Mova Sakanyi, Ambassador of the Democratic Republic of the Congo to the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg,

as Agent;

Mr. Tshibangu Kalala, Professor of International Law at the University of Kinshasa, member of the Kinshasa and Brussels Bars, and member of the Congolese Parliament,

as Co-Agent,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 28 December 1998, the Government of the Republic of Guinea (hereinafter "Guinea") filed in the Registry of the Court an Application instituting proceedings against the Democratic Republic of the Congo (hereinafter the "DRC", named Zaire between 1971 and 1997) in respect of a dispute concerning "serious violations of international law" alleged to have been committed upon the person of Mr. Ahmadou Sadio Diallo, a Guinean national.

In the Application, Guinea maintained that:

> "Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that State for thirty-two (32) years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled."

Guinea added:

> "[t]his expulsion came at a time when Mr. Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses [Africom-Zaire and Africontainers-Zaire] by the [Congolese] State and by oil companies established in its territory and of which the State is a shareholder".

According to Guinea, Mr. Diallo's arrests, detentions and expulsion constituted, *inter alia*, violations of

> "the principle that aliens should be treated in accordance with 'a minimum standard of civilization', [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court".

To found the jurisdiction of the Court, Guinea invoked in the Application the declarations whereby the two States have recognized the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute of the Court.

2. On 3 October 2002, the DRC raised preliminary objections in respect of the admissibility of Guinea's Application. In its Judgment of 24 May 2007 on these preliminary objections, the Court declared the Application of the Republic of Guinea to be admissible "in so far as it concerns protection of Mr. Diallo's rights as an individual" and "in so far as it concerns protection of [his] direct rights as *associé* in Africom-Zaire and Africontainers-Zaire". However, the Court declared the Application of the Republic of Guinea to be inadmissible "in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire" (*Ahmadou Sadio Diallo*

(Republic of Guinea v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, pp. 617-618, para. 98, subpara. 3 *(a)*, *(b)*, and *(c)* of the operative part).

3. In its Judgment of 30 November 2010 on the merits, the Court found that, in respect of the circumstances in which Mr. Diallo had been expelled on 31 January 1996, the DRC had violated Article 13 of the International Covenant on Civil and Political Rights (hereinafter the "Covenant") and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights (hereinafter the "African Charter") (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 692, para. 165, subpara. (2) of the operative part). The Court also found that, in respect of the circumstances in which Mr. Diallo had been arrested and detained in 1995-1996 with a view to his expulsion, the DRC had violated Article 9, paragraphs 1 and 2, of the Covenant and Article 6 of the African Charter (*ibid.*, p. 692, para. 165, subpara. (3) of the operative part).

4. The Court further decided that

> "the Democratic Republic of the Congo [was] under obligation to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations referred to in subparagraphs (2) and (3) [of the operative part]" (*ibid.*, p. 693, para. 165, subpara. (7) of the operative part),

namely the unlawful arrests, detentions and expulsion of Mr. Diallo.

5. In addition, the Court found that the DRC had violated Mr. Diallo's rights under Article 36, paragraph 1 *(b)*, of the Vienna Convention on Consular Relations (*ibid.*, p. 692, para. 165, subpara. (4) of the operative part). It did not however order the DRC to pay compensation for this violation (*ibid.*, p. 693, para. 165, subpara. (7) of the operative part).

6. In the same Judgment, the Court rejected all other submissions by Guinea relating to the arrests and detentions of Mr. Diallo, including the contention that he was subjected to treatment prohibited by Article 10, paragraph 1, of the Covenant during his detentions (*ibid.*, subpara. (5) of the operative part). Furthermore, the Court found that the DRC had not violated Mr. Diallo's direct rights as an *associé* in the companies Africom- Zaire and Africontainers-Zaire (*ibid.*, subpara. (6) of the operative part).

7. Finally, the Court decided, with respect to the question of compensation owed by the DRC to Guinea, that "failing agreement between the Parties on this matter within six months from the date of [the said] Judgment, [this] question . . . shall be settled by the Court" (*ibid.*, subpara. (8) of the operative part). Considering itself to have been "sufficiently informed of the facts of the . . . case", the Court found that "a single exchange of written pleadings by the Parties would then be sufficient in order for it to decide on the amount of compensation" (*ibid*, p. 692, para. 164).

8. The time-limit of six months thus fixed by the Court having expired on 30 May 2011 without an agreement being reached between the Parties on the question of compensation due to Guinea, the President of the Court held a meeting with the representatives of the Parties on 14 September 2011 in order to ascertain their views on the time-limits to be fixed for the filing of the two pleadings envisaged by the Court.

9. By an Order of 20 September 2011, the Court fixed 6 December 2011 and 21 February 2012 as the respective time-limits for the filing of the Memorial of Guinea and the Counter-Memorial of the DRC on the question of compensa-

tion due to Guinea. The Memorial and the Counter-Memorial were duly filed within the time-limits thus prescribed.

10. In the written proceedings relating to compensation, the following submissions were presented by the Parties:

On behalf of the Government of Guinea,

in the Memorial:

> "In compensation for the damage suffered by Mr. Ahmadou Sadio Diallo as a result of his arbitrary detentions and expulsion, the Republic of Guinea begs the Court to order the Democratic Republic of the Congo to pay it (on behalf of its national) the following sums:
>
> — US$250,000 for mental and moral damage, including injury to his reputation;
> — US$6,430,148 for loss of earnings during his detention and following his expulsion;
> — US$550,000 for other material damage; and
>
> — US$4,360,000 for loss of potential earnings;
>
> amounting to a total of eleven million five hundred and ninety thousand one hundred and forty-eight American dollars (US$11,590,148), not including statutory default interest.
>
> Furthermore, as a result of having been forced to institute the present proceedings, the Guinean State has incurred unrecoverable costs which it should not, in equity, be required to bear and which are assessed at US$500,000. The Republic of Guinea also begs the Court to order the DRC to pay it that sum.
>
> The Democratic Republic of the Congo should also be ordered to pay all the costs."

On behalf of the Government of the DRC,

in the Counter-Memorial:

> "Having regard to all of the arguments of fact and law set out above, the Democratic Republic of the Congo asks the Court to adjudge and declare that:
>
> (1) compensation in an amount of US$30,000 is due to Guinea to make good the non-pecuniary injury suffered by Mr. Diallo as a result of his wrongful detentions and expulsion in 1995-1996;
> (2) no default interest is due on the amount of compensation as fixed above;
> (3) the DRC shall have a time-limit of six months from the date of the Court's judgment in which to pay to Guinea the above amount of compensation;
> (4) no compensation is due in respect of the other material damage claimed by Guinea;
> (5) each Party shall bear its own costs of the proceedings, including costs and fees of its counsel, advocates, advisers, assistants and others."

* * *

I. Introductory Observations

11. It falls to the Court at this stage of the proceedings to determine the amount of compensation to be awarded to Guinea as a consequence of the unlawful arrests, detentions and expulsion of Mr. Diallo by the DRC, pursuant to the findings of the Court set out in its Judgment of 30 November 2010 and recalled above. In that Judgment, the Court indicated that the amount of compensation was to be based on "the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-96, including the resulting loss of his personal belongings" (*I.C.J. Reports 2010 (II)*, p. 691, para. 163).

12. The Court begins by recalling certain of the facts on which it based its Judgment of 30 November 2010. Mr. Diallo was continuously detained for 66 days, from 5 November 1995 until 10 January 1996 (*ibid.*, p. 662, para. 59), and was detained for a second time between 25 and 31 January 1996 (*ibid.*, p. 662, para. 60), that is, for a total of 72 days. The Court also observed that Guinea failed to demonstrate that Mr. Diallo was subjected to inhuman or degrading treatment during his detentions (*ibid.*, p. 671, paras. 88-89). In addition, the Court found that Mr. Diallo was expelled by the DRC on 31 January 1996 and that he received notice of his expulsion on the same day (*ibid.*, p. 659, para. 50, and p. 668, para. 78).

13. The Court turns to the question of compensation for the violations of Mr. Diallo's human rights established in its Judgment of 30 November 2010. It recalls that it has fixed an amount of compensation once, in the *Corfu Channel* case (*(United Kingdom* v. *Albania), Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 244). In the present case, Guinea is exercising diplomatic protection with respect to one of its nationals, Mr. Diallo, and is seeking compensation for the injury caused to him. As the Permanent Court of International Justice stated in the *Factory of Chorzów* case (*Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, pp. 27-28), "[i]t is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law". The Court has taken into account the practice in other international courts, tribunals and commissions (such as the International Tribunal for the Law of the Sea, the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and the United Nations Compensation Commission), which have applied general principles governing compensation when fixing its amount, including in respect of injury resulting from unlawful detention and expulsion.

14. Guinea seeks compensation under four heads of damage: non-material injury (referred to by Guinea as "mental and moral dam-

age"); and three heads of material damage: alleged loss of personal property; alleged loss of professional remuneration (referred to by Guinea as "loss of earnings") during Mr. Diallo's detentions and after his expulsion; and alleged deprivation of "potential earnings". As to each head of damage, the Court will consider whether an injury is established. It will then "ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent", taking into account "whether there is a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 233-234, para. 462). If the existence of injury and causation is established, the Court will then determine the valuation.

15. The assessment of compensation owed to Guinea in this case will require the Court to weigh the Parties' factual contentions. The Court recalled in its Judgment of 30 November 2010 that, as a general rule, it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact (*I.C.J. Reports 2010 (II)*, p. 660, para. 54; see also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 668, para. 72; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 162). The Court also recognized that this general rule would have to be applied flexibly in this case and, in particular, that the Respondent may be in a better position to establish certain facts (*I.C.J. Reports 2010 (II)*, pp. 660-661, paras. 54-56).

16. In the present stage of the proceedings, the Court once again will be guided by the approach summarized in the preceding paragraph. Thus, the starting point in the Court's inquiry will be the evidence adduced by Guinea to support its claim under each head of damage, which the Court will assess in light of evidence introduced by the DRC. The Court also recognizes that the abruptness of Mr. Diallo's expulsion may have diminished the ability of Mr. Diallo and Guinea to locate certain documents, calling for some flexibility by the Court in considering the record before it.

17. Before turning to the various heads of damage, the Court also recalls that the scope of the present proceedings is determined in important respects by the Court's Judgments of 24 May 2007 and of 30 November 2010. Having declared Guinea's Application inadmissible as to alleged violations of the rights of Africom-Zaire and Africontainers-Zaire (*I.C.J. Reports 2007 (II)*, p. 616, para. 94), the Court will not take account of any claim for injury sustained by the two companies, rather than by Mr. Diallo himself. Moreover, the Court will award no compensation in respect of Guinea's claim that the DRC violated Mr. Diallo's direct rights as an *associé* in Africom-Zaire and Africontainers-Zaire,

because the Court found that there was no such violation in its Judgment of 30 November 2010 (*I.C.J. Reports 2010 (II)*, p. 690, para. 157, and pp. 690-691, para. 159). The Court's inquiry will be limited to the injury resulting from the breach of Mr. Diallo's rights as an individual, that is, "the injury flowing from the wrongful detentions and expulsion of Mr. Diallo in 1995-1996, including the resulting loss of his personal belongings" (*ibid.*, p. 691, para. 163).

II. Heads of Damage in respect of which Compensation Is Requested

A. Claim for Compensation for Non-Material Injury Suffered by Mr. Diallo

18. "Mental and moral damage", referred to by Guinea, or "non-pecuniary injury", referred to by the DRC, covers harm other than material injury which is suffered by an injured entity or individual. Non-material injury to a person which is cognizable under international law may take various forms. For instance, the umpire in the *Lusitania* cases before the Mixed Claims Commission (United States/Germany) mentioned "mental suffering, injury to [a claimant's] feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation" (opinion in the *Lusitania* cases, 1 November 1923, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. VII, p. 40). The Inter-American Court of Human Rights observed in *Gutiérrez-Soler* v. *Colombia* that "[n]on pecuniary damage may include distress, suffering, tampering with the victim's core values, and changes of a non-pecuniary nature in the person's everyday life" (judgment of 12 September 2005 (merits, reparations and costs), IACHR, Series C, No. 132, para. 82).

19. In the present case, Guinea contends that

> "Mr. Diallo suffered moral and mental harm, including emotional pain, suffering and shock, as well as the loss of his position in society and injury to his reputation as a result of his arrests, detentions and expulsion by the DRC."

No specific evidence regarding this head of damage is submitted by Guinea.

20. The DRC, for its part, does not contest the fact that Mr. Diallo suffered "non-pecuniary injury". However, the DRC requests the Court to

> "take into account the specific circumstances of this case, the brevity of the detention complained of, the absence of any mistreatment of

> Mr. Diallo, [and] the fact that Mr. Diallo was expelled to his country of origin, with which he had been able to maintain ongoing and high-level contacts throughout his lengthy stay in the Congo".

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21. In the view of the Court, non-material injury can be established even without specific evidence. In the case of Mr. Diallo, the fact that he suffered non-material injury is an inevitable consequence of the wrongful acts of the DRC already ascertained by the Court. In its Judgment on the merits, the Court found that Mr. Diallo had been arrested without being informed of the reasons for his arrest and without being given the possibility to seek a remedy (*I.C.J. Reports 2010 (II)*, p. 666, para. 74, and p. 670, para. 84); that he was detained for an unjustifiably long period pending expulsion (*ibid.*, pp. 668-669, para. 79); that he was made the object of accusations that were not substantiated (*ibid.*, p. 669, para. 82); and that he was wrongfully expelled from the country where he had resided for 32 years and where he had engaged in significant business activities (*ibid.*, pp. 666-667, paras. 73 and 74). Thus, it is reasonable to conclude that the DRC's wrongful conduct caused Mr. Diallo significant psychological suffering and loss of reputation.

22. The Court has taken into account the number of days for which Mr. Diallo was detained and its earlier conclusion that it had not been demonstrated that Mr. Diallo was mistreated in violation of Article 10, paragraph 1, of the Covenant (*ibid.*, p. 671, para. 89).

23. The circumstances of the case point to the existence of certain factors which aggravate Mr. Diallo's non-material injury. One is the context in which the wrongful detentions and expulsion occurred. As the Court noted in its Judgment on the merits,

> "it is difficult not to discern a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital" (*I.C.J. Reports 2010 (II)*, p. 669, para. 82).

In addition, Mr. Diallo's

> "arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter" *(ibid.)*.

24. Quantification of compensation for non-material injury necessarily rests on equitable considerations. As the umpire noted in the *Lusitania* cases, non-material injuries "are 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 therefore as compensatory damages" (*RIAA*, Vol. VII, p. 40). When considering compensation for material or non-material injury caused by violations of the Covenant or the African Charter, respectively, the Human Rights Committee and the African Commission on Human and Peoples' Rights recommended "adequate compensation" without specifying the sum to be paid (see, for example, *A.* v. *Australia*, HRC, 3 April 1997, communication No. 560/1993, United Nations doc. CCPR/C/59/D/560/1993, para. 11; *Kenneth Good* v. *Republic of Botswana*, ACHPR, 26 May 2010, communication No. 313/05, *28th Activity Report*, Ann. IV, p. 110, para. 244). Arbitral tribunals and regional human rights courts have been more specific, given the power to assess compensation granted by their respective constitutive instruments. Equitable considerations have guided their quantification of compensation for non-material harm. For instance, in *Al-Jedda* v. *United Kingdom*, the Grand Chamber of the European Court of Human Rights stated that, for determining damage,

> "[i]ts guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred" (application No. 27021/08, judgment of 7 July 2011, *ECHR Reports* 2011, para. 114).

Similarly, the Inter-American Court of Human Rights has said that the payment of a sum of money as compensation for non-pecuniary damages may be determined by that court "in reasonable exercise of its judicial authority and on the basis of equity" (*Cantoral Benavides* v. *Peru*, judgment of 3 December 2001 (reparations and costs), IACHR, Series C, No. 88, para. 53).

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25. With regard to the non-material injury suffered by Mr. Diallo, the circumstances outlined in paragraphs 21 to 23 lead the Court to consider that the amount of US$85,000 would provide appropriate compensation. The sum is expressed in the currency to which both Parties referred in their written pleadings on compensation.

B. Claim for Compensation for Material Injury Suffered by Mr. Diallo

26. As previously noted (see paragraph 14), Guinea claims compensation for three heads of material damage. The Court will begin by address-

ing Guinea's claim relating to the loss of Mr. Diallo's personal property; it will then consider Guinea's claims concerning loss of professional remuneration during Mr. Diallo's unlawful detentions and following his unlawful expulsion from the DRC; and, finally, it will turn to Guinea's claim in respect of "potential earnings".

1. Alleged loss of Mr. Diallo's personal property (including assets in bank accounts)

27. Guinea claims that Mr. Diallo's abrupt expulsion prevented him from making arrangements for the transfer or disposal of personal property that was in his apartment and also caused the loss of certain assets in bank accounts. Guinea refers to an inventory of items in Mr. Diallo's apartment that was prepared 12 days after he was expelled, claiming that the inventory understated his personal property because it failed to include a number of high-value items that were in the apartment. It states that all of these assets have been irretrievably lost and estimates the value of lost tangible and intangible assets (including bank accounts) at US$550,000.

28. The DRC contends that Guinea was responsible for having produced the inventory in question as evidence before the Court, only later to declare it incomplete. Citing Guinea's role in preparing the inventory, the DRC characterizes that inventory as "credible" and "serious", and contends that Guinea cannot now claim that Mr. Diallo owned additional assets not reflected in it. The DRC further asserts that it cannot be held responsible for the alleged loss of any property that was in the apartment because the DRC did not order Mr. Diallo's eviction from the apartment and because Mr. Diallo's personal property was under the control of officials from the Guinean embassy and of Mr. Diallo's friends and relatives. Further, the DRC states that Guinea has provided no evidence regarding bank assets.

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29. The Court here addresses Guinea's claim for the loss of Mr. Diallo's personal property, without taking into account property of the two companies (to which Guinea also refers), given the Court's prior decision that Guinea's claims relating to the companies were inadmissible (see paragraph 17 above). The personal property at issue in Guinea's claim may be divided into three categories: furnishings of Mr. Diallo's apartment that appear on the above-referenced inventory; certain high-value items alleged to have been in Mr. Diallo's apartment, which are not specified on that inventory; and assets in bank accounts.

30. As to personal property that was located in Mr. Diallo's apartment, it appears that the inventory of the property in Mr. Diallo's apart-

ment, which both Parties have submitted to the Court, was prepared approximately 12 days after Mr. Diallo's expulsion from the DRC. While Guinea complains about omissions from the inventory (the high-value items discussed below), both Parties appear to accept that the items that are listed on the inventory were in the apartment at the time the inventory was prepared.

31. There is, however, uncertainty about what happened to the property listed on the inventory. Guinea does not point to any evidence that Mr. Diallo attempted to transport or to dispose of the property in the apartment, and there is no evidence before the Court that the DRC barred him from doing so. The DRC states that it did not take possession of the apartment and that it did not evict Mr. Diallo from the apartment. Mr. Diallo himself stated in 2008 that the company from which the apartment was leased took possession of it soon after his expulsion and that, as a result, he had lost all of his personal effects. Therefore, taken as a whole, Guinea has failed to prove the extent of the loss of Mr. Diallo's personal property listed on the inventory and the extent to which any such loss was caused by the DRC's unlawful conduct.

32. Even assuming that it could be established that the personal property on the inventory was lost and that any such loss was caused by the DRC's unlawful conduct, Guinea offers no evidence regarding the value of the items on the inventory (either with respect to individual items or in the aggregate).

33. Despite the shortcomings in the evidence related to the property listed on the inventory, the Court recalls that Mr. Diallo lived and worked in the territory of the DRC for over thirty years, during which time he surely accumulated personal property. Even assuming that the DRC is correct in its contention that Guinean officials and Mr. Diallo's relatives were in a position to dispose of that personal property after Mr. Diallo's expulsion, the Court considers that, at a minimum, Mr. Diallo would have had to transport his personal property to Guinea or to arrange for its disposition in the DRC. Thus, the Court is satisfied that the DRC's unlawful conduct caused some material injury to Mr. Diallo with respect to personal property that had been in the apartment in which he lived, although it would not be reasonable to accept the very large sum claimed by Guinea for this head of damage. In such a situation, the Court considers it appropriate to award an amount of compensation based on equitable considerations (see paragraph 36 below). Other courts, including the European Court of Human Rights and the Inter-American Court of Human Rights, have followed this approach where warranted (see, e.g., *Lupsa* v. *Romania*, application No. 10337/04, judgment of 8 June 2006, *ECHR Reports* 2006-VII, paras. 70-72; *Chaparro Alvarez and Lapo Iñiguez* v. *Ecuador*, judgment of 21 November 2007 (preliminary objections, merits, reparations and costs), IACHR, Series C, No. 170, paras. 240 and 242).

34. The Court next considers Guinea's contention that Mr. Diallo's apartment contained certain high-value items not specified on the inven-

tory described above. Guinea mentions several items in its Memorial (e.g., a diamond-studded watch and two paintings by a renowned artist), but offers few details and provides no evidence to support the assertion that the items were located in Mr. Diallo's apartment at the time of his detentions and expulsion. There is no statement by Mr. Diallo describing these goods. There are no records of purchase, even as to items allegedly purchased from well-known establishments selling high-value luxury items that can be expected to keep records of sales, and which are located outside the territory of the DRC, thus making them accessible to Mr. Diallo. Guinea has put forward no evidence whatsoever that Mr. Diallo owned these items at the time of his expulsion, that they were in his apartment if he did own them, or that they were lost as a result of his treatment by the DRC. For these reasons, the Court rejects Guinea's claims as to the loss of high-value items not specified on the inventory.

35. As to assets alleged to have been contained in bank accounts, Guinea offers no details and no evidence to support its claim. There is no information about the total sum held in bank accounts, the amount of any particular account or the name(s) of the bank(s) in which the account(s) were held. Further, there is no evidence demonstrating that the unlawful detentions and expulsion of Mr. Diallo caused the loss of any assets held in bank accounts. For example, Guinea does not explain why Mr. Diallo could not access any such accounts after leaving the DRC. Thus, it has not been established that Mr. Diallo lost any assets held in his bank accounts in the DRC or that the DRC's unlawful acts caused Mr. Diallo to lose any such financial assets. Accordingly, the Court rejects Guinea's claim as to the loss of bank account assets.

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36. The Court therefore awards no compensation in respect of the high-value items and bank account assets described in paragraphs 34 and 35 above. However, in view of the Court's conclusions above (see paragraph 33) regarding the personal property of Mr. Diallo and on the basis of equitable considerations, the Court awards the sum of US$10,000 under this head of damage.

2. Alleged loss of remuneration during Mr. Diallo's unlawful detentions and following his unlawful expulsion

37. At the outset, the Court notes that, in its submissions at the conclusion of its Memorial, Guinea claims US$6,430,148 for Mr. Diallo's loss of earnings during his detentions and following his expulsion. How-

ever, Guinea makes reference elsewhere in its Memorial to a sum of US$80,000 for Mr. Diallo's loss of earnings during his detentions. As presented by Guinea, this claim for US$80,000, although not reflected as a separate submission, is clearly distinct from its claim for US$6,430,148 which, in the reasoning of the Memorial, only concerns the alleged "loss of earnings" following Mr. Diallo's expulsion. The Court will interpret Guinea's submissions in light of the reasoning of its Memorial, as it is entitled to do (see, e.g., *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30). Therefore, in the present Judgment, it will first consider the claim of US$80,000 for loss of professional remuneration during Mr. Diallo's detentions (see paragraphs 38-46) and then will examine the claim of US$6,430,148 for loss of professional remuneration following his expulsion (see paragraphs 47-49).

38. Guinea asserts that, prior to his arrest on 5 November 1995, Mr. Diallo received monthly remuneration of US$25,000 in his capacity as *gérant* of Africom-Zaire and Africontainers-Zaire. Based on that figure, Guinea estimates that Mr. Diallo suffered a loss totalling US$80,000 during the 72 days he was detained, an amount that, according to Guinea, takes account of inflation. Guinea states that remuneration from the two companies was Mr. Diallo's "main source of income" and does not ask the Court to award compensation in respect of any other income relating to the period of Mr. Diallo's detentions. Guinea further asserts that Mr. Diallo was unable to carry out his "normal management activities" while in detention and thus to ensure that his companies were being properly run.

39. In response, the DRC contends that Guinea has not produced any documentary evidence to support the claim for loss of remuneration. The DRC also takes the view that Guinea has failed to show that Mr. Diallo's detentions caused a loss of remuneration that he otherwise would have received. In particular, the DRC asserts that Guinea has failed to explain why Mr. Diallo, as the sole *gérant* and *associé* of the two companies, could not have directed that payments be made to him. According to the DRC, no compensation for loss of remuneration during the period of Mr. Diallo's detention is warranted.

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40. The Court observes that, in general, a claim for income lost as a result of unlawful detention is cognizable as a component of compensation. This approach has been followed, for example, by the European

Court of Human Rights (see, e.g., *Teixeira de Castro* v. *Portugal*, application No. 44/1997/828/1034, judgment of 9 June 1998, *ECHR Reports* 1998-IV, paras. 46-49), by the Inter-American Court of Human Rights (see, e.g., *Suárez-Rosero* v. *Ecuador*, judgment of 20 January 1999 (reparations and costs), IACHR, Series C, No. 44, para. 60), and by the Governing Council of the United Nations Compensation Commission (see United Nations Compensation Commission Governing Council, *Report and Recommendations Made by the Panel of Commissioners concerning the Fourteenth Instalment of "E3" Claims*, United Nations doc. S/AC. 26/2000/19, 29 September 2000, para. 126). Moreover, if the amount of the lost income cannot be calculated precisely, estimation may be appropriate (see, e.g., *Elci and Others* v. *Turkey*, applications Nos. 23145/93 and 25091/94, judgment of 13 November 2003, ECHR, para. 721; *Case of the "Street Children" (Villagrán-Morales et al.)* v. *Guatemala*, judgment of 26 May 2001 (reparations and costs), IACHR, Series C, No. 77, para. 79). Thus, the Court must first consider whether Guinea has established that Mr. Diallo was receiving remuneration prior to his detentions and that such remuneration was in the amount of US$25,000 per month.

41. The claim that Mr. Diallo was earning US$25,000 per month as *gérant* of the two companies is made for the first time in the present phase of the proceedings, devoted to compensation. Guinea offers no evidence to support the claim. There are no bank account or tax records. There are no accounting records of either company showing that it had made such payments. It is plausible, of course, that Mr. Diallo's abrupt expulsion impeded or precluded his access to such records. That said, the absence of any evidence in support of the claim for loss of remuneration at issue here stands in stark contrast to the evidence adduced by Guinea at an earlier stage of this case in support of the claims relating to the two companies, which included various documents from the records of the companies.

42. Moreover, there is evidence suggesting that Mr. Diallo was not receiving US$25,000 per month in remuneration from the two companies prior to his detentions. First, the evidence regarding Africom-Zaire and Africontainers-Zaire strongly indicates that neither of the companies was conducting business — apart from the attempts to collect debts allegedly owed to each company — during the years immediately prior to Mr. Diallo's detentions. In particular, the record indicates that the operations of Africontainers-Zaire had, even according to Guinea, experienced a serious decline by 1990. In addition, as the Court noted previously, the DRC asserted that Africom-Zaire had ceased all commercial activities by the end of the 1980s and for that reason had been struck from the Trade Register (*I.C.J. Reports 2007 (II)*, p. 593, para. 22; *I.C.J. Reports 2010 (II)*, p. 677, para. 108); this assertion was not challenged by Guinea. It appears that disputes about the amounts payable by various entities to Africom-Zaire and Africontainers-Zaire continued into

the 1990s, in some cases even after Mr. Diallo's expulsion in 1996. But there is no evidence of operating activity that would have generated a flow of income during the years just prior to Mr. Diallo's detentions.

43. Secondly, in contrast to Guinea's claim in the present phase of the proceedings devoted to compensation that Mr. Diallo was receiving monthly remuneration of US$25,000, Guinea told the Court, during the preliminary objections phase, that Mr. Diallo was "already impoverished in 1995". This statement to the Court is consistent with the fact that, on 12 July 1995, Mr. Diallo obtained in the DRC, at his request, a "Certificate of Indigency" declaring him "temporarily destitute" and thus permitting him to avoid payments that would otherwise have been required in order to register a judgment in favour of one of the companies.

44. The Court therefore concludes that Guinea has failed to establish that Mr. Diallo was receiving remuneration from Africom-Zaire and Africontainers-Zaire on a monthly basis in the period immediately prior to his detentions in 1995-1996 or that such remuneration was at the rate of US$25,000 per month.

45. Guinea also does not explain to the satisfaction of the Court how Mr. Diallo's detentions caused an interruption in any remuneration that Mr. Diallo might have been receiving in his capacity as *gérant* of the two companies. If the companies were in fact in a position to pay Mr. Diallo as of the time that he was detained, it is reasonable to expect that employees could have continued to make the necessary payments to the *gérant* (their managing director and the owner of the companies). Moreover, as noted above (see paragraph 12), Mr. Diallo was detained from 5 November 1995 to 10 January 1996, then released and then detained again from 25 January 1996 to 31 January 1996. Thus, there was a period of two weeks during which there was an opportunity for Mr. Diallo to make arrangements to receive any remuneration that the companies allegedly had failed to pay him during the initial 66-day period of detention.

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46. Under these circumstances, Guinea has not proven to the satisfaction of the Court that Mr. Diallo suffered a loss of professional remuneration as a result of his unlawful detentions.

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47. In addition to the claim for loss of remuneration during his unlawful detentions, Guinea asserts that the unlawful expulsion of Mr. Diallo by the DRC deprived him of the ability to continue receiving remuneration as the *gérant* of Africom-Zaire and Africontainers-Zaire. Based on its claim (described above) that Mr. Diallo received remuneration of US$25,000 per month prior to his detentions in 1995-1996, Guinea asserts

that, during the period that has elapsed since Mr. Diallo's expulsion on 31 January 1996, he has lost additional "professional income" in the amount of US$4,755,500. Guinea further asserts that this amount should be adjusted upward to account for inflation, such that its estimate of Mr. Diallo's loss of professional remuneration since his expulsion is US$6,430,148.

48. The DRC reiterates its position regarding the claim for unpaid remuneration from the period of Mr. Diallo's detentions, in particular the lack of evidence to support the claim that Mr. Diallo was receiving remuneration of US$25,000 per month prior to his detentions and expulsion.

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49. For the reasons indicated above, the Court has already rejected the claim for loss of professional remuneration during the period of Mr. Diallo's detentions (see paragraphs 38-46). Those reasons also apply with respect to Guinea's claim relating to the period following Mr. Diallo's expulsion. Moreover, Guinea's claim with respect to Mr. Diallo's post-expulsion remuneration is highly speculative and assumes that Mr. Diallo would have continued to receive US$25,000 per month had he not been unlawfully expelled. While an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative (cf. *Khamidov* v. *Russia*, application No. 72118/01, judgment of 15 November 2007 (merits and just satisfaction), ECHR, para. 197; *Chaparro Alvarez and Lapo Iñiguez* v. *Ecuador*, judgment of 21 November 2007 (preliminary objections, merits, reparations and costs), IACHR, Series C, No. 170, paras. 235-236; see also Commentary to Article 36, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, Vol. II (2), pp. 104-105 (concerning "lost profits" claims)). Thus, the Court concludes that no compensation can be awarded for Guinea's claim relating to unpaid remuneration following Mr. Diallo's expulsion.

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50. The Court therefore awards no compensation for remuneration that Mr. Diallo allegedly lost during his detentions and following his expulsion.

3. Alleged deprivation of potential earnings

51. Guinea makes an additional claim that it describes as relating to Mr. Diallo's "potential earnings". Specifically, Guinea states that Mr. Diallo's unlawful detentions and subsequent expulsion resulted in a

decline in the value of the two companies and the dispersal of their assets. Guinea also asserts that Mr. Diallo was unable to assign his holdings *(parts sociales)* in these companies to third parties and that his loss of potential earnings can be valued at 50 per cent of the "exchange value of the holdings", a sum that, according to Guinea, totals US$4,360,000.

52. The DRC points out that Guinea's calculation of the alleged loss to Mr. Diallo is based on assets belonging to the two companies, and not assets that belong to Mr. Diallo in his individual capacity. Furthermore, the DRC contends that Guinea provides no proof that the companies' assets have, in fact, been lost or that specific assets of Africom-Zaire or Africontainers-Zaire to which Guinea refers could not be sold on the open market.

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53. The Court considers that Guinea's claim concerning "potential earnings" amounts to a claim for a loss in the value of the companies allegedly resulting from Mr. Diallo's detentions and expulsion. Such a claim is beyond the scope of these proceedings, given this Court's prior decision that Guinea's claims relating to the injuries alleged to have been caused to the companies are inadmissible (*I.C.J. Reports 2007 (II)*, p. 617, para. 98, subpara. (1) *(b)* of the operative part).

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54. For these reasons, the Court awards no compensation to Guinea in respect of its claim relating to the "potential earnings" of Mr. Diallo.

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55. Having analysed the components of Guinea's claim in respect of material injury caused to Mr. Diallo as a result of the DRC's unlawful conduct, the Court awards compensation to Guinea in the amount of US$10,000.

III. Total Sum Awarded and Post-Judgment Interest

56. The total sum awarded to Guinea is US$95,000 to be paid by 31 August 2012. The Court expects timely payment and has no reason to assume that the DRC will not act accordingly. Nevertheless, considering that the award of post-judgment interest is consistent with the practice of other international courts and tribunals (see, for example, *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, judgment of 1 July 1999, ITLOS, para. 175; *Bámaca-Velásquez* v. *Guatemala*, judgment of 22 February 2002 (reparations and costs), IACHR, Series C, No. 91, para. 103; *Papamichalopoulos and Others* v. *Greece (Article 50)*,

application No. 33808/02, judgment of 31 October 1995, ECHR, Series A, No. 330-B, para. 39; *Lordos and Others* v. *Turkey*, application No. 15973/90, judgment of 10 January 2012 (just satisfaction), ECHR, para. 76 and *dispositif*, para. 1 *(b)*), the Court decides that, should payment be delayed, post-judgment interest on the principal sum due will accrue as from 1 September 2012 at an annual rate of 6 per cent. This rate has been fixed taking into account the prevailing interest rates on the international market and the importance of prompt compliance.

57. The Court recalls that the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury.

IV. Procedural Costs

58. Guinea requests the Court to award costs in its favour, in the amount of US$500,000, because, "as a result of having been forced to institute the present proceedings, the Guinean State has incurred unrecoverable costs which it should not, in equity, be required to bear".

59. The DRC asks the Court "to dismiss the request for the reimbursement of costs submitted by Guinea and to leave each State to bear its own costs of the proceedings, including the costs of its counsel, advocates and others". The DRC contends that Guinea lost the major part of the case and that, moreover, the amount claimed "represents an arbitrary, lump-sum determination, unsupported by any serious and credible evidence".

*

60. The Court recalls that Article 64 of the Statute provides that, "[u]nless otherwise decided by the Court, each party shall bear its own costs". While the general rule has so far always been followed by the Court, Article 64 implies that there may be circumstances which would make it appropriate for the Court to allocate costs in favour of one of the parties. However, the Court does not consider that any such circumstances exist in the present case. Accordingly, each Party shall bear its own costs.

* * *

61. For these reasons,

THE COURT,

(1) By fifteen votes to one,

Fixes the amount of compensation due from the Democratic Republic of the Congo to the Republic of Guinea for the non-material injury suffered by Mr. Diallo at US$85,000;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; *Judge* ad hoc Mahiou;

AGAINST: *Judge* ad hoc Mampuya;

(2) By fifteen votes to one,

Fixes the amount of compensation due from the Democratic Republic of the Congo to the Republic of Guinea for the material injury suffered by Mr. Diallo in relation to his personal property at US$10,000;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; *Judge* ad hoc Mahiou;

AGAINST: *Judge* ad hoc Mampuya;

(3) By fourteen votes to two,

Finds that no compensation is due from the Democratic Republic of the Congo to the Republic of Guinea with regard to the claim concerning material injury allegedly suffered by Mr. Diallo as a result of a loss of professional remuneration during his unlawful detentions and following his unlawful expulsion;

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde; *Judge* ad hoc Mampuya;

AGAINST: *Judge* Yusuf; *Judge* ad hoc Mahiou;

(4) Unanimously,

Finds that no compensation is due from the Democratic Republic of the Congo to the Republic of Guinea with regard to the claim concerning material injury allegedly suffered by Mr. Diallo as a result of a deprivation of potential earnings;

(5) Unanimously,

Decides that the total amount of compensation due under points 1 and 2 above shall be paid by 31 August 2012 and that, in case it has not been paid by this date, interest on the principal sum due from the Democratic Republic of the Congo to the Republic of Guinea will accrue as from 1 September 2012 at an annual rate of 6 per cent;

(6) By fifteen votes to one,

Rejects the claim of the Republic of Guinea concerning the costs incurred in the proceedings.

IN FAVOUR: *President* Tomka; *Vice-President* Sepúlveda-Amor; *Judges* Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; *Judge* ad hoc Mampuya;

AGAINST: *Judge* ad hoc Mahiou.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this nineteenth day of June, two thousand and twelve, 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 Guinea and the Government of the Democratic Republic of the Congo, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judges YUSUF and GREENWOOD append declarations to the Judgment of the Court; Judges *ad hoc* MAHIOU and MAMPUYA append separate opinions to the Judgment of the Court.

(Initialled) P.T.

(Initialled) Ph.C.

Annex 118

Climate Change 2014
Synthesis Report
Summary for Policymakers

Introduction

This Synthesis Report is based on the reports of the three Working Groups of the Intergovernmental Panel on Climate Change (IPCC), including relevant Special Reports. It provides an integrated view of climate change as the final part of the IPCC's Fifth Assessment Report (AR5).

This summary follows the structure of the longer report which addresses the following topics: Observed changes and their causes; Future climate change, risks and impacts; Future pathways for adaptation, mitigation and sustainable development; Adaptation and mitigation.

In the Synthesis Report, the certainty in key assessment findings is communicated as in the Working Group Reports and Special Reports. It is based on the author teams' evaluations of underlying scientific understanding and is expressed as a qualitative level of confidence (from *very low* to *very high*) and, when possible, probabilistically with a quantified likelihood (from *exceptionally unlikely* to *virtually certain*)[1]. Where appropriate, findings are also formulated as statements of fact without using uncertainty qualifiers.

This report includes information relevant to Article 2 of the United Nations Framework Convention on Climate Change (UNFCCC).

SPM 1. Observed Changes and their Causes

Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems. *{1}*

SPM 1.1 Observed changes in the climate system

Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, and sea level has risen. *{1.1}*

Each of the last three decades has been successively warmer at the Earth's surface than any preceding decade since 1850. The period from 1983 to 2012 was *likely* the warmest 30-year period of the last 1400 years in the Northern Hemisphere, where such assessment is possible (*medium confidence*). The globally averaged combined land and ocean surface temperature data as calculated by a linear trend show a warming of 0.85 [0.65 to 1.06] °C[2] over the period 1880 to 2012, when multiple independently produced datasets exist (Figure SPM.1a). *{1.1.1, Figure 1.1}*

In addition to robust multi-decadal warming, the globally averaged surface temperature exhibits substantial decadal and interannual variability (Figure SPM.1a). Due to this natural variability, trends based on short records are very sensitive to the beginning and end dates and do not in general reflect long-term climate trends. As one example, the rate of warming over

[1] Each finding is grounded in an evaluation of underlying evidence and agreement. In many cases, a synthesis of evidence and agreement supports an assignment of confidence. The summary terms for evidence are: limited, medium or robust. For agreement, they are low, medium or high. A level of confidence is expressed using five qualifiers: very low, low, medium, high and very high, and typeset in italics, e.g., *medium confidence*. The following terms have been used to indicate the assessed likelihood of an outcome or a result: virtually certain 99–100% probability, very likely 90–100%, likely 66–100%, about as likely as not 33–66%, unlikely 0–33%, very unlikely 0–10%, exceptionally unlikely 0–1%. Additional terms (extremely likely 95–100%, more likely than not >50–100%, more unlikely than likely 0–<50%, extremely unlikely 0–5%) may also be used when appropriate. Assessed likelihood is typeset in italics, e.g., *very likely*. See for more details: Mastrandrea, M.D., C.B. Field, T.F. Stocker, O. Edenhofer, K.L. Ebi, D.J. Frame, H. Held, E. Kriegler, K.J. Mach, P.R. Matschoss, G.-K. Plattner, G.W. Yohe and F.W. Zwiers, 2010: Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties, Intergovernmental Panel on Climate Change (IPCC), Geneva, Switzerland, 4 pp.

[2] Ranges in square brackets or following '±' are expected to have a 90% likelihood of including the value that is being estimated, unless otherwise stated.

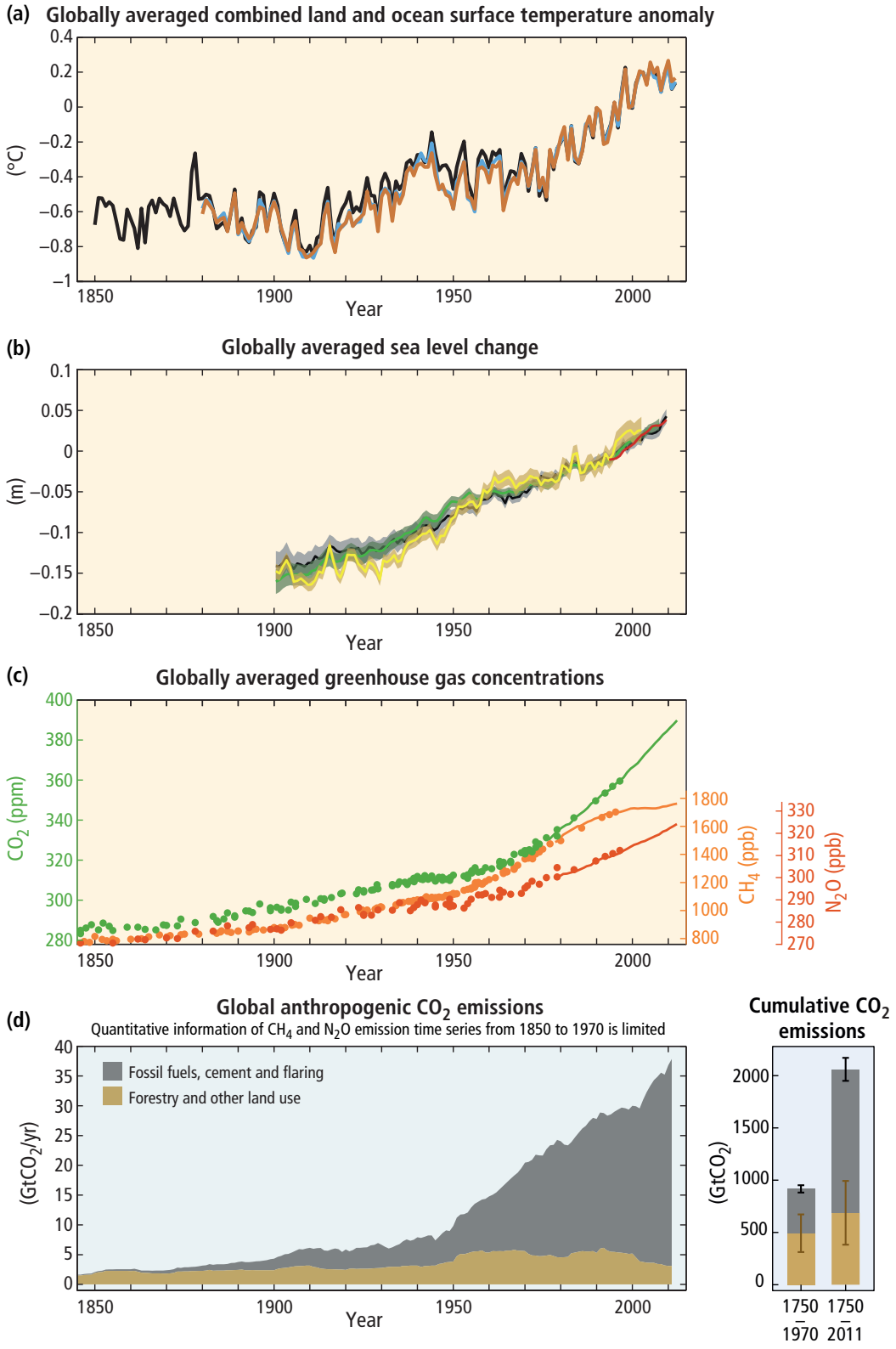

Figure SPM.1 | The complex relationship between the observations (panels a, b, c, yellow background) and the emissions (panel d, light blue background) is addressed in Section 1.2 and Topic 1. Observations and other indicators of a changing global climate system. Observations: **(a)** Annually and globally averaged combined land and ocean surface temperature anomalies relative to the average over the period 1986 to 2005. Colours indicate different data sets. **(b)** Annually and globally averaged sea level change relative to the average over the period 1986 to 2005 in the longest-running dataset. Colours indicate different data sets. All datasets are aligned to have the same value in 1993, the first year of satellite altimetry data (red). Where assessed, uncertainties are indicated by coloured shading. **(c)** Atmospheric concentrations of the greenhouse gases carbon dioxide (CO_2, green), methane (CH_4, orange) and nitrous oxide (N_2O, red) determined from ice core data (dots) and from direct atmospheric measurements (lines). Indicators: **(d)** Global anthropogenic CO_2 emissions from forestry and other land use as well as from burning of fossil fuel, cement production and flaring. Cumulative emissions of CO_2 from these sources and their uncertainties are shown as bars and whiskers, respectively, on the right hand side. The global effects of the accumulation of CH_4 and N_2O emissions are shown in panel c. Greenhouse gas emission data from 1970 to 2010 are shown in Figure SPM.2. *{Figures 1.1, 1.3, 1.5}*

the past 15 years (1998–2012; 0.05 [–0.05 to 0.15] °C per decade), which begins with a strong El Niño, is smaller than the rate calculated since 1951 (1951–2012; 0.12 [0.08 to 0.14] °C per decade). *{1.1.1, Box 1.1}*

Ocean warming dominates the increase in energy stored in the climate system, accounting for more than 90% of the energy accumulated between 1971 and 2010 (*high confidence*), with only about 1% stored in the atmosphere. On a global scale, the ocean warming is largest near the surface, and the upper 75 m warmed by 0.11 [0.09 to 0.13] °C per decade over the period 1971 to 2010. It is *virtually certain* that the upper ocean (0–700 m) warmed from 1971 to 2010, and it *likely* warmed between the 1870s and 1971. *{1.1.2, Figure 1.2}*

Averaged over the mid-latitude land areas of the Northern Hemisphere, precipitation has increased since 1901 (*medium confidence* before and *high confidence* after 1951). For other latitudes, area-averaged long-term positive or negative trends have *low confidence*. Observations of changes in ocean surface salinity also provide indirect evidence for changes in the global water cycle over the ocean (*medium confidence*). It is *very likely* that regions of high salinity, where evaporation dominates, have become more saline, while regions of low salinity, where precipitation dominates, have become fresher since the 1950s. *{1.1.1, 1.1.2}*

Since the beginning of the industrial era, oceanic uptake of CO_2 has resulted in acidification of the ocean; the pH of ocean surface water has decreased by 0.1 (*high confidence*), corresponding to a 26% increase in acidity, measured as hydrogen ion concentration. *{1.1.2}*

Over the period 1992 to 2011, the Greenland and Antarctic ice sheets have been losing mass (*high confidence*), *likely* at a larger rate over 2002 to 2011. Glaciers have continued to shrink almost worldwide (*high confidence*). Northern Hemisphere spring snow cover has continued to decrease in extent (*high confidence*). There is *high confidence* that permafrost temperatures have increased in most regions since the early 1980s in response to increased surface temperature and changing snow cover. *{1.1.3}*

The annual mean Arctic sea-ice extent decreased over the period 1979 to 2012, with a rate that was *very likely* in the range 3.5 to 4.1% per decade. Arctic sea-ice extent has decreased in every season and in every successive decade since 1979, with the most rapid decrease in decadal mean extent in summer (*high confidence*). It is *very likely* that the annual mean Antarctic sea-ice extent increased in the range of 1.2 to 1.8% per decade between 1979 and 2012. However, there is *high confidence* that there are strong regional differences in Antarctica, with extent increasing in some regions and decreasing in others. *{1.1.3, Figure 1.1}*

Over the period 1901 to 2010, global mean sea level rose by 0.19 [0.17 to 0.21] m (Figure SPM.1b). The rate of sea level rise since the mid-19th century has been larger than the mean rate during the previous two millennia (*high confidence*). *{1.1.4, Figure 1.1}*

SPM 1.2 Causes of climate change

Anthropogenic greenhouse gas emissions have increased since the pre-industrial era, driven largely by economic and population growth, and are now higher than ever. This has led to atmospheric concentrations of carbon dioxide, methane and nitrous oxide that are unprecedented in at least the last 800,000 years. Their effects, together with those of other anthropogenic drivers, have been detected throughout the climate system and are *extremely likely* to have been the dominant cause of the observed warming since the mid-20th century. *{1.2, 1.3.1}*

Anthropogenic greenhouse gas (GHG) emissions since the pre-industrial era have driven large increases in the atmospheric concentrations of carbon dioxide (CO_2), methane (CH_4) and nitrous oxide (N_2O) (Figure SPM.1c). Between 1750 and 2011, cumulative anthropogenic CO_2 emissions to the atmosphere were 2040 ± 310 $GtCO_2$. About 40% of these emissions have remained in the atmosphere (880 ± 35 $GtCO_2$); the rest was removed from the atmosphere and stored on land (in plants and soils) and in the ocean. The ocean has absorbed about 30% of the emitted anthropogenic CO_2, causing ocean acidification. About half of the anthropogenic CO_2 emissions between 1750 and 2011 have occurred in the last 40 years (*high confidence*) (Figure SPM.1d). *{1.2.1, 1.2.2}*

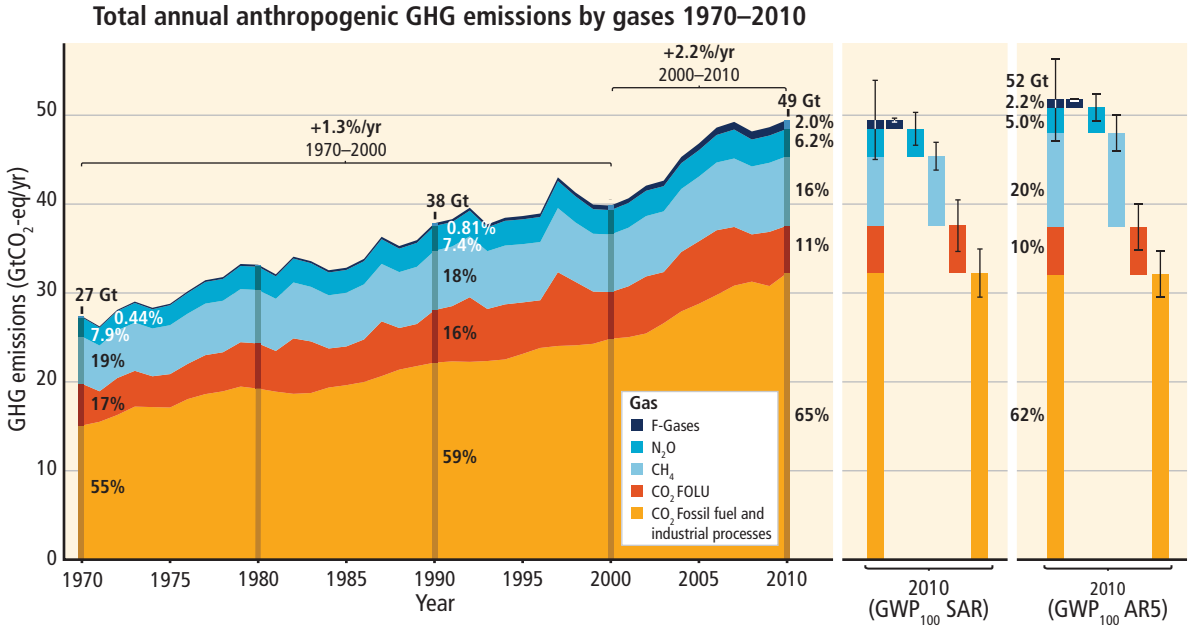

Figure SPM.2 | Total annual anthropogenic greenhouse gas (GHG) emissions (gigatonne of CO_2-equivalent per year, $GtCO_2$-eq/yr) for the period 1970 to 2010 by gases: CO_2 from fossil fuel combustion and industrial processes; CO_2 from Forestry and Other Land Use (FOLU); methane (CH_4); nitrous oxide (N_2O); fluorinated gases covered under the Kyoto Protocol (F-gases). Right hand side shows 2010 emissions, using alternatively CO_2-equivalent emission weightings based on IPCC Second Assessment Report (SAR) and AR5 values. Unless otherwise stated, CO_2-equivalent emissions in this report include the basket of Kyoto gases (CO_2, CH_4, N_2O as well as F-gases) calculated based on 100-year Global Warming Potential (GWP_{100}) values from the SAR (see Glossary). Using the most recent GWP_{100} values from the AR5 (right-hand bars) would result in higher total annual GHG emissions (52 $GtCO_2$-eq/yr) from an increased contribution of methane, but does not change the long-term trend significantly. *{Figure 1.6, Box 3.2}*

Total anthropogenic GHG emissions have continued to increase over 1970 to 2010 with larger absolute increases between 2000 and 2010, despite a growing number of climate change mitigation policies. Anthropogenic GHG emissions in 2010 have reached 49 ± 4.5 $GtCO_2$-eq/yr [3]. Emissions of CO_2 from fossil fuel combustion and industrial processes contributed about 78% of the total GHG emissions increase from 1970 to 2010, with a similar percentage contribution for the increase during the period 2000 to 2010 (*high confidence*) (Figure SPM.2). Globally, economic and population growth continued to be the most important drivers of increases in CO_2 emissions from fossil fuel combustion. The contribution of population growth between 2000 and 2010 remained roughly identical to the previous three decades, while the contribution of economic growth has risen sharply. Increased use of coal has reversed the long-standing trend of gradual decarbonization (i.e., reducing the carbon intensity of energy) of the world's energy supply (*high confidence*). *{1.2.2}*

The evidence for human influence on the climate system has grown since the IPCC Fourth Assessment Report (AR4). It is *extremely likely* that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by the anthropogenic increase in GHG concentrations and other anthropogenic forcings together. The best estimate of the human-induced contribution to warming is similar to the observed warming over this period (Figure SPM.3). Anthropogenic forcings have *likely* made a substantial contribution to surface temperature increases since the mid-20th century over every continental region except Antarctica[4]. Anthropogenic influences have *likely* affected the global water cycle since 1960 and contributed to the retreat of glaciers since the 1960s and to the increased surface melting of the Greenland ice sheet since 1993. Anthropogenic influences have *very likely* contributed to Arctic sea-ice loss since 1979 and have *very likely* made a substantial contribution to increases in global upper ocean heat content (0–700 m) and to global mean sea level rise observed since the 1970s. *{1.3, Figure 1.10}*

[3] Greenhouse gas emissions are quantified as CO_2-equivalent ($GtCO_2$-eq) emissions using weightings based on the 100-year Global Warming Potentials, using IPCC Second Assessment Report values unless otherwise stated. *{Box 3.2}*

[4] For Antarctica, large observational uncertainties result in *low confidence* that anthropogenic forcings have contributed to the observed warming averaged over available stations.

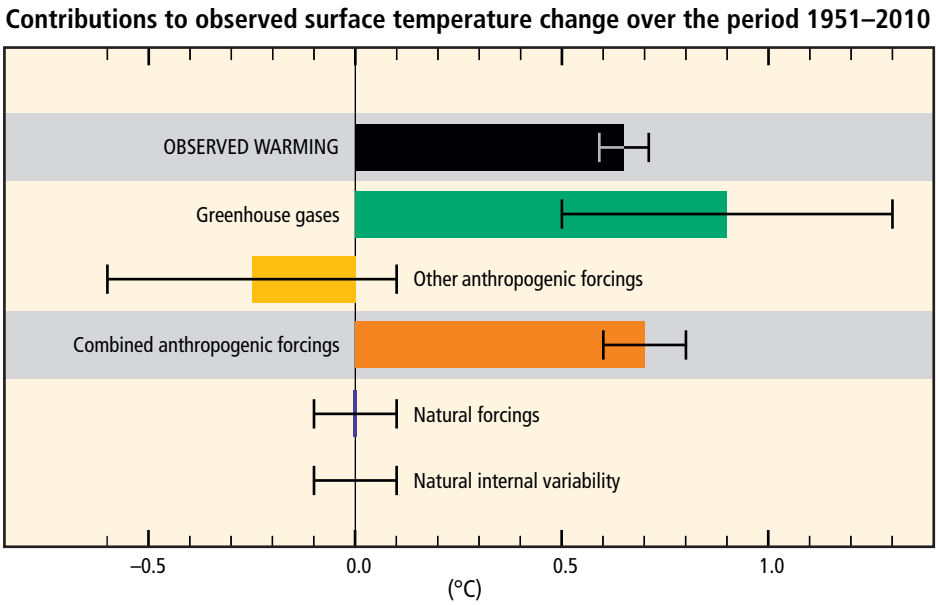

Figure SPM.3 | Assessed *likely* ranges (whiskers) and their mid-points (bars) for warming trends over the 1951–2010 period from well-mixed greenhouse gases, other anthropogenic forcings (including the cooling effect of aerosols and the effect of land use change), combined anthropogenic forcings, natural forcings and natural internal climate variability (which is the element of climate variability that arises spontaneously within the climate system even in the absence of forcings). The observed surface temperature change is shown in black, with the 5 to 95% uncertainty range due to observational uncertainty. The attributed warming ranges (colours) are based on observations combined with climate model simulations, in order to estimate the contribution of an individual external forcing to the observed warming. The contribution from the combined anthropogenic forcings can be estimated with less uncertainty than the contributions from greenhouse gases and from other anthropogenic forcings separately. This is because these two contributions partially compensate, resulting in a combined signal that is better constrained by observations. *{Figure 1.9}*

SPM 1.3 Impacts of climate change

In recent decades, changes in climate have caused impacts on natural and human systems on all continents and across the oceans. Impacts are due to observed climate change, irrespective of its cause, indicating the sensitivity of natural and human systems to changing climate. *{1.3.2}*

Evidence of observed climate change impacts is strongest and most comprehensive for natural systems. In many regions, changing precipitation or melting snow and ice are altering hydrological systems, affecting water resources in terms of quantity and quality (*medium confidence*). Many terrestrial, freshwater and marine species have shifted their geographic ranges, seasonal activities, migration patterns, abundances and species interactions in response to ongoing climate change (*high confidence*). Some impacts on human systems have also been attributed to climate change, with a major or minor contribution of climate change distinguishable from other influences (Figure SPM.4). Assessment of many studies covering a wide range of regions and crops shows that negative impacts of climate change on crop yields have been more common than positive impacts (*high confidence*). Some impacts of ocean acidification on marine organisms have been attributed to human influence (*medium confidence*). *{1.3.2}*

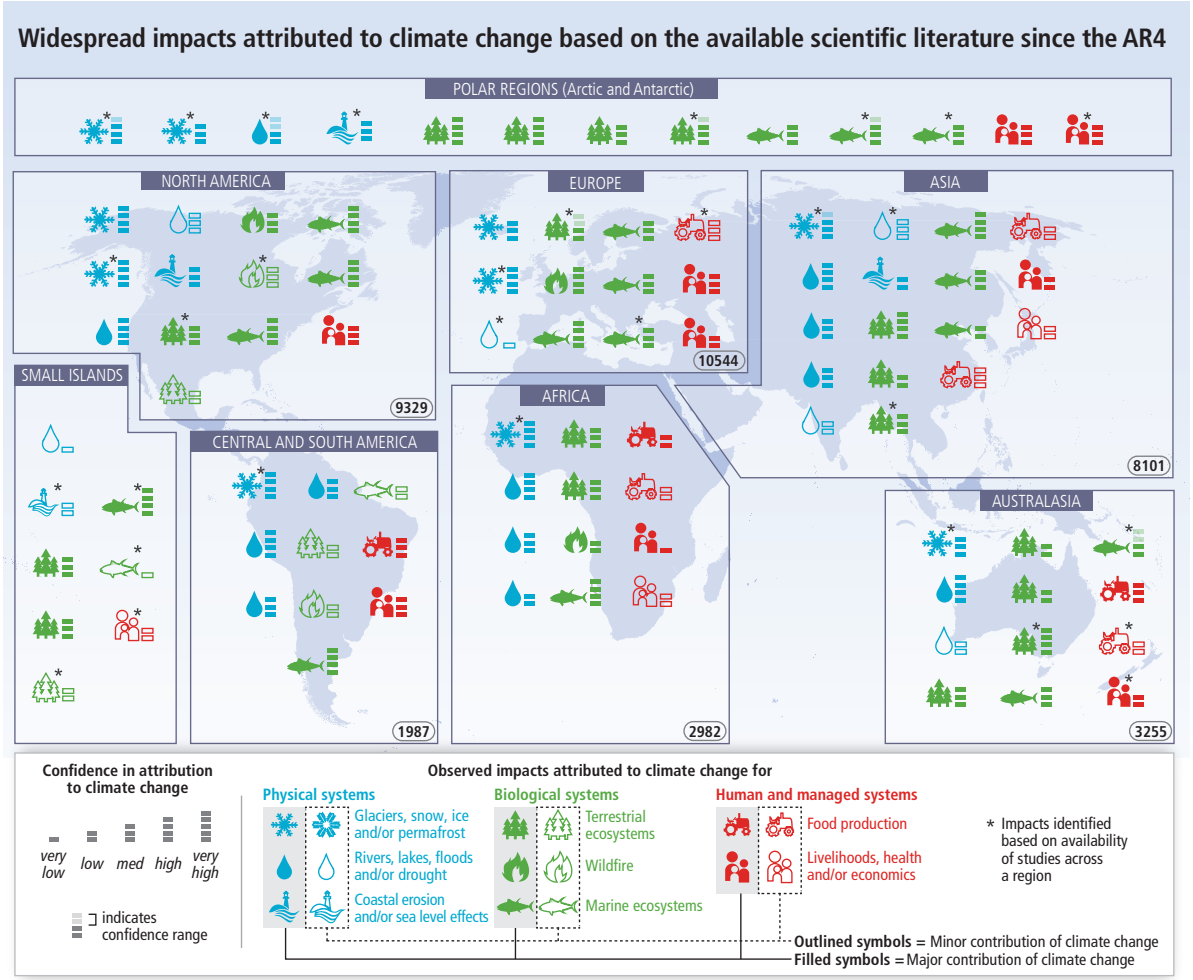

Figure SPM.4 | Based on the available scientific literature since the IPCC Fourth Assessment Report (AR4), there are substantially more impacts in recent decades now attributed to climate change. Attribution requires defined scientific evidence on the role of climate change. Absence from the map of additional impacts attributed to climate change does not imply that such impacts have not occurred. The publications supporting attributed impacts reflect a growing knowledge base, but publications are still limited for many regions, systems and processes, highlighting gaps in data and studies. Symbols indicate categories of attributed impacts, the relative contribution of climate change (major or minor) to the observed impact and confidence in attribution. Each symbol refers to one or more entries in WGII Table SPM.A1, grouping related regional-scale impacts. Numbers in ovals indicate regional totals of climate change publications from 2001 to 2010, based on the Scopus bibliographic database for publications in English with individual countries mentioned in title, abstract or key words (as of July 2011). These numbers provide an overall measure of the available scientific literature on climate change across regions; they do not indicate the number of publications supporting attribution of climate change impacts in each region. Studies for polar regions and small islands are grouped with neighbouring continental regions. The inclusion of publications for assessment of attribution followed IPCC scientific evidence criteria defined in WGII Chapter 18. Publications considered in the attribution analyses come from a broader range of literature assessed in the WGII AR5. See WGII Table SPM.A1 for descriptions of the attributed impacts. *{Figure 1.11}*

SPM 1.4 Extreme events

Changes in many extreme weather and climate events have been observed since about 1950. Some of these changes have been linked to human influences, including a decrease in cold temperature extremes, an increase in warm temperature extremes, an increase in extreme high sea levels and an increase in the number of heavy precipitation events in a number of regions. *{1.4}*

It is *very likely* that the number of cold days and nights has decreased and the number of warm days and nights has increased on the global scale. It is *likely* that the frequency of heat waves has increased in large parts of Europe, Asia and Australia. It is

very likely that human influence has contributed to the observed global scale changes in the frequency and intensity of daily temperature extremes since the mid-20th century. It is *likely* that human influence has more than doubled the probability of occurrence of heat waves in some locations. There is *medium confidence* that the observed warming has increased heat-related human mortality and decreased cold-related human mortality in some regions. *{1.4}*

There are *likely* more land regions where the number of heavy precipitation events has increased than where it has decreased. Recent detection of increasing trends in extreme precipitation and discharge in some catchments implies greater risks of flooding at regional scale (*medium confidence*). It is *likely* that extreme sea levels (for example, as experienced in storm surges) have increased since 1970, being mainly a result of rising mean sea level. *{1.4}*

Impacts from recent climate-related extremes, such as heat waves, droughts, floods, cyclones and wildfires, reveal significant vulnerability and exposure of some ecosystems and many human systems to current climate variability (*very high confidence*). *{1.4}*

SPM 2. Future Climate Changes, Risks and Impacts

Continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems. Limiting climate change would require substantial and sustained reductions in greenhouse gas emissions which, together with adaptation, can limit climate change risks. *{2}*

SPM 2.1 Key drivers of future climate

Cumulative emissions of CO_2 largely determine global mean surface warming by the late 21st century and beyond. Projections of greenhouse gas emissions vary over a wide range, depending on both socio-economic development and climate policy. *{2.1}*

Anthropogenic GHG emissions are mainly driven by population size, economic activity, lifestyle, energy use, land use patterns, technology and climate policy. The Representative Concentration Pathways (RCPs), which are used for making projections based on these factors, describe four different 21st century pathways of GHG emissions and atmospheric concentrations, air pollutant emissions and land use. The RCPs include a stringent mitigation scenario (RCP2.6), two intermediate scenarios (RCP4.5 and RCP6.0) and one scenario with very high GHG emissions (RCP8.5). Scenarios without additional efforts to constrain emissions ('baseline scenarios') lead to pathways ranging between RCP6.0 and RCP8.5 (Figure SPM.5a). RCP2.6 is representative of a scenario that aims to keep global warming *likely* below 2°C above pre-industrial temperatures. The RCPs are consistent with the wide range of scenarios in the literature as assessed by WGIII[5]. *{2.1, Box 2.2, 4.3}*

Multiple lines of evidence indicate a strong, consistent, almost linear relationship between cumulative CO_2 emissions and projected global temperature change to the year 2100 in both the RCPs and the wider set of mitigation scenarios analysed in WGIII (Figure SPM.5b). Any given level of warming is associated with a range of cumulative CO_2 emissions[6], and therefore, e.g., higher emissions in earlier decades imply lower emissions later. *{2.2.5, Table 2.2}*

[5] Roughly 300 baseline scenarios and 900 mitigation scenarios are categorized by CO_2-equivalent concentration (CO_2-eq) by 2100. The CO_2-eq includes the forcing due to all GHGs (including halogenated gases and tropospheric ozone), aerosols and albedo change.

[6] Quantification of this range of CO_2 emissions requires taking into account non-CO_2 drivers.

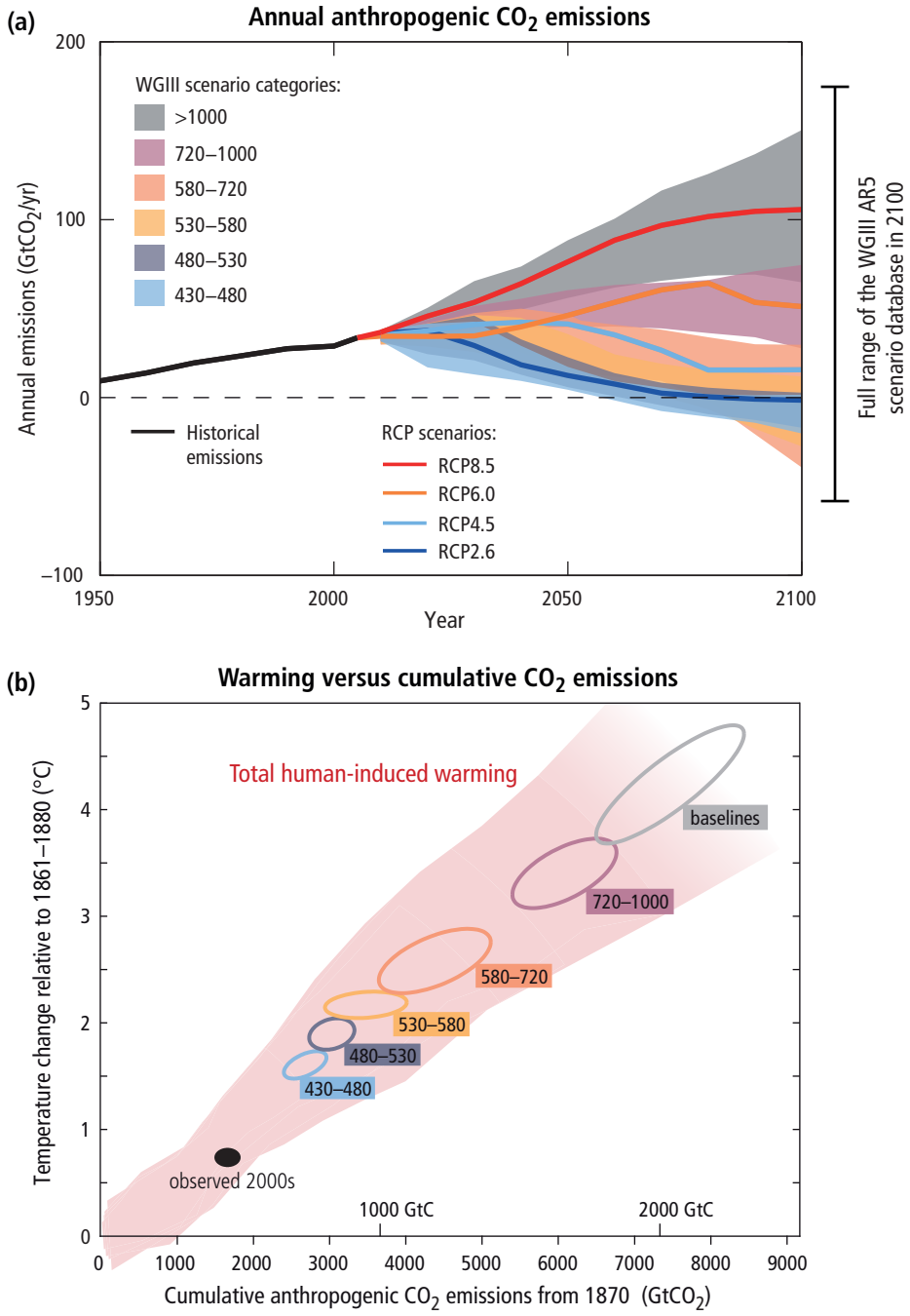

Figure SPM.5 | **(a)** Emissions of carbon dioxide (CO_2) alone in the Representative Concentration Pathways (RCPs) (lines) and the associated scenario categories used in WGIII (coloured areas show 5 to 95% range). The WGIII scenario categories summarize the wide range of emission scenarios published in the scientific literature and are defined on the basis of CO_2-eq concentration levels (in ppm) in 2100. The time series of other greenhouse gas emissions are shown in Box 2.2, Figure 1. **(b)** Global mean surface temperature increase at the time global CO_2 emissions reach a given net cumulative total, plotted as a function of that total, from various lines of evidence. Coloured plume shows the spread of past and future projections from a hierarchy of climate-carbon cycle models driven by historical emissions and the four RCPs over all times out to 2100, and fades with the decreasing number of available models. Ellipses show total anthropogenic warming in 2100 versus cumulative CO_2 emissions from 1870 to 2100 from a simple climate model (median climate response) under the scenario categories used in WGIII. The width of the ellipses in terms of temperature is caused by the impact of different scenarios for non-CO_2 climate drivers. The filled black ellipse shows observed emissions to 2005 and observed temperatures in the decade 2000–2009 with associated uncertainties. *{Box 2.2, Figure 1; Figure 2.3}*

Multi-model results show that limiting total human-induced warming to less than 2°C relative to the period 1861–1880 with a probability of >66%[7] would require cumulative CO_2 emissions from all anthropogenic sources since 1870 to remain below about 2900 $GtCO_2$ (with a range of 2550 to 3150 $GtCO_2$ depending on non-CO_2 drivers). About 1900 $GtCO_2$[8] had already been emitted by 2011. For additional context see Table 2.2. *{2.2.5}*

SPM 2.2 Projected changes in the climate system

Surface temperature is projected to rise over the 21st century under all assessed emission scenarios. It is *very likely* that heat waves will occur more often and last longer, and that extreme precipitation events will become more intense and frequent in many regions. The ocean will continue to warm and acidify, and global mean sea level to rise. *{2.2}*

The projected changes in Section SPM 2.2 are for 2081–2100 relative to 1986–2005, unless otherwise indicated.

Future climate will depend on committed warming caused by past anthropogenic emissions, as well as future anthropogenic emissions and natural climate variability. The global mean surface temperature change for the period 2016–2035 relative to 1986–2005 is similar for the four RCPs and will *likely* be in the range 0.3°C to 0.7°C (*medium confidence*). This assumes that there will be no major volcanic eruptions or changes in some natural sources (e.g., CH_4 and N_2O), or unexpected changes in total solar irradiance. By mid-21st century, the magnitude of the projected climate change is substantially affected by the choice of emissions scenario. *{2.2.1, Table 2.1}*

Relative to 1850–1900, global surface temperature change for the end of the 21st century (2081–2100) is projected to *likely* exceed 1.5°C for RCP4.5, RCP6.0 and RCP8.5 (*high confidence*). Warming is *likely* to exceed 2°C for RCP6.0 and RCP8.5 (*high confidence*), *more likely than not* to exceed 2°C for RCP4.5 (*medium confidence*), but *unlikely* to exceed 2°C for RCP2.6 (*medium confidence*). *{2.2.1}*

The increase of global mean surface temperature by the end of the 21st century (2081–2100) relative to 1986–2005 is *likely* to be 0.3°C to 1.7°C under RCP2.6, 1.1°C to 2.6°C under RCP4.5, 1.4°C to 3.1°C under RCP6.0 and 2.6°C to 4.8°C under RCP8.5[9]. The Arctic region will continue to warm more rapidly than the global mean (Figure SPM.6a, Figure SPM.7a). *{2.2.1, Figure 2.1, Figure 2.2, Table 2.1}*

It is *virtually certain* that there will be more frequent hot and fewer cold temperature extremes over most land areas on daily and seasonal timescales, as global mean surface temperature increases. It is *very likely* that heat waves will occur with a higher frequency and longer duration. Occasional cold winter extremes will continue to occur. *{2.2.1}*

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[7] Corresponding figures for limiting warming to 2°C with a probability of >50% and >33% are 3000 $GtCO_2$ (range of 2900 to 3200 $GtCO_2$) and 3300 $GtCO_2$ (range of 2950 to 3800 $GtCO_2$) respectively. Higher or lower temperature limits would imply larger or lower cumulative emissions respectively.

[8] This corresponds to about two thirds of the 2900 $GtCO_2$ that would limit warming to less than 2°C with a probability of >66%; to about 63% of the total amount of 3000 $GtCO_2$ that would limit warming to less than 2°C with a probability of >50%; and to about 58% of the total amount of 3300 $GtCO_2$ that would limit warming to less than 2°C with a probability of >33%.

[9] The period 1986–2005 is approximately 0.61 [0.55 to 0.67] °C warmer than 1850–1900. *{2.2.1}*

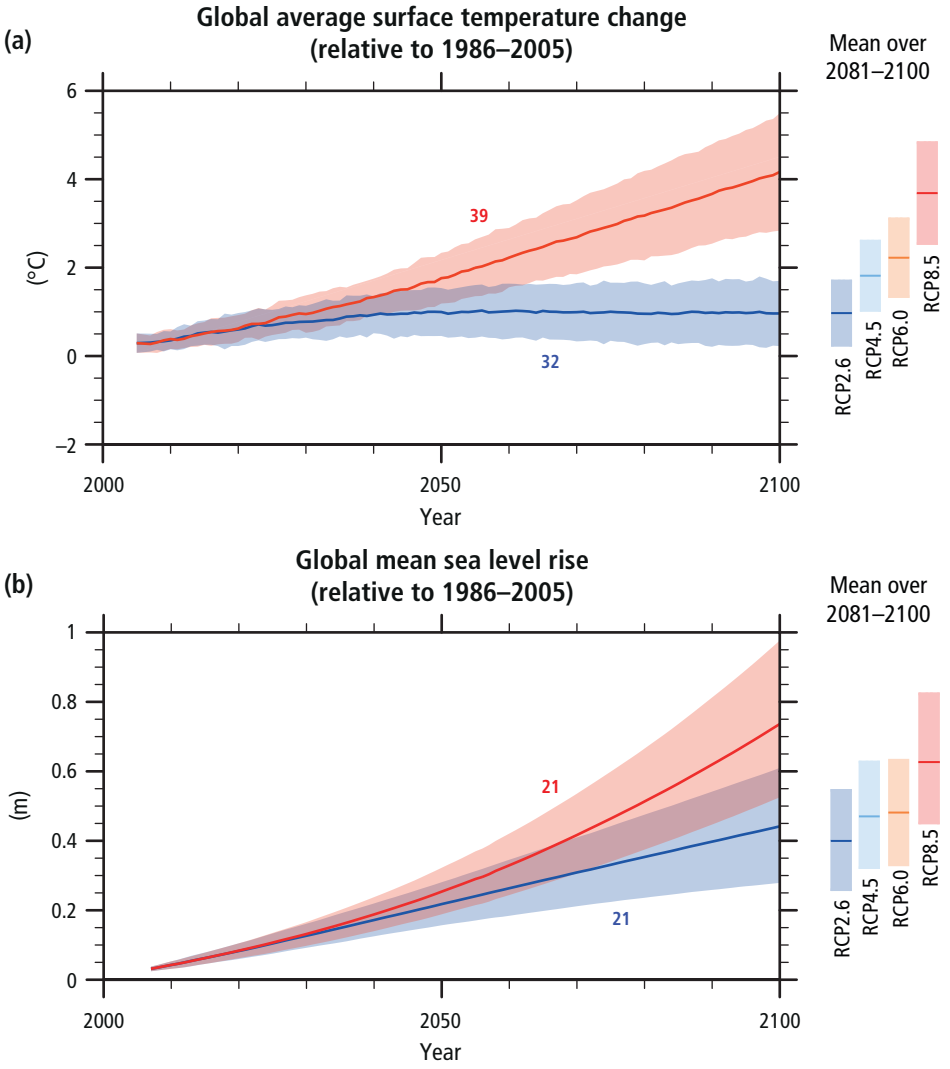

Figure SPM.6 | Global average surface temperature change **(a)** and global mean sea level rise[10] **(b)** from 2006 to 2100 as determined by multi-model simulations. All changes are relative to 1986–2005. Time series of projections and a measure of uncertainty (shading) are shown for scenarios RCP2.6 (blue) and RCP8.5 (red). The mean and associated uncertainties averaged over 2081–2100 are given for all RCP scenarios as coloured vertical bars at the right hand side of each panel. The number of Coupled Model Intercomparison Project Phase 5 (CMIP5) models used to calculate the multi-model mean is indicated. *{2.2, Figure 2.1}*

Changes in precipitation will not be uniform. The high latitudes and the equatorial Pacific are *likely* to experience an increase in annual mean precipitation under the RCP8.5 scenario. In many mid-latitude and subtropical dry regions, mean precipitation will *likely* decrease, while in many mid-latitude wet regions, mean precipitation will *likely* increase under the RCP8.5 scenario (Figure SPM.7b). Extreme precipitation events over most of the mid-latitude land masses and over wet tropical regions will *very likely* become more intense and more frequent. *{2.2.2, Figure 2.2}*

The global ocean will continue to warm during the 21st century, with the strongest warming projected for the surface in tropical and Northern Hemisphere subtropical regions (Figure SPM.7a). *{2.2.3, Figure 2.2}*

[10] Based on current understanding (from observations, physical understanding and modelling), only the collapse of marine-based sectors of the Antarctic ice sheet, if initiated, could cause global mean sea level to rise substantially above the *likely* range during the 21st century. There is *medium confidence* that this additional contribution would not exceed several tenths of a meter of sea level rise during the 21st century.

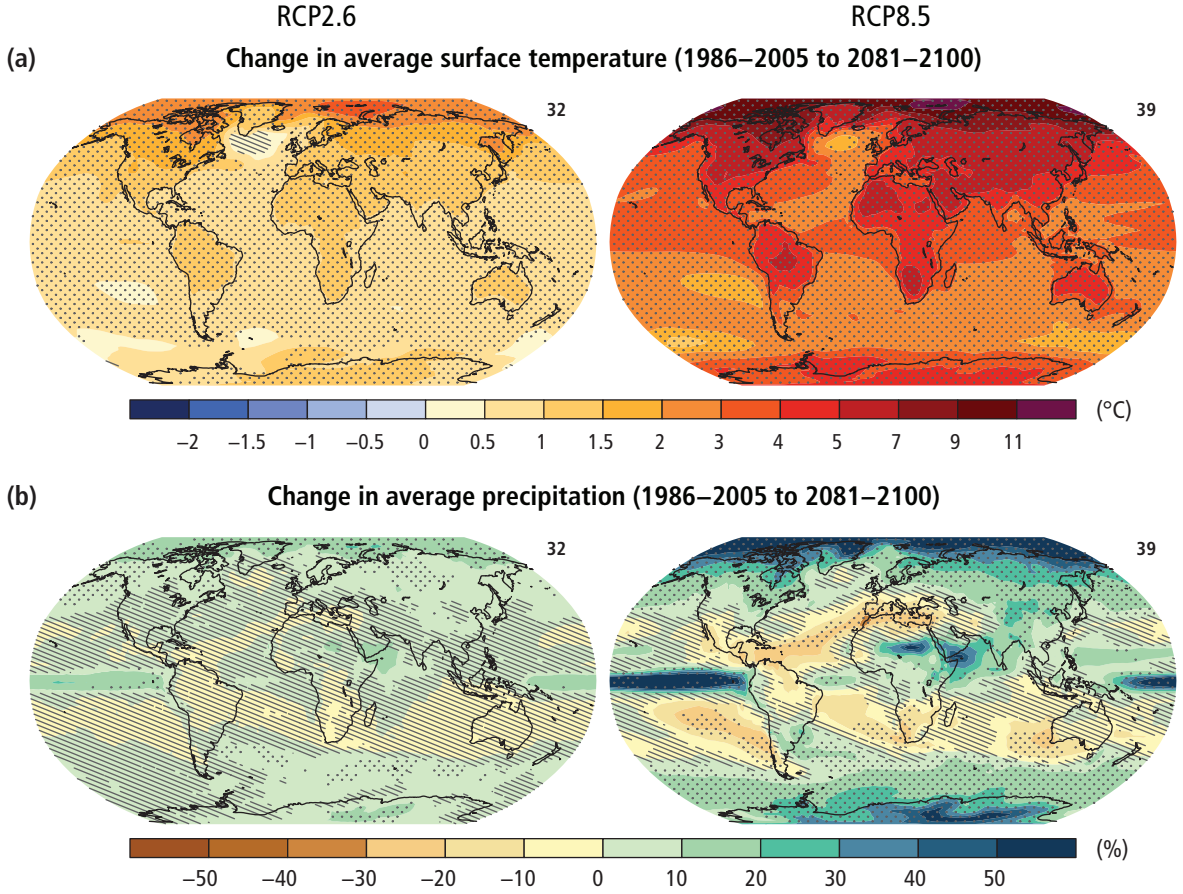

Figure SPM.7 | Change in average surface temperature **(a)** and change in average precipitation **(b)** based on multi-model mean projections for 2081–2100 relative to 1986–2005 under the RCP2.6 (left) and RCP8.5 (right) scenarios. The number of models used to calculate the multi-model mean is indicated in the upper right corner of each panel. Stippling (i.e., dots) shows regions where the projected change is large compared to natural internal variability and where at least 90% of models agree on the sign of change. Hatching (i.e., diagonal lines) shows regions where the projected change is less than one standard deviation of the natural internal variability. *{2.2, Figure 2.2}*

Earth System Models project a global increase in ocean acidification for all RCP scenarios by the end of the 21st century, with a slow recovery after mid-century under RCP2.6. The decrease in surface ocean pH is in the range of 0.06 to 0.07 (15 to 17% increase in acidity) for RCP2.6, 0.14 to 0.15 (38 to 41%) for RCP4.5, 0.20 to 0.21 (58 to 62%) for RCP6.0 and 0.30 to 0.32 (100 to 109%) for RCP8.5. *{2.2.4, Figure 2.1}*

Year-round reductions in Arctic sea ice are projected for all RCP scenarios. A nearly ice-free[11] Arctic Ocean in the summer sea-ice minimum in September before mid-century is *likely* for RCP8.5[12] (*medium confidence*). *{2.2.3, Figure 2.1}*

It is *virtually certain* that near-surface permafrost extent at high northern latitudes will be reduced as global mean surface temperature increases, with the area of permafrost near the surface (upper 3.5 m) projected to decrease by 37% (RCP2.6) to 81% (RCP8.5) for the multi-model average (*medium confidence*). *{2.2.3}*

The global glacier volume, excluding glaciers on the periphery of Antarctica (and excluding the Greenland and Antarctic ice sheets), is projected to decrease by 15 to 55% for RCP2.6 and by 35 to 85% for RCP8.5 (*medium confidence*). *{2.2.3}*

[11] When sea-ice extent is less than one million km^2 for at least five consecutive years.

[12] Based on an assessment of the subset of models that most closely reproduce the climatological mean state and 1979–2012 trend of the Arctic sea-ice extent.

There has been significant improvement in understanding and projection of sea level change since the AR4. Global mean sea level rise will continue during the 21st century, *very likely* at a faster rate than observed from 1971 to 2010. For the period 2081–2100 relative to 1986–2005, the rise will *likely* be in the ranges of 0.26 to 0.55 m for RCP2.6, and of 0.45 to 0.82 m for RCP8.5 (*medium confidence*)[10] (Figure SPM.6b). Sea level rise will not be uniform across regions. By the end of the 21st century, it is *very likely* that sea level will rise in more than about 95% of the ocean area. About 70% of the coastlines worldwide are projected to experience a sea level change within ±20% of the global mean. *{2.2.3}*

SPM 2.3 Future risks and impacts caused by a changing climate

Climate change will amplify existing risks and create new risks for natural and human systems. Risks are unevenly distributed and are generally greater for disadvantaged people and communities in countries at all levels of development. *{2.3}*

Risk of climate-related impacts results from the interaction of climate-related hazards (including hazardous events and trends) with the vulnerability and exposure of human and natural systems, including their ability to adapt. Rising rates and magnitudes of warming and other changes in the climate system, accompanied by ocean acidification, increase the risk of severe, pervasive and in some cases irreversible detrimental impacts. Some risks are particularly relevant for individual regions (Figure SPM.8), while others are global. The overall risks of future climate change impacts can be reduced by limiting the rate and magnitude of climate change, including ocean acidification. The precise levels of climate change sufficient to trigger abrupt and irreversible change remain uncertain, but the risk associated with crossing such thresholds increases with rising temperature (*medium confidence*). For risk assessment, it is important to evaluate the widest possible range of impacts, including low-probability outcomes with large consequences. *{1.5, 2.3, 2.4, 3.3, Box Introduction.1, Box 2.3, Box 2.4}*

A large fraction of species faces increased extinction risk due to climate change during and beyond the 21st century, especially as climate change interacts with other stressors (*high confidence*). Most plant species cannot naturally shift their geographical ranges sufficiently fast to keep up with current and high projected rates of climate change in most landscapes; most small mammals and freshwater molluscs will not be able to keep up at the rates projected under RCP4.5 and above in flat landscapes in this century (*high confidence*). Future risk is indicated to be high by the observation that natural global climate change at rates lower than current anthropogenic climate change caused significant ecosystem shifts and species extinctions during the past millions of years. Marine organisms will face progressively lower oxygen levels and high rates and magnitudes of ocean acidification (*high confidence*), with associated risks exacerbated by rising ocean temperature extremes (*medium confidence*). Coral reefs and polar ecosystems are highly vulnerable. Coastal systems and low-lying areas are at risk from sea level rise, which will continue for centuries even if the global mean temperature is stabilized (*high confidence*). *{2.3, 2.4, Figure 2.5}*

Climate change is projected to undermine food security (Figure SPM.9). Due to projected climate change by the mid-21st century and beyond, global marine species redistribution and marine biodiversity reduction in sensitive regions will challenge the sustained provision of fisheries productivity and other ecosystem services (*high confidence*). For wheat, rice and maize in tropical and temperate regions, climate change without adaptation is projected to negatively impact production for local temperature increases of 2°C or more above late 20th century levels, although individual locations may benefit (*medium confidence*). Global temperature increases of ~4°C or more[13] above late 20th century levels, combined with increasing food demand, would pose large risks to food security globally (*high confidence*). Climate change is projected to reduce renewable surface water and groundwater resources in most dry subtropical regions (*robust evidence*, *high agreement*), intensifying competition for water among sectors (*limited evidence*, *medium agreement*). *{2.3.1, 2.3.2}*

[13] Projected warming averaged over land is larger than global average warming for all RCP scenarios for the period 2081–2100 relative to 1986–2005. For regional projections, see Figure SPM.7. *{2.2}*

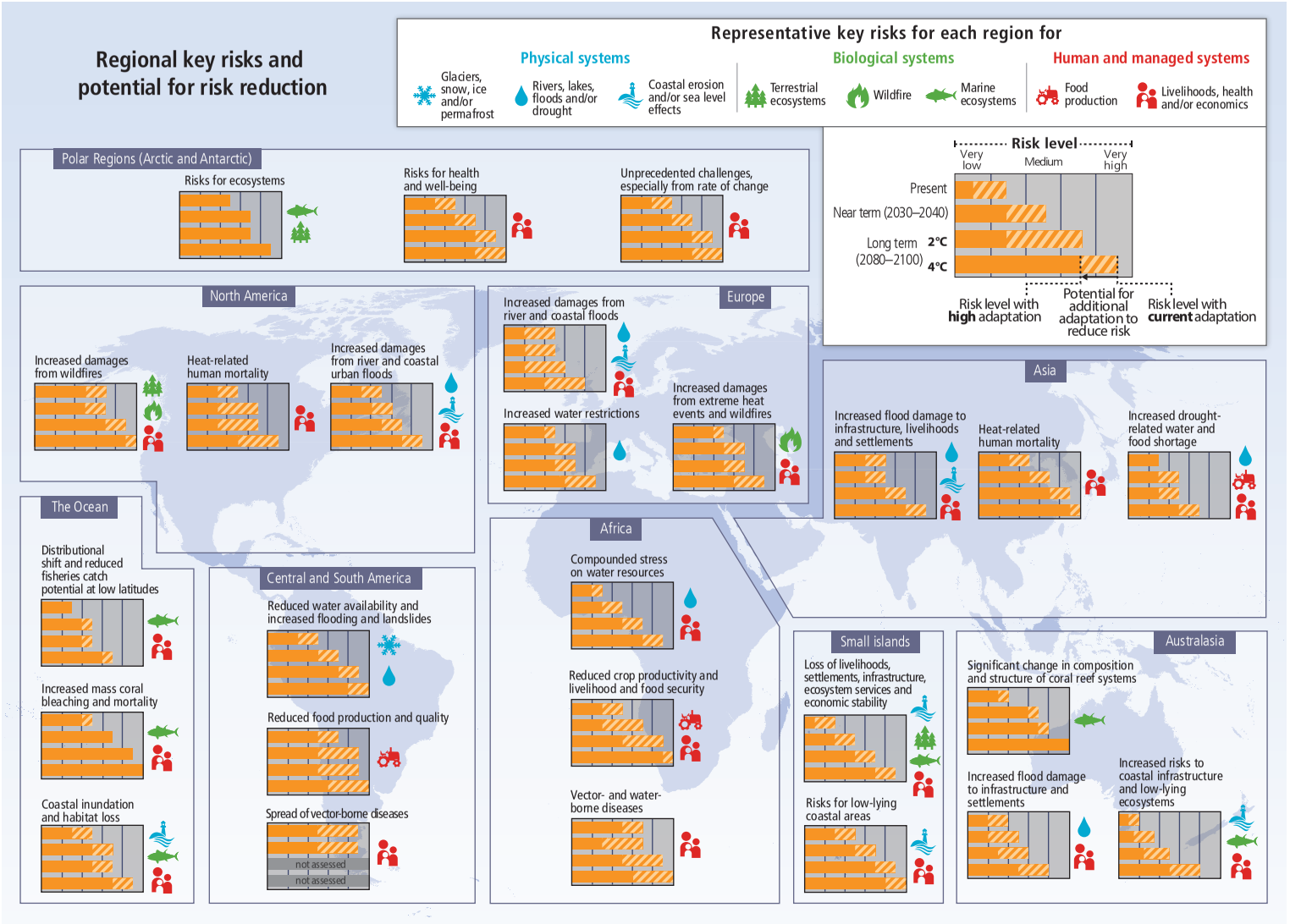

Figure SPM.8 | Representative key risks[14] for each region, including the potential for risk reduction through adaptation and mitigation, as well as limits to adaptation. Each key risk is assessed as very low, low, medium, high or very high. Risk levels are presented for three time frames: present, near term (here, for 2030–2040) and long term (here, for 2080–2100). In the near term, projected levels of global mean temperature increase do not diverge substantially across different emission scenarios. For the long term, risk levels are presented for two possible futures (2°C and 4°C global mean temperature increase above pre-industrial levels). For each timeframe, risk levels are indicated for a continuation of current adaptation and assuming high levels of current or future adaptation. Risk levels are not necessarily comparable, especially across regions. *{Figure 2.4}*

[14] Identification of key risks was based on expert judgment using the following specific criteria: large magnitude, high probability or irreversibility of impacts; timing of impacts; persistent vulnerability or exposure contributing to risks; or limited potential to reduce risks through adaptation or mitigation.

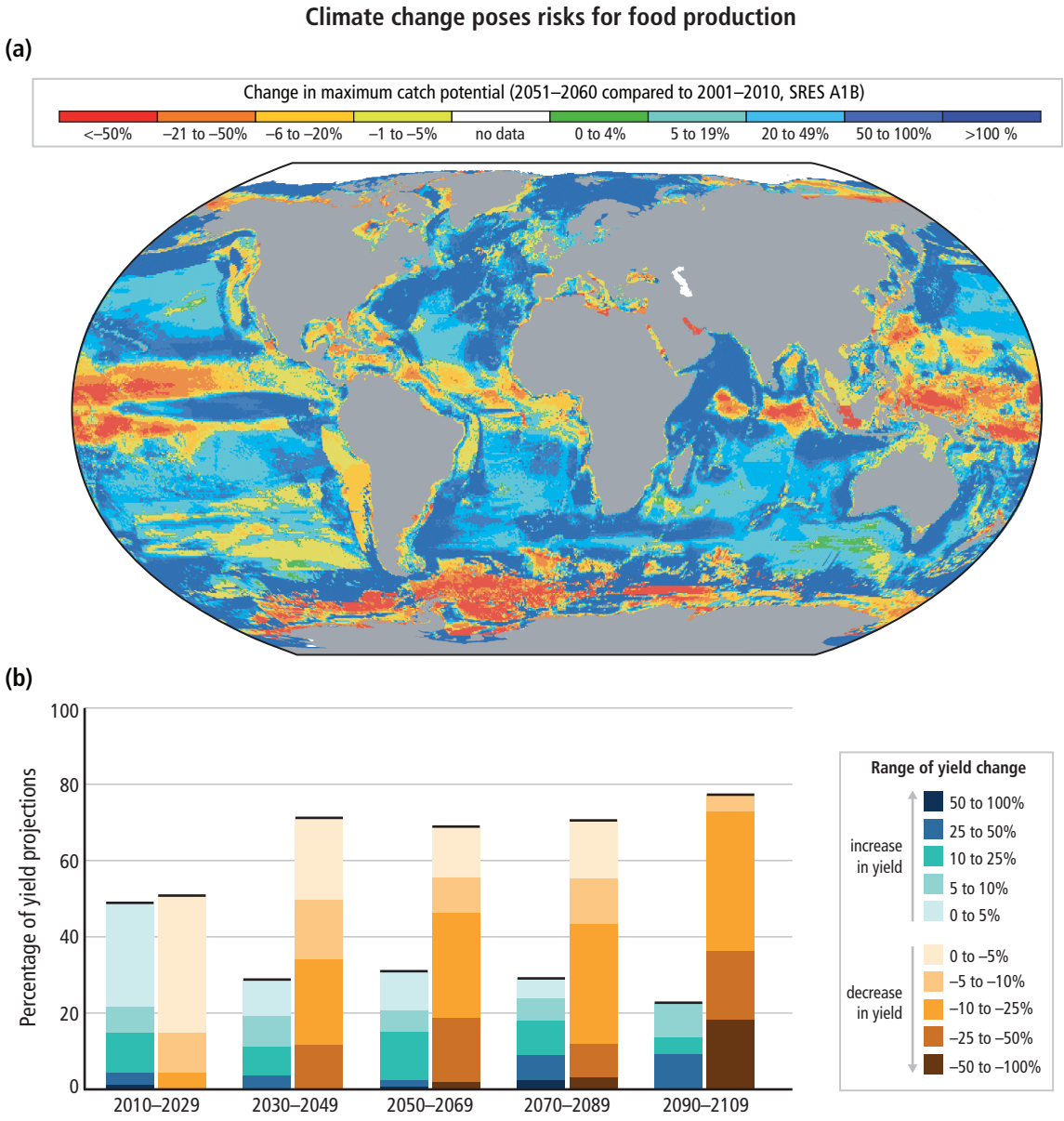

Figure SPM.9 | **(a)** Projected global redistribution of maximum catch potential of ~1000 exploited marine fish and invertebrate species. Projections compare the 10-year averages 2001–2010 and 2051–2060 using ocean conditions based on a single climate model under a moderate to high warming scenario, without analysis of potential impacts of overfishing or ocean acidification. **(b)** Summary of projected changes in crop yields (mostly wheat, maize, rice and soy), due to climate change over the 21st century. Data for each timeframe sum to 100%, indicating the percentage of projections showing yield increases versus decreases. The figure includes projections (based on 1090 data points) for different emission scenarios, for tropical and temperate regions and for adaptation and no-adaptation cases combined. Changes in crop yields are relative to late 20th century levels. *{Figure 2.6a, Figure 2.7}*

Until mid-century, projected climate change will impact human health mainly by exacerbating health problems that already exist (*very high confidence*). Throughout the 21st century, climate change is expected to lead to increases in ill-health in many regions and especially in developing countries with low income, as compared to a baseline without climate change (*high confidence*). By 2100 for RCP8.5, the combination of high temperature and humidity in some areas for parts of the year is expected to compromise common human activities, including growing food and working outdoors (*high confidence*). *{2.3.2}*

In urban areas climate change is projected to increase risks for people, assets, economies and ecosystems, including risks from heat stress, storms and extreme precipitation, inland and coastal flooding, landslides, air pollution, drought, water scarcity, sea level rise and storm surges (*very high confidence*). These risks are amplified for those lacking essential infrastructure and services or living in exposed areas. *{2.3.2}*

Rural areas are expected to experience major impacts on water availability and supply, food security, infrastructure and agricultural incomes, including shifts in the production areas of food and non-food crops around the world (*high confidence*). *{2.3.2}*

Aggregate economic losses accelerate with increasing temperature (*limited evidence, high agreement*), but global economic impacts from climate change are currently difficult to estimate. From a poverty perspective, climate change impacts are projected to slow down economic growth, make poverty reduction more difficult, further erode food security and prolong existing and create new poverty traps, the latter particularly in urban areas and emerging hotspots of hunger (*medium confidence*). International dimensions such as trade and relations among states are also important for understanding the risks of climate change at regional scales. *{2.3.2}*

Climate change is projected to increase displacement of people (*medium evidence, high agreement*). Populations that lack the resources for planned migration experience higher exposure to extreme weather events, particularly in developing countries with low income. Climate change can indirectly increase risks of violent conflicts by amplifying well-documented drivers of these conflicts such as poverty and economic shocks (*medium confidence*). *{2.3.2}*

SPM 2.4 Climate change beyond 2100, irreversibility and abrupt changes

Many aspects of climate change and associated impacts will continue for centuries, even if anthropogenic emissions of greenhouse gases are stopped. The risks of abrupt or irreversible changes increase as the magnitude of the warming increases. *{2.4}*

Warming will continue beyond 2100 under all RCP scenarios except RCP2.6. Surface temperatures will remain approximately constant at elevated levels for many centuries after a complete cessation of net anthropogenic CO_2 emissions. A large fraction of anthropogenic climate change resulting from CO_2 emissions is irreversible on a multi-century to millennial timescale, except in the case of a large net removal of CO_2 from the atmosphere over a sustained period. *{2.4, Figure 2.8}*

Stabilization of global average surface temperature does not imply stabilization for all aspects of the climate system. Shifting biomes, soil carbon, ice sheets, ocean temperatures and associated sea level rise all have their own intrinsic long timescales which will result in changes lasting hundreds to thousands of years after global surface temperature is stabilized. *{2.1, 2.4}*

There is *high confidence* that ocean acidification will increase for centuries if CO_2 emissions continue, and will strongly affect marine ecosystems. *{2.4}*

It is *virtually certain* that global mean sea level rise will continue for many centuries beyond 2100, with the amount of rise dependent on future emissions. The threshold for the loss of the Greenland ice sheet over a millennium or more, and an associated sea level rise of up to 7 m, is greater than about 1°C (*low confidence*) but less than about 4°C (*medium confidence*) of global warming with respect to pre-industrial temperatures. Abrupt and irreversible ice loss from the Antarctic ice sheet is possible, but current evidence and understanding is insufficient to make a quantitative assessment. *{2.4}*

Magnitudes and rates of climate change associated with medium- to high-emission scenarios pose an increased risk of abrupt and irreversible regional-scale change in the composition, structure and function of marine, terrestrial and freshwater ecosystems, including wetlands (*medium confidence*). A reduction in permafrost extent is *virtually certain* with continued rise in global temperatures. *{2.4}*

SPM 3. Future Pathways for Adaptation, Mitigation and Sustainable Development

Adaptation and mitigation are complementary strategies for reducing and managing the risks of climate change. Substantial emissions reductions over the next few decades can reduce climate risks in the 21st century and beyond, increase prospects for effective adaptation, reduce the costs and challenges of mitigation in the longer term and contribute to climate-resilient pathways for sustainable development. *{3.2, 3.3, 3.4}*

SPM 3.1 Foundations of decision-making about climate change

Effective decision-making to limit climate change and its effects can be informed by a wide range of analytical approaches for evaluating expected risks and benefits, recognizing the importance of governance, ethical dimensions, equity, value judgments, economic assessments and diverse perceptions and responses to risk and uncertainty. *{3.1}*

Sustainable development and equity provide a basis for assessing climate policies. Limiting the effects of climate change is necessary to achieve sustainable development and equity, including poverty eradication. Countries' past and future contributions to the accumulation of GHGs in the atmosphere are different, and countries also face varying challenges and circumstances and have different capacities to address mitigation and adaptation. Mitigation and adaptation raise issues of equity, justice and fairness. Many of those most vulnerable to climate change have contributed and contribute little to GHG emissions. Delaying mitigation shifts burdens from the present to the future, and insufficient adaptation responses to emerging impacts are already eroding the basis for sustainable development. Comprehensive strategies in response to climate change that are consistent with sustainable development take into account the co-benefits, adverse side effects and risks that may arise from both adaptation and mitigation options. *{3.1, 3.5, Box 3.4}*

The design of climate policy is influenced by how individuals and organizations perceive risks and uncertainties and take them into account. Methods of valuation from economic, social and ethical analysis are available to assist decision-making. These methods can take account of a wide range of possible impacts, including low-probability outcomes with large consequences. But they cannot identify a single best balance between mitigation, adaptation and residual climate impacts. *{3.1}*

Climate change has the characteristics of a collective action problem at the global scale, because most GHGs accumulate over time and mix globally, and emissions by any agent (e.g., individual, community, company, country) affect other agents. Effective mitigation will not be achieved if individual agents advance their own interests independently. Cooperative responses, including international cooperation, are therefore required to effectively mitigate GHG emissions and address other climate change issues. The effectiveness of adaptation can be enhanced through complementary actions across levels, including international cooperation. The evidence suggests that outcomes seen as equitable can lead to more effective cooperation. *{3.1}*

SPM 3.2 Climate change risks reduced by mitigation and adaptation

Without additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st century will lead to high to very high risk of severe, widespread and irreversible impacts globally (*high confidence*). Mitigation involves some level of co-benefits and of risks due to adverse side effects, but these risks do not involve the same possibility of severe, widespread and irreversible impacts as risks from climate change, increasing the benefits from near-term mitigation efforts. *{3.2, 3.4}*

Mitigation and adaptation are complementary approaches for reducing risks of climate change impacts over different timescales (*high confidence*). Mitigation, in the near term and through the century, can substantially reduce climate change

impacts in the latter decades of the 21st century and beyond. Benefits from adaptation can already be realized in addressing current risks, and can be realized in the future for addressing emerging risks. *{3.2, 4.5}*

Five Reasons For Concern (RFCs) aggregate climate change risks and illustrate the implications of warming and of adaptation limits for people, economies and ecosystems across sectors and regions. The five RFCs are associated with: (1) Unique and threatened systems, (2) Extreme weather events, (3) Distribution of impacts, (4) Global aggregate impacts, and (5) Large-scale singular events. In this report, the RFCs provide information relevant to Article 2 of UNFCCC. *{Box 2.4}*

Without additional mitigation efforts beyond those in place today, and even with adaptation, warming by the end of the 21st century will lead to high to very high risk of severe, widespread and irreversible impacts globally (*high confidence*) (Figure SPM.10). In most scenarios without additional mitigation efforts (those with 2100 atmospheric concentrations

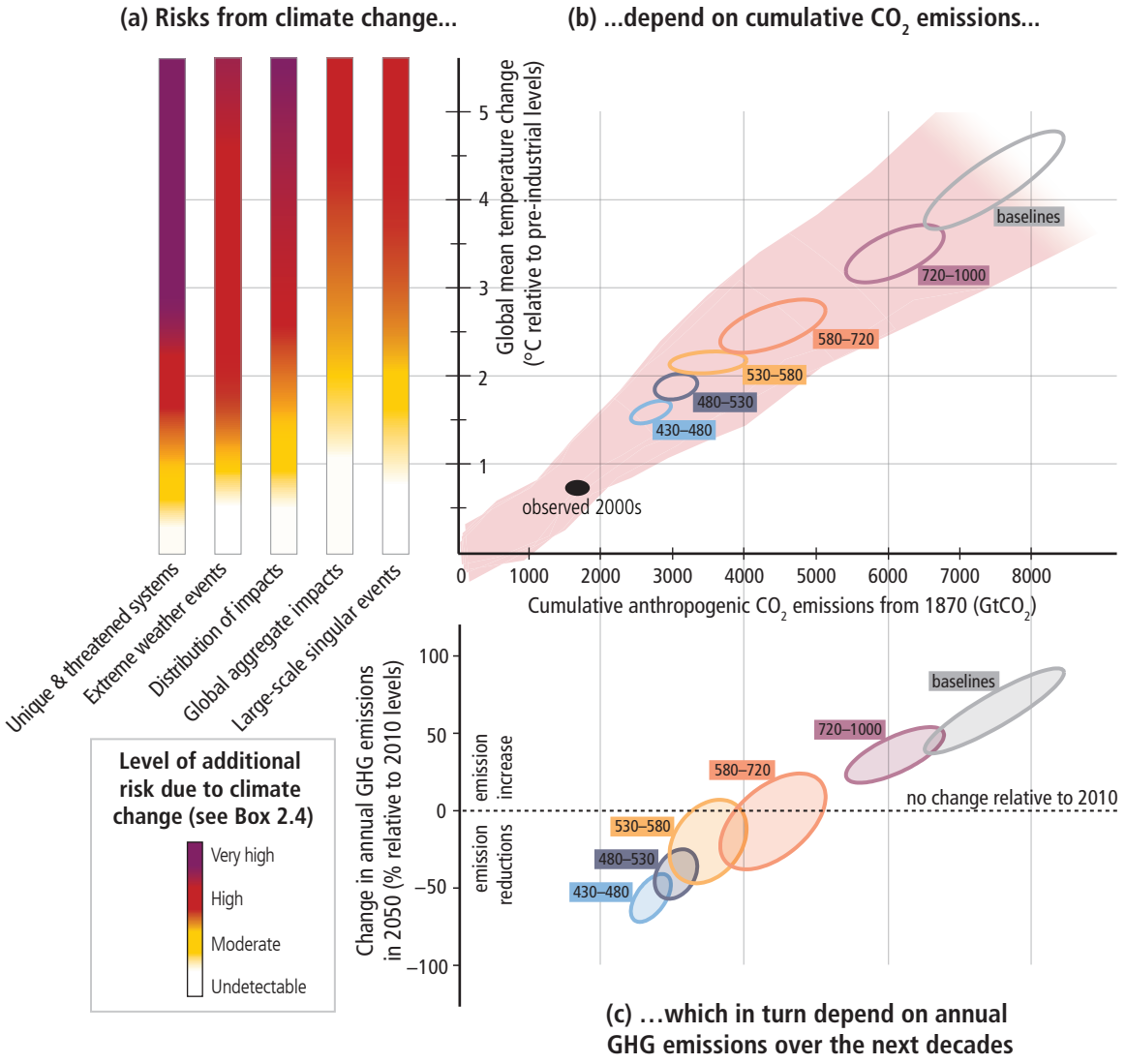

Figure SPM.10 | The relationship between risks from climate change, temperature change, cumulative carbon dioxide (CO_2) emissions and changes in annual greenhouse gas (GHG) emissions by 2050. Limiting risks across Reasons For Concern **(a)** would imply a limit for cumulative emissions of CO_2 **(b)** which would constrain annual GHG emissions over the next few decades **(c)**. **Panel a** reproduces the five Reasons For Concern *{Box 2.4}*. **Panel b** links temperature changes to cumulative CO_2 emissions (in $GtCO_2$) from 1870. They are based on Coupled Model Intercomparison Project Phase 5 (CMIP5) simulations (pink plume) and on a simple climate model (median climate response in 2100), for the baselines and five mitigation scenario categories (six ellipses). Details are provided in Figure SPM.5. **Panel c** shows the relationship between the cumulative CO_2 emissions (in $GtCO_2$) of the scenario categories and their associated change in annual GHG emissions by 2050, expressed in percentage change (in percent $GtCO_2$-eq per year) relative to 2010. The ellipses correspond to the same scenario categories as in Panel b, and are built with a similar method (see details in Figure SPM.5). *{Figure 3.1}*

>1000 ppm CO_2-eq), warming is *more likely than not* to exceed 4°C above pre-industrial levels by 2100 (Table SPM.1). The risks associated with temperatures at or above 4°C include substantial species extinction, global and regional food insecurity, consequential constraints on common human activities and limited potential for adaptation in some cases (*high confidence*). Some risks of climate change, such as risks to unique and threatened systems and risks associated with extreme weather events, are moderate to high at temperatures 1°C to 2°C above pre-industrial levels. *{2.3, Figure 2.5, 3.2, 3.4, Box 2.4, Table SPM.1}*

Substantial cuts in GHG emissions over the next few decades can substantially reduce risks of climate change by limiting warming in the second half of the 21st century and beyond. Cumulative emissions of CO_2 largely determine global mean surface warming by the late 21st century and beyond. Limiting risks across RFCs would imply a limit for cumulative emissions of CO_2. Such a limit would require that global net emissions of CO_2 eventually decrease to zero and would constrain annual emissions over the next few decades (Figure SPM.10) (*high confidence*). But some risks from climate damages are unavoidable, even with mitigation and adaptation. *{2.2.5, 3.2, 3.4}*

Mitigation involves some level of co-benefits and risks, but these risks do not involve the same possibility of severe, widespread and irreversible impacts as risks from climate change. Inertia in the economic and climate system and the possibility of irreversible impacts from climate change increase the benefits from near-term mitigation efforts (*high confidence*). Delays in additional mitigation or constraints on technological options increase the longer-term mitigation costs to hold climate change risks at a given level (Table SPM.2). *{3.2, 3.4}*

SPM 3.3 Characteristics of adaptation pathways

Adaptation can reduce the risks of climate change impacts, but there are limits to its effectiveness, especially with greater magnitudes and rates of climate change. Taking a longer-term perspective, in the context of sustainable development, increases the likelihood that more immediate adaptation actions will also enhance future options and preparedness. *{3.3}*

Adaptation can contribute to the well-being of populations, the security of assets and the maintenance of ecosystem goods, functions and services now and in the future. Adaptation is place- and context-specific (*high confidence*). A first step towards adaptation to future climate change is reducing vulnerability and exposure to present climate variability (*high confidence*). Integration of adaptation into planning, including policy design, and decision-making can promote synergies with development and disaster risk reduction. Building adaptive capacity is crucial for effective selection and implementation of adaptation options (*robust evidence, high agreement*). *{3.3}*

Adaptation planning and implementation can be enhanced through complementary actions across levels, from individuals to governments (*high confidence*). National governments can coordinate adaptation efforts of local and sub-national governments, for example by protecting vulnerable groups, by supporting economic diversification and by providing information, policy and legal frameworks and financial support (*robust evidence*, *high agreement*). Local government and the private sector are increasingly recognized as critical to progress in adaptation, given their roles in scaling up adaptation of communities, households and civil society and in managing risk information and financing (*medium evidence*, *high agreement*). *{3.3}*

Adaptation planning and implementation at all levels of governance are contingent on societal values, objectives and risk perceptions (*high confidence*). Recognition of diverse interests, circumstances, social-cultural contexts and expectations can benefit decision-making processes. Indigenous, local and traditional knowledge systems and practices, including indigenous peoples' holistic view of community and environment, are a major resource for adapting to climate change, but these have not been used consistently in existing adaptation efforts. Integrating such forms of knowledge with existing practices increases the effectiveness of adaptation. *{3.3}*

Constraints can interact to impede adaptation planning and implementation (*high confidence*). Common constraints on implementation arise from the following: limited financial and human resources; limited integration or coordination of governance; uncertainties about projected impacts; different perceptions of risks; competing values; absence of key adaptation leaders and advocates; and limited tools to monitor adaptation effectiveness. Another constraint includes insufficient research, monitoring, and observation and the finance to maintain them. *{3.3}*

Greater rates and magnitude of climate change increase the likelihood of exceeding adaptation limits (*high confidence*). Limits to adaptation emerge from the interaction among climate change and biophysical and/or socio-economic constraints. Further, poor planning or implementation, overemphasizing short-term outcomes or failing to sufficiently anticipate consequences can result in maladaptation, increasing the vulnerability or exposure of the target group in the future or the vulnerability of other people, places or sectors (*medium evidence, high agreement*). Underestimating the complexity of adaptation as a social process can create unrealistic expectations about achieving intended adaptation outcomes. *{3.3}*

Significant co-benefits, synergies and trade-offs exist between mitigation and adaptation and among different adaptation responses; interactions occur both within and across regions (*very high confidence*). Increasing efforts to mitigate and adapt to climate change imply an increasing complexity of interactions, particularly at the intersections among water, energy, land use and biodiversity, but tools to understand and manage these interactions remain limited. Examples of actions with co-benefits include (i) improved energy efficiency and cleaner energy sources, leading to reduced emissions of health-damaging, climate-altering air pollutants; (ii) reduced energy and water consumption in urban areas through greening cities and recycling water; (iii) sustainable agriculture and forestry; and (iv) protection of ecosystems for carbon storage and other ecosystem services. *{3.3}*

Transformations in economic, social, technological and political decisions and actions can enhance adaptation and promote sustainable development (*high confidence*). At the national level, transformation is considered most effective when it reflects a country's own visions and approaches to achieving sustainable development in accordance with its national circumstances and priorities. Restricting adaptation responses to incremental changes to existing systems and structures, without considering transformational change, may increase costs and losses and miss opportunities. Planning and implementation of transformational adaptation could reflect strengthened, altered or aligned paradigms and may place new and increased demands on governance structures to reconcile different goals and visions for the future and to address possible equity and ethical implications. Adaptation pathways are enhanced by iterative learning, deliberative processes and innovation. *{3.3}*

SPM 3.4 Characteristics of mitigation pathways

There are multiple mitigation pathways that are *likely* to limit warming to below 2°C relative to pre-industrial levels. These pathways would require substantial emissions reductions over the next few decades and near zero emissions of CO_2 and other long-lived greenhouse gases by the end of the century. Implementing such reductions poses substantial technological, economic, social and institutional challenges, which increase with delays in additional mitigation and if key technologies are not available. Limiting warming to lower or higher levels involves similar challenges but on different timescales. *{3.4}*

Without additional efforts to reduce GHG emissions beyond those in place today, global emissions growth is expected to persist, driven by growth in global population and economic activities. Global mean surface temperature increases in 2100 in baseline scenarios—those without additional mitigation—range from 3.7°C to 4.8°C above the average for 1850–1900 for a median climate response. They range from 2.5°C to 7.8°C when including climate uncertainty (5th to 95th percentile range) (*high confidence*). *{3.4}*

Emissions scenarios leading to CO_2-equivalent concentrations in 2100 of about 450 ppm or lower are *likely* to maintain warming below 2°C over the 21st century relative to pre-industrial levels[15]. These scenarios are characterized by 40 to 70% global anthropogenic GHG emissions reductions by 2050 compared to 2010[16], and emissions levels near zero or below in 2100. Mitigation scenarios reaching concentration levels of about 500 ppm CO_2-eq by 2100 are *more likely than not* to limit temperature change to less than 2°C, unless they temporarily overshoot concentration levels of roughly 530 ppm CO_2-eq

[15] For comparison, the CO_2-eq concentration in 2011 is estimated to be 430 ppm (uncertainty range 340 to 520 ppm)

[16] This range differs from the range provided for a similar concentration category in the AR4 (50 to 85% lower than 2000 for CO_2 only). Reasons for this difference include that this report has assessed a substantially larger number of scenarios than in the AR4 and looks at all GHGs. In addition, a large proportion of the new scenarios include Carbon Dioxide Removal (CDR) technologies (see below). Other factors include the use of 2100 concentration levels instead of stabilization levels and the shift in reference year from 2000 to 2010.

before 2100, in which case they are *about as likely as not* to achieve that goal. In these 500 ppm CO_2-eq scenarios, global 2050 emissions levels are 25 to 55% lower than in 2010. Scenarios with higher emissions in 2050 are characterized by a greater reliance on Carbon Dioxide Removal (CDR) technologies beyond mid-century (and vice versa). Trajectories that are *likely* to limit warming to 3°C relative to pre-industrial levels reduce emissions less rapidly than those limiting warming to 2°C. A limited number of studies provide scenarios that are *more likely than not* to limit warming to 1.5°C by 2100; these scenarios are characterized by concentrations below 430 ppm CO_2-eq by 2100 and 2050 emission reduction between 70% and 95% below 2010. For a comprehensive overview of the characteristics of emissions scenarios, their CO_2-equivalent concentrations and their likelihood to keep warming to below a range of temperature levels, see Figure SPM.11 and Table SPM.1. *{3.4}*

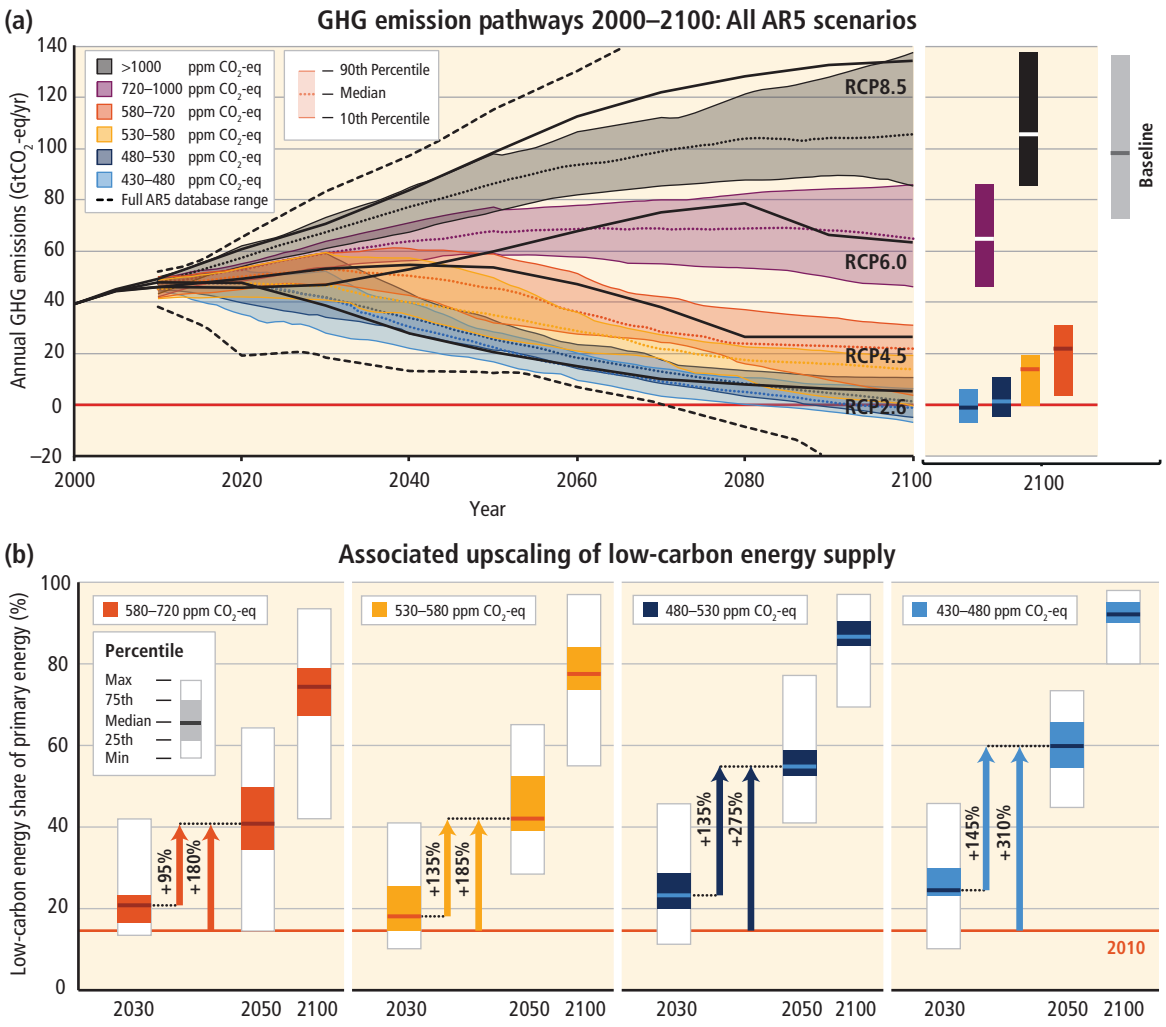

Figure SPM.11 | Global greenhouse gas emissions (gigatonne of CO_2-equivalent per year, $GtCO_2$-eq/yr) in baseline and mitigation scenarios for different long-term concentration levels **(a)** and associated upscaling requirements of low-carbon energy (% of primary energy) for 2030, 2050 and 2100 compared to 2010 levels in mitigation scenarios **(b)**. *{Figure 3.2}*

Table SPM.1 | Key characteristics of the scenarios collected and assessed for WGIII AR5. For all parameters the 10th to 90th percentile of the scenarios is shown [a]. *{Table 3.1}*

CO_2-eq Concentrations in 2100 (ppm CO_2-eq) [f] Category label (conc. range)	Subcategories	Relative position of the RCPs [d]	Change in CO_2-eq emissions compared to 2010 (in %) [c]		Likelihood of staying below a specific temperature level over the 21st century (relative to 1850–1900) [d, e]			
			2050	2100	1.5°C	2°C	3°C	4°C
<430	Only a limited number of individual model studies have explored levels below 430 ppm CO_2-eq [j]							
450 (430 to 480)	Total range [a, g]	RCP2.6	–72 to –41	–118 to –78	*More unlikely than likely*	*Likely*	*Likely*	*Likely*
500 (480 to 530)	No overshoot of 530 ppm CO_2-eq		–57 to –42	–107 to –73	*Unlikely*	*More likely than not*		
	Overshoot of 530 ppm CO_2-eq		–55 to –25	–114 to –90		*About as likely as not*		
550 (530 to 580)	No overshoot of 580 ppm CO_2-eq		–47 to –19	–81 to –59		*More unlikely than likely* [i]		
	Overshoot of 580 ppm CO_2-eq		–16 to 7	–183 to –86				
(580 to 650)	Total range	RCP4.5	–38 to 24	–134 to –50				
(650 to 720)	Total range		–11 to 17	–54 to –21		*Unlikely*	*More likely than not*	
(720 to 1000) [b]	Total range	RCP6.0	18 to 54	–7 to 72	*Unlikely* [h]		*More unlikely than likely*	
>1000 [b]	Total range	RCP8.5	52 to 95	74 to 178		*Unlikely* [h]	*Unlikely*	*More unlikely than likely*

Notes:

[a] The 'total range' for the 430 to 480 ppm CO_2-eq concentrations scenarios corresponds to the range of the 10th to 90th percentile of the subcategory of these scenarios shown in Table 6.3 of the Working Group III Report.

[b] Baseline scenarios fall into the >1000 and 720 to 1000 ppm CO_2-eq categories. The latter category also includes mitigation scenarios. The baseline scenarios in the latter category reach a temperature change of 2.5°C to 5.8°C above the average for 1850–1900 in 2100. Together with the baseline scenarios in the >1000 ppm CO_2-eq category, this leads to an overall 2100 temperature range of 2.5°C to 7.8°C (range based on median climate response: 3.7°C to 4.8°C) for baseline scenarios across both concentration categories.

[c] The global 2010 emissions are 31% above the 1990 emissions (consistent with the historic greenhouse gas emission estimates presented in this report). CO_2-eq emissions include the basket of Kyoto gases (carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O) as well as fluorinated gases).

[d] The assessment here involves a large number of scenarios published in the scientific literature and is thus not limited to the Representative Concentration Pathways (RCPs). To evaluate the CO_2-eq concentration and climate implications of these scenarios, the Model for the Assessment of Greenhouse Gas Induced Climate Change (MAGICC) was used in a probabilistic mode. For a comparison between MAGICC model results and the outcomes of the models used in WGI, see WGI 12.4.1.2, 12.4.8 and WGIII 6.3.2.6.

[e] The assessment in this table is based on the probabilities calculated for the full ensemble of scenarios in WGIII AR5 using MAGICC and the assessment in WGI of the uncertainty of the temperature projections not covered by climate models. The statements are therefore consistent with the statements in WGI, which are based on the Coupled Model Intercomparison Project Phase 5 (CMIP5) runs of the RCPs and the assessed uncertainties. Hence, the likelihood statements reflect different lines of evidence from both WGs. This WGI method was also applied for scenarios with intermediate concentration levels where no CMIP5 runs are available. The likelihood statements are indicative only *{WGIII 6.3}* and follow broadly the terms used by the WGI SPM for temperature projections: likely 66–100%, more likely than not >50–100%, about as likely as not 33–66%, and unlikely 0–33%. In addition the term more unlikely than likely 0–<50% is used.

[f] The CO_2-equivalent concentration (see Glossary) is calculated on the basis of the total forcing from a simple carbon cycle/climate model, MAGICC. The CO_2-equivalent concentration in 2011 is estimated to be 430 ppm (uncertainty range 340 to 520 ppm). This is based on the assessment of total anthropogenic radiative forcing for 2011 relative to 1750 in WGI, i.e., 2.3 W/m^2, uncertainty range 1.1 to 3.3 W/m^2.

[g] The vast majority of scenarios in this category overshoot the category boundary of 480 ppm CO_2-eq concentration.

[h] For scenarios in this category, no CMIP5 run or MAGICC realization stays below the respective temperature level. Still, an *unlikely* assignment is given to reflect uncertainties that may not be reflected by the current climate models.

[i] Scenarios in the 580 to 650 ppm CO_2-eq category include both overshoot scenarios and scenarios that do not exceed the concentration level at the high end of the category (e.g., RCP4.5). The latter type of scenarios, in general, have an assessed probability of *more unlikely than likely* to stay below the 2°C temperature level, while the former are mostly assessed to have an *unlikely* probability of staying below this level.

[j] In these scenarios, global CO_2-eq emissions in 2050 are between 70 to 95% below 2010 emissions, and they are between 110 to 120% below 2010 emissions in 2100.

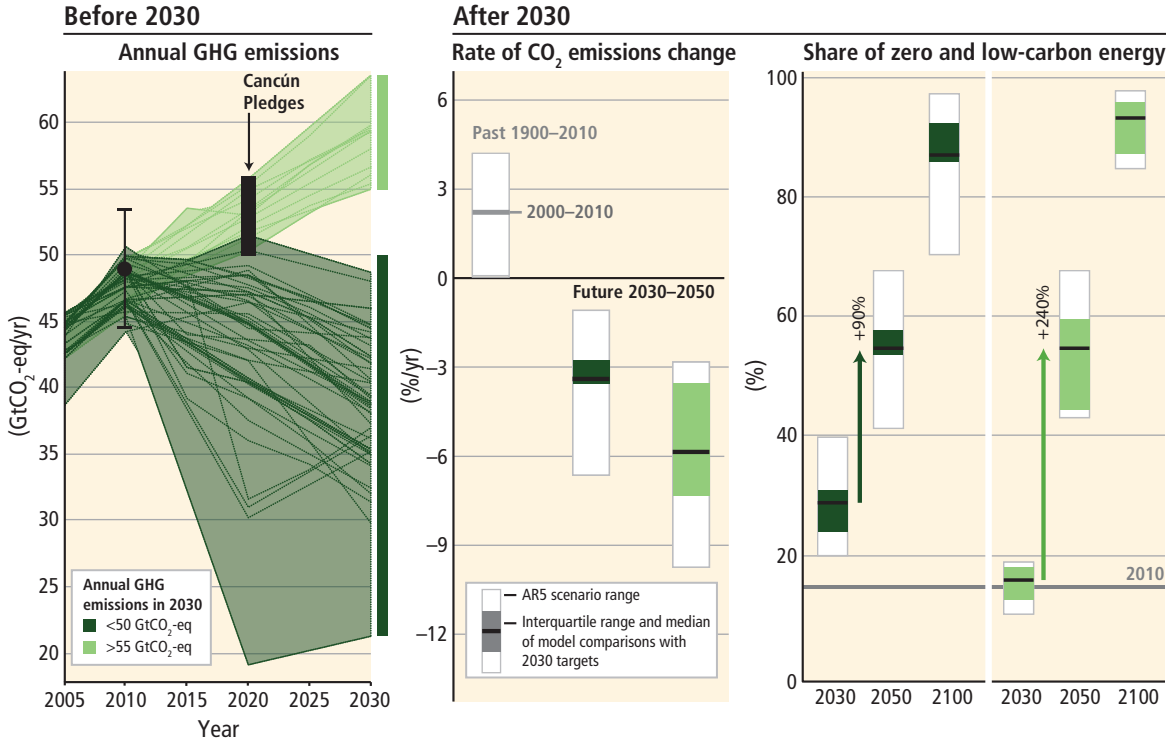

Figure SPM.12 | The implications of different 2030 greenhouse gas (GHG) emissions levels for the rate of carbon dioxide (CO_2) emissions reductions and low-carbon energy upscaling in mitigation scenarios that are at least *about as likely as not* to keep warming throughout the 21st century below 2°C relative to pre-industrial levels (2100 CO_2-equivalent concentrations of 430 to 530 ppm). The scenarios are grouped according to different emissions levels by 2030 (coloured in different shades of green). The left panel shows the pathways of GHG emissions (gigatonne of CO_2-equivalent per year, $GtCO_2$-eq/yr) leading to these 2030 levels. The black dot with whiskers gives historic GHG emission levels and associated uncertainties in 2010 as reported in Figure SPM.2. The black bar shows the estimated uncertainty range of GHG emissions implied by the Cancún Pledges. The middle panel denotes the average annual CO_2 emissions reduction rates for the period 2030–2050. It compares the median and interquartile range across scenarios from recent inter-model comparisons with explicit 2030 interim goals to the range of scenarios in the Scenario Database for WGIII AR5. Annual rates of historical emissions change (sustained over a period of 20 years) and the average annual CO_2 emission change between 2000 and 2010 are shown as well. The arrows in the right panel show the magnitude of zero and low-carbon energy supply upscaling from 2030 to 2050 subject to different 2030 GHG emissions levels. Zero- and low-carbon energy supply includes renewables, nuclear energy and fossil energy with carbon dioxide capture and storage (CCS) or bioenergy with CCS (BECCS). [Note: Only scenarios that apply the full, unconstrained mitigation technology portfolio of the underlying models (default technology assumption) are shown. Scenarios with large net negative global emissions (>20 $GtCO_2$-eq/yr), scenarios with exogenous carbon price assumptions and scenarios with 2010 emissions significantly outside the historical range are excluded.] *{Figure 3.3}*

Mitigation scenarios reaching about 450 ppm CO_2-eq in 2100 (consistent with a *likely* chance to keep warming below 2°C relative to pre-industrial levels) typically involve temporary overshoot[17] of atmospheric concentrations, as do many scenarios reaching about 500 ppm CO_2-eq to about 550 ppm CO_2-eq in 2100 (Table SPM.1). Depending on the level of overshoot, overshoot scenarios typically rely on the availability and widespread deployment of bioenergy with carbon dioxide capture and storage (BECCS) and afforestation in the second half of the century. The availability and scale of these and other CDR technologies and methods are uncertain and CDR technologies are, to varying degrees, associated with challenges and risks[18]. CDR is also prevalent in many scenarios without overshoot to compensate for residual emissions from sectors where mitigation is more expensive (*high confidence*). *{3.4, Box 3.3}*

Reducing emissions of non-CO_2 agents can be an important element of mitigation strategies. All current GHG emissions and other forcing agents affect the rate and magnitude of climate change over the next few decades, although long-term warming is mainly driven by CO_2 emissions. Emissions of non-CO_2 forcers are often expressed as 'CO_2-equivalent emissions', but the choice of metric to calculate these emissions, and the implications for the emphasis and timing of abatement of the various climate forcers, depends on application and policy context and contains value judgments. *{3.4, Box 3.2}*

[17] In concentration 'overshoot' scenarios, concentrations peak during the century and then decline.

[18] CDR methods have biogeochemical and technological limitations to their potential on the global scale. There is insufficient knowledge to quantify how much CO_2 emissions could be partially offset by CDR on a century timescale. CDR methods may carry side effects and long-term consequences on a global scale.

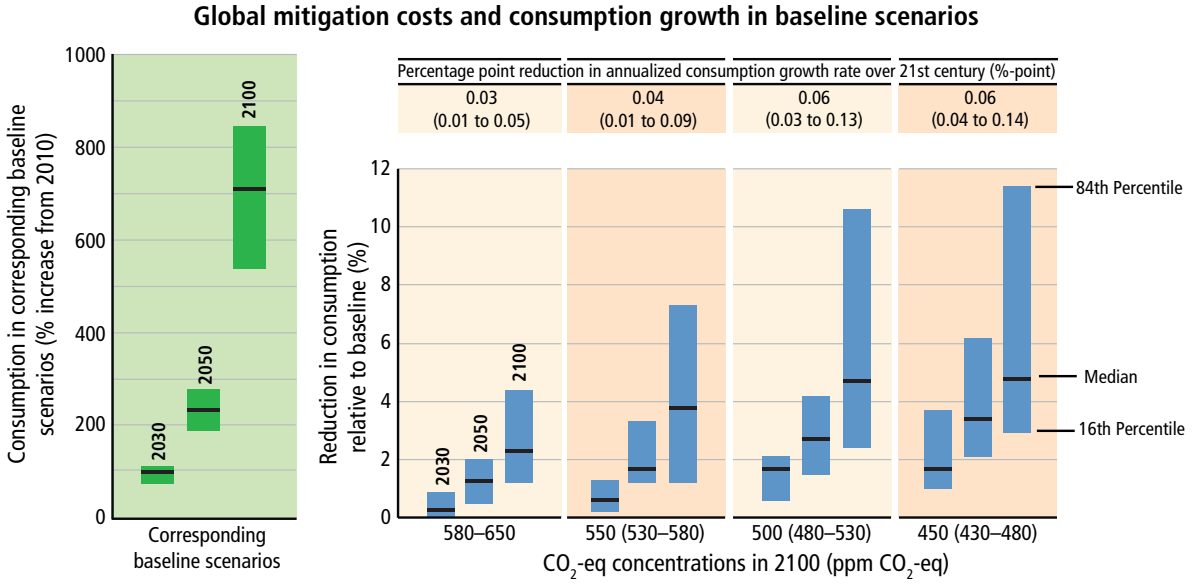

Figure SPM.13 | Global mitigation costs in cost-effective scenarios at different atmospheric concentrations levels in 2100. Cost-effective scenarios assume immediate mitigation in all countries and a single global carbon price, and impose no additional limitations on technology relative to the models' default technology assumptions. Consumption losses are shown relative to a baseline development without climate policy (left panel). The table at the top shows percentage points of annualized consumption growth reductions relative to consumption growth in the baseline of 1.6 to 3% per year (e.g., if the reduction is 0.06 percentage points per year due to mitigation, and baseline growth is 2.0% per year, then the growth rate with mitigation would be 1.94% per year). Cost estimates shown in this table do not consider the benefits of reduced climate change or co-benefits and adverse side effects of mitigation. Estimates at the high end of these cost ranges are from models that are relatively inflexible to achieve the deep emissions reductions required in the long run to meet these goals and/or include assumptions about market imperfections that would raise costs. *{Figure 3.4}*

Delaying additional mitigation to 2030 will substantially increase the challenges associated with limiting warming over the 21st century to below 2°C relative to pre-industrial levels. It will require substantially higher rates of emissions reductions from 2030 to 2050; a much more rapid scale-up of low-carbon energy over this period; a larger reliance on CDR in the long term; and higher transitional and long-term economic impacts. Estimated global emissions levels in 2020 based on the Cancún Pledges are not consistent with cost-effective mitigation trajectories that are at least *about as likely as not* to limit warming to below 2°C relative to pre-industrial levels, but they do not preclude the option to meet this goal (*high confidence*) (Figure SPM.12, Table SPM.2). *{3.4}*

Estimates of the aggregate economic costs of mitigation vary widely depending on methodologies and assumptions, but increase with the stringency of mitigation. Scenarios in which all countries of the world begin mitigation immediately, in which there is a single global carbon price, and in which all key technologies are available have been used as a cost-effective benchmark for estimating macro-economic mitigation costs (Figure SPM.13). Under these assumptions mitigation scenarios that are *likely* to limit warming to below 2°C through the 21st century relative to pre-industrial levels entail losses in global consumption—not including benefits of reduced climate change as well as co-benefits and adverse side effects of mitigation—of 1 to 4% (median: 1.7%) in 2030, 2 to 6% (median: 3.4%) in 2050 and 3 to 11% (median: 4.8%) in 2100 relative to consumption in baseline scenarios that grows anywhere from 300% to more than 900% over the century (Figure SPM.13). These numbers correspond to an annualized reduction of consumption growth by 0.04 to 0.14 (median: 0.06) percentage points over the century relative to annualized consumption growth in the baseline that is between 1.6 and 3% per year (*high confidence*). *{3.4}*

In the absence or under limited availability of mitigation technologies (such as bioenergy, CCS and their combination BECCS, nuclear, wind/solar), mitigation costs can increase substantially depending on the technology considered. Delaying additional mitigation increases mitigation costs in the medium to long term. Many models could not limit *likely* warming to below 2°C over the 21st century relative to pre-industrial levels if additional mitigation is considerably delayed. Many models could not limit *likely* warming to below 2°C if bioenergy, CCS and their combination (BECCS) are limited (*high confidence*) (Table SPM.2). *{3.4}*

Table SPM.2 | Increase in global mitigation costs due to either limited availability of specific technologies or delays in additional mitigation [a] relative to cost-effective scenarios [b]. The increase in costs is given for the median estimate and the 16th to 84th percentile range of the scenarios (in parentheses) [c]. In addition, the sample size of each scenario set is provided in the coloured symbols. The colours of the symbols indicate the fraction of models from systematic model comparison exercises that could successfully reach the targeted concentration level. *{Table 3.2}*

Mitigation cost increases in scenarios with limited availability of technologies [d] *[% increase in total discounted [e] mitigation costs (2015–2100) relative to default technology assumptions]*					**Mitigation cost increases due to delayed additional mitigation until 2030** *[% increase in mitigation costs relative to immediate mitigation]*	
2100 concentrations (ppm CO_2-eq)	no CCS	nuclear phase out	limited solar/wind	limited bioenergy	medium term costs (2030–2050)	long term costs (2050–2100)
450 (430 to 480)	138% (29 to 297%) 4	7% (4 to 18%) 8	6% (2 to 29%) 8	64% (44 to 78%) 8	44% (2 to 78%) 29	37% (16 to 82%) 29
500 (480 to 530)	not available (n.a.)	n.a.	n.a.	n.a.		
550 (530 to 580)	39% (18 to 78%) 11	13% (2 to 23%) 10	8% (5 to 15%) 10	18% (4 to 66%) 12	15% (3 to 32%)	16% (5 to 24%)
580 to 650	n.a.	n.a.	n.a.	n.a.		

Symbol legend—fraction of models successful in producing scenarios (numbers indicate the number of successful models)

: all models successful

: between 50 and 80% of models successful

: between 80 and 100% of models successful

: less than 50% of models successful

Notes:

[a] Delayed mitigation scenarios are associated with greenhouse gas emission of more than 55 $GtCO_2$-eq in 2030, and the increase in mitigation costs is measured relative to cost-effective mitigation scenarios for the same long-term concentration level.

[b] Cost-effective scenarios assume immediate mitigation in all countries and a single global carbon price, and impose no additional limitations on technology relative to the models' default technology assumptions.

[c] The range is determined by the central scenarios encompassing the 16th to 84th percentile range of the scenario set. Only scenarios with a time horizon until 2100 are included. Some models that are included in the cost ranges for concentration levels above 530 ppm CO_2-eq in 2100 could not produce associated scenarios for concentration levels below 530 ppm CO_2-eq in 2100 with assumptions about limited availability of technologies and/or delayed additional mitigation.

[d] No CCS: carbon dioxide capture and storage is not included in these scenarios. Nuclear phase out: no addition of nuclear power plants beyond those under construction, and operation of existing plants until the end of their lifetime. Limited Solar/Wind: a maximum of 20% global electricity generation from solar and wind power in any year of these scenarios. Limited Bioenergy: a maximum of 100 EJ/yr modern bioenergy supply globally (modern bioenergy used for heat, power, combinations and industry was around 18 EJ/yr in 2008). EJ = Exajoule = 10^{18} Joule.

[e] Percentage increase of net present value of consumption losses in percent of baseline consumption (for scenarios from general equilibrium models) and abatement costs in percent of baseline gross domestic product (GDP, for scenarios from partial equilibrium models) for the period 2015–2100, discounted at 5% per year.

Mitigation scenarios reaching about 450 or 500 ppm CO_2-eq by 2100 show reduced costs for achieving air quality and energy security objectives, with significant co-benefits for human health, ecosystem impacts and sufficiency of resources and resilience of the energy system. *{4.4.2.2}*

Mitigation policy could devalue fossil fuel assets and reduce revenues for fossil fuel exporters, but differences between regions and fuels exist (*high confidence*). Most mitigation scenarios are associated with reduced revenues from coal and oil trade for major exporters (*high confidence*). The availability of CCS would reduce the adverse effects of mitigation on the value of fossil fuel assets (*medium confidence*). *{4.4.2.2}*

Solar Radiation Management (SRM) involves large-scale methods that seek to reduce the amount of absorbed solar energy in the climate system. SRM is untested and is not included in any of the mitigation scenarios. If it were deployed, SRM would

entail numerous uncertainties, side effects, risks and shortcomings and has particular governance and ethical implications. SRM would not reduce ocean acidification. If it were terminated, there is *high confidence* that surface temperatures would rise very rapidly impacting ecosystems susceptible to rapid rates of change. *{Box 3.3}*

SPM 4. Adaptation and Mitigation

Many adaptation and mitigation options can help address climate change, but no single option is sufficient by itself. Effective implementation depends on policies and cooperation at all scales and can be enhanced through integrated responses that link adaptation and mitigation with other societal objectives. *{4}*

SPM 4.1 Common enabling factors and constraints for adaptation and mitigation responses

Adaptation and mitigation responses are underpinned by common enabling factors. These include effective institutions and governance, innovation and investments in environmentally sound technologies and infrastructure, sustainable livelihoods and behavioural and lifestyle choices. *{4.1}*

Inertia in many aspects of the socio-economic system constrains adaptation and mitigation options (*medium evidence, high agreement*). Innovation and investments in environmentally sound infrastructure and technologies can reduce GHG emissions and enhance resilience to climate change (*very high confidence*). *{4.1}*

Vulnerability to climate change, GHG emissions and the capacity for adaptation and mitigation are strongly influenced by livelihoods, lifestyles, behaviour and culture (*medium evidence, medium agreement*). Also, the social acceptability and/or effectiveness of climate policies are influenced by the extent to which they incentivize or depend on regionally appropriate changes in lifestyles or behaviours. *{4.1}*

For many regions and sectors, enhanced capacities to mitigate and adapt are part of the foundation essential for managing climate change risks (*high confidence*). Improving institutions as well as coordination and cooperation in governance can help overcome regional constraints associated with mitigation, adaptation and disaster risk reduction (*very high confidence*). *{4.1}*

SPM 4.2 Response options for adaptation

Adaptation options exist in all sectors, but their context for implementation and potential to reduce climate-related risks differs across sectors and regions. Some adaptation responses involve significant co-benefits, synergies and trade-offs. Increasing climate change will increase challenges for many adaptation options. *{4.2}*

Adaptation experience is accumulating across regions in the public and private sectors and within communities. There is increasing recognition of the value of social (including local and indigenous), institutional, and ecosystem-based measures and of the extent of constraints to adaptation. Adaptation is becoming embedded in some planning processes, with more limited implementation of responses (*high confidence*). *{1.6, 4.2, 4.4.2.1}*

The need for adaptation along with associated challenges is expected to increase with climate change (*very high confidence*). Adaptation options exist in all sectors and regions, with diverse potential and approaches depending on their context in vulnerability reduction, disaster risk management or proactive adaptation planning (Table SPM.3). Effective strategies and actions consider the potential for co-benefits and opportunities within wider strategic goals and development plans. *{4.2}*

Table SPM.3 | Approaches for managing the risks of climate change through adaptation. These approaches should be considered overlapping rather than discrete, and they are often pursued simultaneously. Examples are presented in no specific order and can be relevant to more than one category. *{Table 4.2}*

Overlapping Approaches	Category	Examples
Vulnerability & Exposure Reduction through development, planning & practices including many low-regrets measures; Adaptation including incremental & transformational adjustments; Transformation	Human development	Improved access to education, nutrition, health facilities, energy, safe housing & settlement structures, & social support structures; Reduced gender inequality & marginalization in other forms.
	Poverty alleviation	Improved access to & control of local resources; Land tenure; Disaster risk reduction; Social safety nets & social protection; Insurance schemes.
	Livelihood security	Income, asset & livelihood diversification; Improved infrastructure; Access to technology & decision-making fora; Increased decision-making power; Changed cropping, livestock & aquaculture practices; Reliance on social networks.
	Disaster risk management	Early warning systems; Hazard & vulnerability mapping; Diversifying water resources; Improved drainage; Flood & cyclone shelters; Building codes & practices; Storm & wastewater management; Transport & road infrastructure improvements.
	Ecosystem management	Maintaining wetlands & urban green spaces; Coastal afforestation; Watershed & reservoir management; Reduction of other stressors on ecosystems & of habitat fragmentation; Maintenance of genetic diversity; Manipulation of disturbance regimes; Community-based natural resource management.
	Spatial or land-use planning	Provisioning of adequate housing, infrastructure & services; Managing development in flood prone & other high risk areas; Urban planning & upgrading programs; Land zoning laws; Easements; Protected areas.
	Structural/physical	***Engineered & built-environment options***: Sea walls & coastal protection structures; Flood levees; Water storage; Improved drainage; Flood & cyclone shelters; Building codes & practices; Storm & wastewater management; Transport & road infrastructure improvements; Floating houses; Power plant & electricity grid adjustments.
		Technological options: New crop & animal varieties; Indigenous, traditional & local knowledge, technologies & methods; Efficient irrigation; Water-saving technologies; Desalinisation; Conservation agriculture; Food storage & preservation facilities; Hazard & vulnerability mapping & monitoring; Early warning systems; Building insulation; Mechanical & passive cooling; Technology development, transfer & diffusion.
		Ecosystem-based options: Ecological restoration; Soil conservation; Afforestation & reforestation; Mangrove conservation & replanting; Green infrastructure (e.g., shade trees, green roofs); Controlling overfishing; Fisheries co-management; Assisted species migration & dispersal; Ecological corridors; Seed banks, gene banks & other *ex situ* conservation; Community-based natural resource management.
		Services: Social safety nets & social protection; Food banks & distribution of food surplus; Municipal services including water & sanitation; Vaccination programs; Essential public health services; Enhanced emergency medical services.
	Institutional	***Economic options***: Financial incentives; Insurance; Catastrophe bonds; Payments for ecosystem services; Pricing water to encourage universal provision and careful use; Microfinance; Disaster contingency funds; Cash transfers; Public-private partnerships.
		Laws & regulations: Land zoning laws; Building standards & practices; Easements; Water regulations & agreements; Laws to support disaster risk reduction; Laws to encourage insurance purchasing; Defined property rights & land tenure security; Protected areas; Fishing quotas; Patent pools & technology transfer.
		National & government policies & programs: National & regional adaptation plans including mainstreaming; Sub-national & local adaptation plans; Economic diversification; Urban upgrading programs; Municipal water management programs; Disaster planning & preparedness; Integrated water resource management; Integrated coastal zone management; Ecosystem-based management; Community-based adaptation.
	Social	***Educational options***: Awareness raising & integrating into education; Gender equity in education; Extension services; Sharing indigenous, traditional & local knowledge; Participatory action research & social learning; Knowledge-sharing & learning platforms.
		Informational options: Hazard & vulnerability mapping; Early warning & response systems; Systematic monitoring & remote sensing; Climate services; Use of indigenous climate observations; Participatory scenario development; Integrated assessments.
		Behavioural options: Household preparation & evacuation planning; Migration; Soil & water conservation; Storm drain clearance; Livelihood diversification; Changed cropping, livestock & aquaculture practices; Reliance on social networks.
	Spheres of change	***Practical***: Social & technical innovations, behavioural shifts, or institutional & managerial changes that produce substantial shifts in outcomes.
		Political: Political, social, cultural & ecological decisions & actions consistent with reducing vulnerability & risk & supporting adaptation, mitigation & sustainable development.
		Personal: Individual & collective assumptions, beliefs, values & worldviews influencing climate-change responses.

SPM 4.3 Response options for mitigation

Mitigation options are available in every major sector. Mitigation can be more cost-effective if using an integrated approach that combines measures to reduce energy use and the greenhouse gas intensity of end-use sectors, decarbonize energy supply, reduce net emissions and enhance carbon sinks in land-based sectors. *{4.3}*

Well-designed systemic and cross-sectoral mitigation strategies are more cost-effective in cutting emissions than a focus on individual technologies and sectors, with efforts in one sector affecting the need for mitigation in others (*medium confidence*). Mitigation measures intersect with other societal goals, creating the possibility of co-benefits or adverse side effects. These intersections, if well-managed, can strengthen the basis for undertaking climate action. *{4.3}*

Emissions ranges for baseline scenarios and mitigation scenarios that limit CO_2-equivalent concentrations to low levels (about 450 ppm CO_2-eq, *likely* to limit warming to 2°C above pre-industrial levels) are shown for different sectors and gases in Figure SPM.14. Key measures to achieve such mitigation goals include decarbonizing (i.e., reducing the carbon intensity of) electricity generation (*medium evidence, high agreement*) as well as efficiency enhancements and behavioural changes, in order to reduce energy demand compared to baseline scenarios without compromising development (*robust evidence, high agreement*). In scenarios reaching 450 ppm CO_2-eq concentrations by 2100, global CO_2 emissions from the energy supply sector are projected to decline over the next decade and are characterized by reductions of 90% or more below 2010 levels between 2040 and 2070. In the majority of low-concentration stabilization scenarios (about 450 to about 500 ppm CO_2-eq, at least *about as likely as not* to limit warming to 2°C above pre-industrial levels), the share of low-carbon electricity supply (comprising renewable energy (RE), nuclear and carbon dioxide capture and storage (CCS) including bioenergy with carbon dioxide capture and storage (BECCS)) increases from the current share of approximately 30% to more than 80% by 2050, and fossil fuel power generation without CCS is phased out almost entirely by 2100. *{4.3}*

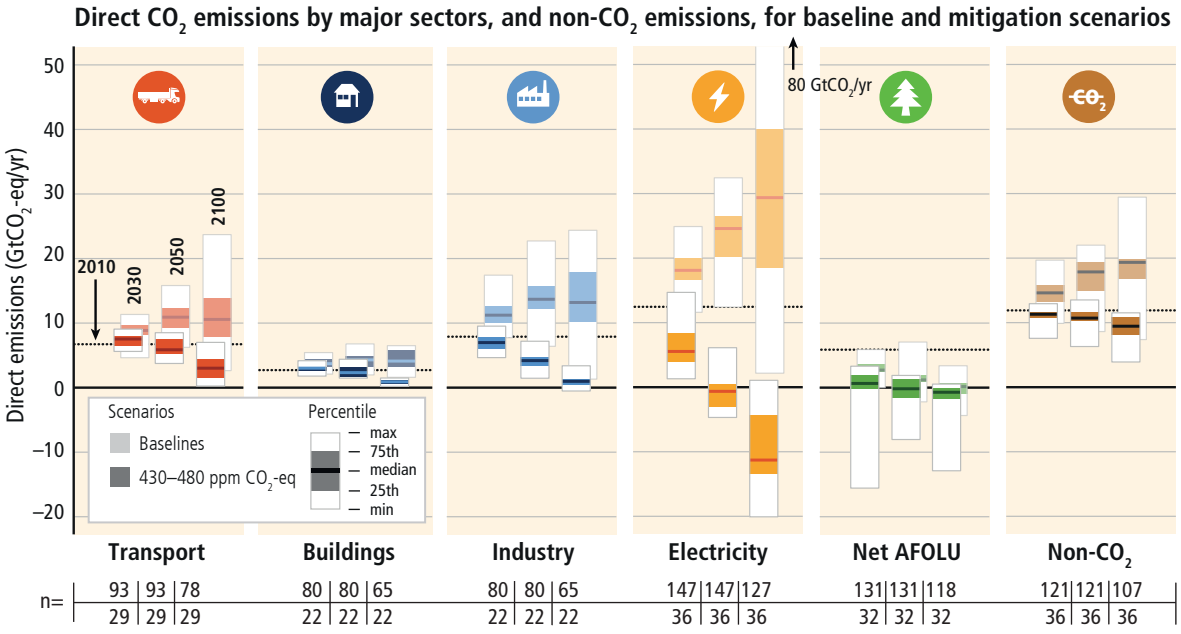

Figure SPM.14 | Carbon dioxide (CO_2) emissions by sector and total non-CO_2 greenhouse gases (Kyoto gases) across sectors in baseline (faded bars) and mitigation scenarios (solid colour bars) that reach about 450 (430 to 480) ppm CO_2-eq concentrations in 2100 (*likely* to limit warming to 2°C above pre-industrial levels). Mitigation in the end-use sectors leads also to indirect emissions reductions in the upstream energy supply sector. Direct emissions of the end-use sectors thus do not include the emission reduction potential at the supply-side due to, for example, reduced electricity demand. The numbers at the bottom of the graphs refer to the number of scenarios included in the range (upper row: baseline scenarios; lower row: mitigation scenarios), which differs across sectors and time due to different sectoral resolution and time horizon of models. Emissions ranges for mitigation scenarios include the full portfolio of mitigation options; many models cannot reach 450 ppm CO_2-eq concentration by 2100 in the absence of carbon dioxide capture and storage (CCS). Negative emissions in the electricity sector are due to the application of bioenergy with carbon dioxide capture and storage (BECCS). 'Net' agriculture, forestry and other land use (AFOLU) emissions consider afforestation, reforestation as well as deforestation activities. *{4.3, Figure 4.1}*

Near-term reductions in energy demand are an important element of cost-effective mitigation strategies, provide more flexibility for reducing carbon intensity in the energy supply sector, hedge against related supply-side risks, avoid lock-in to carbon-intensive infrastructures, and are associated with important co-benefits. The most cost-effective mitigation options in forestry are afforestation, sustainable forest management and reducing deforestation, with large differences in their relative importance across regions; and in agriculture, cropland management, grazing land management and restoration of organic soils (*medium evidence, high agreement*). *{4.3, Figures 4.1, 4.2, Table 4.3}*

Behaviour, lifestyle and culture have a considerable influence on energy use and associated emissions, with high mitigation potential in some sectors, in particular when complementing technological and structural change (*medium evidence, medium agreement*). Emissions can be substantially lowered through changes in consumption patterns, adoption of energy savings measures, dietary change and reduction in food wastes. *{4.1, 4.3}*

SPM 4.4 Policy approaches for adaptation and mitigation, technology and finance

Effective adaptation and mitigation responses will depend on policies and measures across multiple scales: international, regional, national and sub-national. Policies across all scales supporting technology development, diffusion and transfer, as well as finance for responses to climate change, can complement and enhance the effectiveness of policies that directly promote adaptation and mitigation. *{4.4}*

International cooperation is critical for effective mitigation, even though mitigation can also have local co-benefits. Adaptation focuses primarily on local to national scale outcomes, but its effectiveness can be enhanced through coordination across governance scales, including international cooperation: *{3.1, 4.4.1}*

- The United Nations Framework Convention on Climate Change (UNFCCC) is the main multilateral forum focused on addressing climate change, with nearly universal participation. Other institutions organized at different levels of governance have resulted in diversifying international climate change cooperation. *{4.4.1}*

- The Kyoto Protocol offers lessons towards achieving the ultimate objective of the UNFCCC, particularly with respect to participation, implementation, flexibility mechanisms and environmental effectiveness (*medium evidence, low agreement*). *{4.4.1}*

- Policy linkages among regional, national and sub-national climate policies offer potential climate change mitigation benefits (*medium evidence, medium agreement*). Potential advantages include lower mitigation costs, decreased emission leakage and increased market liquidity. *{4.4.1}*

- International cooperation for supporting adaptation planning and implementation has received less attention historically than mitigation but is increasing and has assisted in the creation of adaptation strategies, plans and actions at the national, sub-national and local level (*high confidence*). *{4.4.1}*

There has been a considerable increase in national and sub-national plans and strategies on both adaptation and mitigation since the AR4, with an increased focus on policies designed to integrate multiple objectives, increase co-benefits and reduce adverse side effects (*high confidence*): *{4.4.2.1, 4.4.2.2}*

- National governments play key roles in adaptation planning and implementation (*robust evidence, high agreement*) through coordinating actions and providing frameworks and support. While local government and the private sector have different functions, which vary regionally, they are increasingly recognized as critical to progress in adaptation, given their roles in scaling up adaptation of communities, households and civil society and in managing risk information and financing (*medium evidence, high agreement*). *{4.4.2.1}*

- Institutional dimensions of adaptation governance, including the integration of adaptation into planning and decision-making, play a key role in promoting the transition from planning to implementation of adaptation (*robust evidence,*

high agreement). Examples of institutional approaches to adaptation involving multiple actors include economic options (e.g., insurance, public-private partnerships), laws and regulations (e.g., land-zoning laws) and national and government policies and programmes (e.g., economic diversification). *{4.2, 4.4.2.1, Table SPM.3}*

- In principle, mechanisms that set a carbon price, including cap and trade systems and carbon taxes, can achieve mitigation in a cost-effective way but have been implemented with diverse effects due in part to national circumstances as well as policy design. The short-run effects of cap and trade systems have been limited as a result of loose caps or caps that have not proved to be constraining (*limited evidence, medium agreement*). In some countries, tax-based policies specifically aimed at reducing GHG emissions—alongside technology and other policies—have helped to weaken the link between GHG emissions and GDP (*high confidence*). In addition, in a large group of countries, fuel taxes (although not necessarily designed for the purpose of mitigation) have had effects that are akin to sectoral carbon taxes. *{4.4.2.2}*

- Regulatory approaches and information measures are widely used and are often environmentally effective (*medium evidence, medium agreement*). Examples of regulatory approaches include energy efficiency standards; examples of information programmes include labelling programmes that can help consumers make better-informed decisions. *{4.4.2.2}*

- Sector-specific mitigation policies have been more widely used than economy-wide policies (*medium evidence, high agreement*). Sector-specific policies may be better suited to address sector-specific barriers or market failures and may be bundled in packages of complementary policies. Although theoretically more cost-effective, administrative and political barriers may make economy-wide policies harder to implement. Interactions between or among mitigation policies may be synergistic or may have no additive effect on reducing emissions. *{4.4.2.2}*

- Economic instruments in the form of subsidies may be applied across sectors, and include a variety of policy designs, such as tax rebates or exemptions, grants, loans and credit lines. An increasing number and variety of renewable energy (RE) policies including subsidies—motivated by many factors—have driven escalated growth of RE technologies in recent years. At the same time, reducing subsidies for GHG-related activities in various sectors can achieve emission reductions, depending on the social and economic context (*high confidence*). *{4.4.2.2}*

Co-benefits and adverse side effects of mitigation could affect achievement of other objectives such as those related to human health, food security, biodiversity, local environmental quality, energy access, livelihoods and equitable sustainable development. The potential for co-benefits for energy end-use measures outweighs the potential for adverse side effects whereas the evidence suggests this may not be the case for all energy supply and agriculture, forestry and other land use (AFOLU) measures. Some mitigation policies raise the prices for some energy services and could hamper the ability of societies to expand access to modern energy services to underserved populations (*low confidence*). These potential adverse side effects on energy access can be avoided with the adoption of complementary policies such as income tax rebates or other benefit transfer mechanisms (*medium confidence*). Whether or not side effects materialize, and to what extent side effects materialize, will be case- and site-specific, and depend on local circumstances and the scale, scope and pace of implementation. Many co-benefits and adverse side effects have not been well-quantified. *{4.3, 4.4.2.2, Box 3.4}*

Technology policy (development, diffusion and transfer) complements other mitigation policies across all scales, from international to sub-national; many adaptation efforts also critically rely on diffusion and transfer of technologies and management practices (*high confidence*). Policies exist to address market failures in R&D, but the effective use of technologies can also depend on capacities to adopt technologies appropriate to local circumstances. *{4.4.3}*

Substantial reductions in emissions would require large changes in investment patterns (*high confidence*). For mitigation scenarios that stabilize concentrations (without overshoot) in the range of 430 to 530 ppm CO_2-eq by 2100[19], annual investments in low carbon electricity supply and energy efficiency in key sectors (transport, industry and buildings) are projected in the scenarios to rise by several hundred billion dollars per year before 2030. Within appropriate enabling environments, the private sector, along with the public sector, can play important roles in financing mitigation and adaptation (*medium evidence, high agreement*). *{4.4.4}*

[19] This range comprises scenarios that reach 430 to 480 ppm CO_2-eq by 2100 (*likely* to limit warming to 2°C above pre-industrial levels) and scenarios that reach 480 to 530 ppm CO_2-eq by 2100 (without overshoot: *more likely than* not to limit warming to 2°C above pre-industrial levels).

Financial resources for adaptation have become available more slowly than for mitigation in both developed and developing countries. Limited evidence indicates that there is a gap between global adaptation needs and the funds available for adaptation (*medium confidence*). There is a need for better assessment of global adaptation costs, funding and investment. Potential synergies between international finance for disaster risk management and adaptation have not yet been fully realized (*high confidence*). *{4.4.4}*

SPM 4.5 Trade-offs, synergies and interactions with sustainable development

Climate change is a threat to sustainable development. Nonetheless, there are many opportunities to link mitigation, adaptation and the pursuit of other societal objectives through integrated responses (*high confidence*). Successful implementation relies on relevant tools, suitable governance structures and enhanced capacity to respond (*medium confidence*). *{3.5, 4.5}*

Climate change exacerbates other threats to social and natural systems, placing additional burdens particularly on the poor (*high confidence*). Aligning climate policy with sustainable development requires attention to both adaptation and mitigation (*high confidence*). Delaying global mitigation actions may reduce options for climate-resilient pathways and adaptation in the future. Opportunities to take advantage of positive synergies between adaptation and mitigation may decrease with time, particularly if limits to adaptation are exceeded. Increasing efforts to mitigate and adapt to climate change imply an increasing complexity of interactions, encompassing connections among human health, water, energy, land use and biodiversity (*medium evidence, high agreement*). *{3.1, 3.5, 4.5}*

Strategies and actions can be pursued now which will move towards climate-resilient pathways for sustainable development, while at the same time helping to improve livelihoods, social and economic well-being and effective environmental management. In some cases, economic diversification can be an important element of such strategies. The effectiveness of integrated responses can be enhanced by relevant tools, suitable governance structures and adequate institutional and human capacity (*medium confidence*). Integrated responses are especially relevant to energy planning and implementation; interactions among water, food, energy and biological carbon sequestration; and urban planning, which provides substantial opportunities for enhanced resilience, reduced emissions and more sustainable development (*medium confidence*). *{3.5, 4.4, 4.5}*

Annex 119

SEPARATE OPINION OF SIR HERSCH LAUTERPACHT

While I am in general agreement with the Opinion of the Court, I have concurred in it subject to reservations both with regard to the scope of the operative part of the Opinion and the reasons adduced in support of it. Moreover, I feel it my duty to elaborate in more detail certain questions relating to the main problem confronting the Court.

I

There arises in the present case a preliminary issue which is to a large extent responsible for the division of the Court and which is connected in a significant manner with the exercise of its advisory function.

The request for the present Advisory Opinion of the Court is stated in apparently general terms. It runs as follows: "Is it consistent with the Advisory Opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly Resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the territory of South West Africa?" Thus put, the question does not seem to refer to any specific situation. In view of this, it has been suggested—a suggestion to which the Court, rightly in my view, has declined to accede—that the reply of the Court must be of a general character unrelated to the events and providing no answer to the difficulty which underlay the request for the Opinion. Yet it is clear from the documents transmitted to the Court by the Secretary-General that in asking the Court for an Opinion on the question whether oral hearings of petitioners on matters relating to the territory of South West Africa are consistent with the Opinion of the Court of 11 July 1950, the General Assembly was referring not to this question in general but to one aspect of that question as it results from a particular situation. The gist of that situation is that, while the General Assembly has with practical unanimity approved the Opinion of the Court of 11 July 1950, the Union of South Africa has declined to accept it as expressing the correct legal position and that it has refused to comply with its principal obligations in respect of the supervision of the legal régime of the mandated territory of South West Africa as ascertained by the Court in its Opinion of 11 July 1950. In particular, it has declined to provide the supervising authority with annual reports and to lend its assistance by forwarding, commenting upon, or participating in the examination of written petitions

submitted to the Committee on South West Africa. It is on account of that situation that the Court has been requested to give the present Advisory Opinion. So far as I am aware, no suggestion has been made from any quarter that the Committee on South West Africa is or should be entitled to grant oral hearings even if the Union of South Africa fulfils her obligations as Mandatory in the matter of annual reports and petitions. It cannot be reasonably assumed that in framing its request the General Assembly intended no more than to obtain the confirmation of a proposition which has not been disputed and which is not at issue. The General Assembly could not have intended to confine the task of the Court to an academic exercise not requiring any notable display of judicial effort.

This being so, the Court cannot answer the question put to it without direct reference to a situation of which a complete picture is presented in the documents which have been sent to it by the Secretary-General and of which it must also otherwise take judicial notice. Moreover, that particular situation is set out in the very terms of the request for an Advisory Opinion. The request expressly refers to Resolution 749 A (VIII) of 28 November 1953 which, in its recitals, includes an account of the attitude adopted by the Union of South Africa. Even if the Court were to ignore the official documents, minutes and reports submitted to it by the Secretary-General, the wording of the request, in embodying Resolution 749 A (VIII), must be held to give, in considerable detail, a picture of the problem confronting the General Assembly. It is clear, therefore, that there is no warrant in the present case for extracting from the wording of the request for the Opinion of the Court all possible element of generality and abstraction with the object of producing an answer which is entirely academic in character.

There occurs in the Advisory Opinion of 28 May 1948 on the *Conditions of Admission of a State to Membership in the United Nations* a passage which, when read in isolation, seems to give support to a view contrary to that here advanced. In that case the Court said : "It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it ; nothing which is said in the present opinion refers, either directly or indirectly, to concrete cases or to particular circumstances." (*I.C.J. Reports 1947-1948*, p. 61.) That passage seems to lend colour to the suggestion that the Court ought also in the present case to answer the question put to it without reference to the circumstances which prompted the General Assembly to make the request. However, on reading the relevant paragraph as a whole it is clear that the passage quoted is not germane to the present issue. The Court was on that occasion concerned with the objection that "the question put [to it] must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court". The Court rejected that contention on the ground that it "cannot attribute a

political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision" and that "it is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body". There followed the sentence quoted at the beginning of this paragraph. It will thus be seen from this bare recital that the passage in question is not relevant to the issue now before the Court.

At the same time, while I am in agreement with the present Opinion of the Court as to this aspect of the matter, I do not consider that the question put to it by the General Assembly can accurately be answered by way of a simple affirmative. The difficulty arises from the fact that the General Assembly, although actually desirous of an answer of the Court bearing upon a specific situation, cast its request in an apparently general form unrelated to that situation. This being so, a bare affirmative answer does not seem to me to meet the exigencies of the case. It is a matter of common experience that a mere affirmation or a mere denial of a question does not necessarily result in a close approximation to truth. The previous practice of the Court supplies authority for the proposition that the Court enjoys considerable latitude in construing the question put to it or in formulating its answer in such a manner as to make its advisory function effective and useful. Thus, for instance, in the *Jaworzina* case (Series B, No. 8, p. 50) the Court amplified the question submitted to the Court. Although the request for an Advisory Opinion in that case seemed to be confined to the frontier region of Spisz, the Court came to the conclusion that it must express an opinion on the other parts of the frontier in so far as the delimitation of the frontiers in the entire region may be interdependent. In the case concerning the *Competence of the International Labour Organisation*, it restated and limited the question put to it (Series B, No. 3, p. 59). In the Advisory Opinion on the *Interpretation of the Greco-Turkish Agreement*, the Court held that as the request for its Opinion did not state exactly the question upon which the Opinion was sought, "it is essential that it should determine what this question is and formulate an exact statement of it" (Series B, No. 16, p. 14). In the field of the contentious procedure the previous jurisprudence of the Court as formulated in its Judgment No. 11 on the *Interpretation of Judgments Nos. 7 & 8* (pp. 15, 16) contains authority for the proposition that the Court, for the purpose of the interpretation of its Judgments —a matter of some importance for the purposes of the present Advisory Opinion designed to interpret a previous Opinion—does not consider itself as bound simply to reply "yes" or "no" to the propositions formulated by the parties and that "it cannot be bound by formulae chosen by the Parties concerned, but must be able to take an unhampered decision".

Undoubtedly it is desirable that the request for an Advisory Opinion should not, through excess of brevity, make it necessary for the Court to go outside the question as formulated. Reference may be made in this connection to suggestions bearing upon possible developments in the procedure followed by the General Assembly in making requests for an Advisory Opinion of the Court (see Sir Gerald Fitzmaurice in *Transactions of Grotius Society*, 38 (1952), p. 139). However, the absence of the requisite degree of precision or elaboration in the wording of the request does not absolve the Court of the duty to give an effective and accurate answer in conformity with the true purpose of its advisory function. For these reasons I consider that, having regard to the apparently general form in which the request for the Opinion is framed, the Opinion of the Court in the present case could not properly be couched in terms of "yes" or "no" but ought to have been given in relation both to the specific situation underlying the request for the Advisory Opinion and to the powers of the Committee on South West Africa irrespective of that situation. An answer which concentrates on only one of these two aspects may well be such as either to ignore the true issue before the Court or to open the other for yet another interpretative Opinion.

It may be convenient if, in order to illustrate the above aspect of the present Separate Opinion, I reverse the customary order and give my own version as to what ought to be the answer of the Court in the present case:

(1) It may or may not be consistent with the Advisory Opinion of 11 July 1950 for the Committee on South West Africa to grant oral hearings to petitioners on matters relating to the territory of South West Africa.

(2) In circumstances in which there is present the requisite co-operation on the part of the Mandatory complying with his obligation to send reports and transmit petitions to the supervising authority as envisaged in the Opinion of 11 July 1950, it is not consistent with that Opinion to grant oral hearings to petitioners.

(3) It is consistent with the Advisory Opinion of 11 July 1950 for the Committee on South West Africa to grant oral hearings to petitioners from that territory whenever, and so long as, owing to the absence of such co-operation on the part of the Mandatory, the Committee feels constrained, in order to fulfil the duty entrusted to it by the General Assembly, to use sources of information other than those which would be normally available to it if the Mandatory were willing to assist the Committee in obtaining information in accordance with the procedure as it existed under the League of Nations.

It will be seen that on the main issue, as formulated under (3), my view is substantially identical with that of the operative part of the Opinion of the Court. I differ from it inasmuch, in consequence of the generality of its answer, the latter may be interpreted as meaning that the Committee on South West Africa is entitled to grant oral hearings even if there is present the necessary co-operation on the part of the Union of South Africa. Any such finding would, in my view, be unwarranted and inconsistent with the Opinion of 11 July 1950.

II

I now propose to examine the main substantive question which is relevant to the answer of the Court, namely, whether oral hearings are consistent with that qualifying clause of its Opinion of 11 July 1950 which laid down that "the degree of supervision to be exercised by the General Assembly should not ... exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations". That qualifying clause was in the nature of an elaboration—a necessary elaboration—of the governing consideration which underlay that Opinion, namely, that in the absence of a new arrangement agreed to by the Union of South Africa her obligations and her position in the matter of supervision were, in principle, to continue unaltered. No other object can properly be attributed to that qualifying clause. In particular, no intention can reasonably be imputed to the Court to crystallize in absolute terms and in every detail the degree of supervision and the procedure obtaining under the Mandates System. The object was to preserve the degree and the procedure of supervision not as an end in itself or because of any immutable virtue inherent in it, but merely as a means of obviating an extension or diminution of the obligations of the Union of South Africa as a Mandatory. If, as I believe to be the case, the grant of oral hearings does not, upon examination of the entire position ensuing from the attitude of the Union of South Africa, result in any addition to its obligations, then the issue of crystallizing the degree and procedure of supervision cannot properly be deemed to arise.

So far as the language of the above-mentioned qualifying clause is concerned, I have come to the conclusion that normally, i.e., so long as there are available the regular sources of information through annual reports and petitions transmitted by the Union of South Africa in accordance with the Opinion of 11 July 1950, the grant of oral hearings to petitioners would exceed the degree of supervision which applied during the Mandates System and that it would not conform to the procedure followed in this respect, i.e., in the matter of supervision, by the Council of the League of Nations.

Obtaining of information through oral hearings results in a degree of supervision more stringent than that implied in the system of written petitions. Oral hearings were not permitted under the system applied by the Council of the League of Nations. They were expressly disallowed by it on repeated occasions. As will be submitted later on, that attitude of the Council must be viewed in the light of the circumstances which explained its refusal to authorize oral hearings. However, these circumstances, although they are relevant to the more general issue now before the Court, do not alter the fact that oral hearings found no place in the procedure of supervision as applied under the Mandates System. I have little doubt that this would have been the answer—in the nature of a simple and obvious *constatation*—if that question had been asked during the existence of the League of Nations, at the time of its formal demise in 1946, or when the Advisory Opinion of the Court was given in 1950.

Neither have I found it possible to rely to any substantial extent on the view that although the Council of the League did not permit and that although it expressly rejected the procedure of oral hearings, it was *entitled* to grant oral hearings by virtue of its inherent powers in the matter of supervision and that these powers passed from the Council of the League of Nations to the General Assembly of the United Nations in conformity with the Opinion of the Court of 11 July 1950. Any devolution of powers in this respect could take place only subject to the governing rule as laid down in that Opinion, namely, that the degree of supervision by the General Assembly should not exceed that applied under the Mandates System. I find it difficult to accept as a substantial ground for the present Opinion of the Court an interpretation which construes that qualifying rule as referring not necessarily to the system which actually applied but to one which could or might have been applied in certain circumstances. The doctrine of implied powers of the Council might, if resorted to, render meaningless—to a large extent—the rule that there must be no excess of supervision. As the Council of the League, in the exercise of its alleged inherent powers, could introduce any means of supervision not patently inconsistent with the mandate, no means of supervision thus introduced by the General Assembly could conceivably be in excess of the supervision "applied" under the Mandates System. I cannot accept any such interpretation of the Advisory Opinion of 1950 which may go a long way towards reducing its principal qualifying provision to a mere form of words. The word "applied" in the qualifying passage, quoted above, of the Opinion of 1950 means "actually" (and not "potentially") applied just as the words "procedure followed in this respect by the Council" mean the procedure as actually followed and not as it might have been followed.

It may also be borne in mind that there is a distinct element of unreality in relying, in this and in other matters, on the inherent powers of the Council of the League. Such powers, if any, were powers not of an ordinary legislature or executive proceeding by a majority vote. They were powers of a body acting under the rule of unanimity scrupulously observed. There was, as a matter of reasonable estimate, little prospect of the Council, which included the principal Mandatory Powers as its Members, decreeing by an unanimous vote the authorization of oral hearings which encountered the emphatic opposition of these Powers. There is accordingly no persuasive merit in the argument which relies on inherent powers whose exercise hung on the slender thread of unanimity in circumstances such as these.

* * *

While I am of the view that in normal circumstances the grant of oral hearings to petitioners would result in exceeding the degree of supervision as actually applied under the Mandates System and that it would not conform with the procedure followed in this respect by the Council of the League, I believe that both the excess and the departure are of limited compass. This fact, although it does not affect my answer to the more limited aspect of the question here examined, has a bearing upon what I consider to be the proper basis of the Opinion of the Court.

With regard to degree of supervision, it is difficult to deny that oral hearings, as compared with written petitions, result to some extent in exceeding the degree of supervision obtaining under the League of Nations. In so far as oral hearings accompanied by a detailed examination of petitioners add to the reality and the effectiveness of the scrutiny of the conduct of the administering authority—and it is difficult to deny that they do so—they increase the degree of supervision as compared with a system which knows of no oral hearings of petitioners. It has been suggested that as oral hearings may disclose the spurious or fraudulent nature of some petitions, such hearings are to the advantage of the Mandatory and that they do not therefore increase his obligations in the matter of supervision. This argument I find unconvincing. It assumes that fraudulent petitions are the rule, and not the exception.

Similar considerations apply to the question whether oral hearings constitute a departure from the procedure obtaining under the League of Nations. By and large, oral hearings before the Mandates Commission were not admissible under the procedure of the League of Nations and, in fact, they were never resorted to. On the face of it, recourse to oral hearings would therefore constitute a departure

from the procedure of the Mandates Commission and the Council of the League of Nations.

* * *

Admittedly, the above findings ought to be qualified by reference to certain factors which suggest that the departure consisting in the admission of oral hearings is—although real—less radical than appears at first sight. In the first instance, although the Mandates Commission, in compliance with the attitude of the Council of the League, did not grant oral hearings, that practice was not expressive of its view of the usefulness and of the necessity, in some cases, of relying on that procedure. The record shows that the Mandates Commission felt itself free to approach the Council on future occasions with a view to obtaining a modification of its attitude. Secondly, although the Commission as such did not grant oral hearings, its members and its Chairman, in their individual capacity, did in fact grant oral hearings to petitioners in private interviews outside the meetings of the Commission. Although subsequently some fine psychological distinctions were made between the minds of the members of the Commission as influenced outside its meetings and as formed inside the Commission, the reality of that distinction is limited. Thirdly, the refusal of the Council of the League of Nations to authorize oral hearings did not bear any mark of finality. In stating repeatedly that there was no reason, on the occasions before it, to depart from the previous practice, the Council left the door open for a modification of its practice in exceptional circumstances. It is not certain to what extent such possible modifications included the admissibility of oral hearings. In the report accompanying the Resolution approved by the Council on the last occasion when it declined to authorize oral hearings, it was stated that if in any particular circumstances it should be impossible for all the necessary information to be secured with the assistance of the Mandatory Power, the Council could "decide on such exceptional procedure as might seem appropriate and necessary in the particular circumstances". (Report approved on 7th March 1927.) It is possible —we cannot put it higher than that—that, having regard to the circumstances which brought about the Resolution, the Council, in referring to "such exceptional procedure", was referring to oral hearings. The particular situations, referred to in the Resolution, may fairly be assumed to arise when, owing to an attitude of total non co-operation on his part, no assistance whatsoever is forthcoming from the Mandatory. Fourthly, it appears from the replies which the Mandatory Powers gave in 1926 and in which they rejected the principle of oral hearings that one of the main reasons for their attitude was the assumption of the continuing co-operation and assistance on the part of the Mandatory. It is

noteworthy that throughout the existence of the League of Nations there were no instances of a Mandatory Power refusing to supply information with regard to a complaint brought before the Mandates Commission. (In the case of the Bondelzwarts rebellion, which has been referred to as an instance of that nature, although the Government of South Africa refused to accept and comment on a report of a local commission of enquiry, the South African administrator of the territory in question was questioned at length by the Mandates Commission in the presence of the South African representative and submitted a detailed memorandum on the subject of the complaint (*Permanent Mandates Commission, Minutes of Third Session*, 1923).)

When, therefore, it is said that oral hearings did not exist under the League and that recourse to them by the Committee on South West Africa would be a departure from that practice, this statement—although strictly true—is a simplification of the situation. This is so not only because the exclusion of the oral hearings was less rigid than cursory examination seems to indicate. This is so mainly because the exclusion of oral hearings was a practice adopted within the orbit of the normal operation of other aspects of the machinery of supervision. These have now ceased to operate in consequence of the attitude adopted by the Union of South Africa. To put it in different words, the departure from the legal procedure involved in the system of oral hearings is substantial only if viewed against the background of the situation as it obtained during the existence of the League when reports and petitions were regularly transmitted by the Mandatory. The departure is less drastic when viewed in the light of the cessation of that system as the result of the attitude of non co-operation as adopted by South Africa. For this reason there is no warrant for treating the practice under the League of Nations as being so unequivocal and decisive as to rule out all other factors of a legal or practical nature.

* * *

The above considerations do not decisively affect my answer to the general question whether oral hearings are consistent with the Court's Opinion of 1950. That question, when answered in the abstract—i.e., without reference to the existing situation underlying the request for the Advisory Opinion—must be answered in the negative. However, as already explained, it is not open to the Court to confine itself to an answer in the abstract. For this reason these considerations are of some indirect importance for the specific question as to whether oral hearings are consistent with the Opinion of 1950 having regard to the actual situation in respect of the territory of South West Africa.

III

As stated, if the Court were not confronted with a situation created by the attitude of the Government of South Africa and if it were merely called upon to reply in the abstract to the question put to it, I would feel bound to answer that the grant of oral hearings constitutes a sufficient addition to the degree of supervision and that it departs sufficiently from the procedure obtaining under the League of Nations to bring it within the two restrictive clauses, referred to above, of the Opinion of 11 July 1950. However, this is not the situation with which the Court is faced. The Court is now called upon to answer not an abstract question, but—primarily—the question as to the consistency of oral hearings with its Opinion of 11 July 1950 in a situation in which the two positive dispositions of that Opinion for securing the international supervision of the Territory have become inoperative. These are the provisions, repeatedly affirmed in the Opinion, referring to the obligation of the Mandatory Power to submit annual reports and to transmit petitions from the inhabitants of the Mandated Territory. They are the basic provisions whose place as such must be kept in mind. For this reason any preoccupation with the two limitative clauses of the Opinion ought not to be allowed to overshadow its main purport. There has been a tendency to describe these limitative clauses as the basic provisions of the Opinion of 11 July 1950. Any such emphasis distorts that Opinion.

* * *

It is submitted that in answering the question put to it against the background of the fact that the two basic provisions of the operative part of its Opinion of 1950 are in abeyance owing to the attitude adopted by the Union of South Africa, the Court must be guided by established principles of interpretation and the applicable general principles of law.

In the first instance, in accordance with a recognized principle of interpretation, its Opinion of 11 July 1950 must, like any other legal text, be read as a whole. It must be read as a comprehensive pronouncement providing for the continuation of the administration and the continued supervision, by the United Nations, of the administration of South West Africa as a Mandated Territory. All other dispositions, injunctions and qualifications of the Opinion of 11 July 1950 must be regarded as subservient to that overriding purpose. The principal means for fulfilling that purpose—namely, annual reports supplied by the Mandatory and written petitions transmitted, commented upon and explained by him before the supervising body—which were in operation under the Mandates System

are now in abeyance owing to the attitude adopted by the Union of South Africa. If the Opinion of 11 July 1950 is read as a whole, then it is impossible, without destroying its effect, to maintain fully and literally provisions qualifying the operation of a system whose main characteristics have become inoperative. It seems unreasonable to uphold fully and literally the limitations of a rule after the possibility of giving effect to the rule itself has disappeared. To do that is to elevate the exception into a rule and to reduce the governing rule to a nullity. A court of law cannot give its sanction to any such simplification of logic. Neither can it avoid its judicial duty by declaring that only a political or legislative body is competent to resolve the conflict which has arisen, as the result of the action of a party, between the overriding purpose of the instrument and its individual provisions and limitations. To resolve that conflict, in the light of the instrument as a whole, is an essential function of a judicial tribunal.

In particular, if we act on the principle that the Opinion of 11 July 1950 must be read and interpreted as a whole, then it is necessary to apply that principle to the interpretation of that clause of that Opinion which lays down that the degree of supervision must not exceed that obtaining under the Mandates System. That clause, properly interpreted, does not rigidly and automatically apply to each and every aspect of supervision. If, owing to the attitude of the Government of South Africa, the degree of supervision as applied under the Mandates System is in danger of being severely reduced with regard to the principal aspects of its operation, it is fully consistent with the Opinion of the Court of 11 July 1950 that in some respects that supervision should become more stringent provided that it can be said, in reason and in good faith, that the total effect is not such as to increase the degree of supervision as previously obtaining. It is in accordance with sound principles of interpretation that the Court should safeguard the operation of its Opinion of 11 July 1950 not merely with regard to its individual clauses but in relation to its major purpose. This is, in the present context, the meaning of the principle that that Opinion must be interpreted as a whole. The question is not whether the admission of oral hearings of petitioners implies an excess of supervision with regard to this particular means of supervision. The decisive question is whether, owing to the situation brought about by the Union of South Africa, oral hearings of petitioners would result in an excess of supervision as a whole. It may be admitted that the procedure of oral hearings of petitioners connotes in itself a degree of supervision of a stringency greater than that obtaining in the matter of petitions under the Mandates System. But if, as the result of the attitude of the Union of South Africa, the degree

of supervision is substantially reduced in other respects, then the total effect of the departure here contemplated will not be such as to result in exceeding the degree of supervision as a whole. On the contrary, however effective oral hearings of petitioners may be, they are unlikely to restore to the procedure of supervision the effectiveness of which it is being deprived as the result of the attitude of non co-operation on the part of the Union of South Africa. Thus viewed, the authorization of oral hearings is no more than a specific application of the principle that a legal text must be interpreted as a whole.

* * *

The second principle of law of general import in the present case is connected with the nature of the régime of the territory of South West Africa as declared in the Opinion of 11 July 1950. Inasmuch as that Opinion laid down, by reference to the Covenant of the League of Nations and the Charter of the United Nations, the status of South West Africa—a régime in the nature of an objective law which is legally operative irrespective of the conduct of the Union of South Africa—that status must be given effect except in so far as its application is rendered impossible, in terms of its general purpose, having regard to the attitude adopted by the Union. To that extent there are permissible such modifications in its application as are necessary to maintain—but no more—the effectiveness of that status as contemplated in the Court's Opinion of 1950. It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument—not to change it.

Consequently, there can be no question here of the Union of South Africa having been divested, owing to the attitude adopted by her, of any safeguards which the Opinion of 11 July 1950 provided in her interest as the Mandatory with the view to not increasing her obligations. No countenance can be given to the suggestion that, as the result of the attitude adopted by South Africa, the régime as established by that Opinion of the Court is liable to changes—except in pursuance of the principle that that régime as a whole must be and remain effective. The Opinion of 11 July 1950 has been accepted and approved by the General Assembly. Whatever may be its binding force as part of international law—a question upon which the Court need not express a view—it is the law recognized by the United Nations. It continues to be so although the Government of South Africa has declined to

accept it as binding upon it and although it has acted in disregard of the international obligations as declared by the Court in that Opinion.

* * *

At the same time, and for the same reasons, in so far as the Opinion of 1950 is relied upon for the purpose of upholding literally all the safeguards and restrictions formulated in the interest of the Mandatory, it must, like any other legal instrument, be interpreted reasonably and in accordance with legal principle. The jurisprudence of the Court in the matter of treaties and otherwise provides by analogy some useful instruction in this respect. In the fifteenth Advisory Opinion on the *Jurisdiction of the Courts of Danzig*, the Court formulated the principle that a State cannot avail itself of an objection which would amount to relying on the non-fulfilment of an obligation imposed on it by an international engagement (Series B, No. 15, p. 27). It is not suggested that these principles are directly germane or applicable to the present case. For this is not the case of a treaty—although the Opinion of 11 July 1950 did no more than to formulate a régime resulting from two multilateral conventional instruments, namely, the Covenant of the League of Nations and the Charter of the United Nations. Neither do I suggest that this is technically a case of estoppel—though there is a measure of contradiction, reminiscent of situations underlying estoppel, in the fact that an instrument repudiated by a Government is being invoked for the benefit of that Government. (While the Government of South Africa did not participate in the present proceedings before the Court, in the Fourth Committee of the General Assembly of 1955 it opposed oral hearings in reliance on the Advisory Opinion of 11 July 1950 (Official Records, Fourth Committee, 500th Meeting, 8 November 1955, p. 182).) Finally, I do not attach any decisive importance to the possible submission that this is an instance of a Government claiming to benefit from its own wrong by declining to supply and transmit information which, according to the Opinion of 11 July 1950, it is legally bound to supply and transmit and at the same time resisting the contemplated effort to obtain alternative information. For it may not be easy to characterize precisely in legal terms a situation in which South Africa declines to act on an Advisory Opinion which it was not legally bound to accept but which gave expression to the legal position as ascertained by the Court and as accepted by the General Assembly.

Nevertheless, the above considerations are not wholly extraneous to the case now before the Court. For these are not technical rules of the law of contract or treaties. They are rules of common sense

and good faith. As such they are relevant to all legal instruments, of whatsoever description, inasmuch as their effect is not to permit a party which repudiates an instrument to rely literally on it—or have it invoked for its benefit—in a manner which renders the fulfilment of its purpose impossible. In particular, these principles are relevant to the question—which ought not to remain unanswered—as to the legal basis of a judicial decision which by way of interpretation substitutes a measure of supervision or an act of performance for one repudiated or frustrated by the party affected by the instrument in question. What, apart from the general principles of interpretation as set out above, is the authority for the proposition that the Court may replace one means of supervision by another, not previously authorized—nay, expressly disallowed? This, it may be objected, is not the way in which courts normally proceed in the matter of contracts between individuals (though in many countries courts, when confronted with a situation in which a substantive provision of the instrument governing succession is in danger of being frustrated owing to an obscurity of expression or an event subsequently arising, will vary the original disposition in such a way as to make it approximate so far as possible to the general intention of its author. It will be noted that the supervision by the United Nations of the mandate for South West Africa constitutes the most important example of succession in international organization).

However, this is not a case of a contract or even of an ordinary treaty analogous to a contract. As already pointed out, this is a case of the operation and application of multilateral instruments, as interpreted by the Court in its Opinion of 11 July 1950, creating an international status—an international régime—transcending a mere contractual relation (*I.C.J. Reports 1950*, p. 132). The essence of such instruments is that their validity continues notwithstanding changes in the attitudes, or the status, or the very survival of individual parties or persons affected. Their continuing validity implies their continued operation and the resulting legitimacy of the means devised for that purpose by way of judicial interpretation and application of the original instrument. The unity and the operation of the régime created by them cannot be allowed to fail because of a breakdown or gap which may arise in consequence of an act of a party or otherwise. Thus viewed, the issue before the Court is potentially of wider import than the problem which has provided the occasion for the present Advisory Opinion. It is just because the régime established by them constitutes a unity that, in relation to instruments of this nature, the law—the existing law as judicially interpreted—finds means for removing a clog or filling a lacuna or adopting an alternative device in order to prevent a standstill of the entire system on account of a failure in any particular link or part. This is unlike the case of a breach of the

provisions of an ordinary treaty—which breach creates, as a rule, a right for the injured party to denounce it and to claim damages. It is instructive in this connection that with regard to general texts of a law-making character or those providing for an international régime or administration the principle of separability of their provisions with a view to ensuring the continuous operation of the treaty as a whole has been increasingly recognized by international practice. The treaty as a whole does not terminate as the result of a breach of an individual clause. Neither is it necessarily rendered impotent and inoperative as the result of the action or inaction of one of the parties. It continues in being subject to adaptation to circumstances which have arisen.

IV

It is now necessary to enquire to what extent the situation with which the General Assembly—and the Court—are confronted call for and permit the application of the principles of law as here outlined. To what extent has the refusal of the Union of South Africa to submit annual reports and to transmit and comment on written petitions in conformity with the obligations established in the Opinion of 11 July 1950, created a gap so serious in the system there contemplated as—in conformity with these principles—to render legitimate alternative sources of information not exceeding the total degree of supervision envisaged in that Opinion? These principles are that the Opinion of 1950 must be read as a whole; that it cannot be deprived of its effect by the action of the State which has repudiated it; and that the ensuring of the continued operation of the international régime in question is a legitimate object of the interpretative task of the Court.

Having regard to the non co-operation of the Mandatory, what is the position in the matter of the sources of information available to the supervising agency and indispensable for the proper working of the system of supervision and the implementing of the Opinion of the Court of 11 July 1950?

In the first instance, the annual report of the Mandatory, as provided by the Opinion of the Court of 1950 and as forming an integral part of the procedure of the League of Nations, has disappeared. It has been replaced by a conscientious and well-documented volume prepared by the Secretary-General and entitled "Information and Documentation in respect of the Territory of South West Africa" (such as in Doc. A/AC 73 L 3; Doc. A/AC 73/L 7). That volume provides, to a considerable extent, the substance of the report which the Committee on South West Africa submits to the General Assembly. But this is not a document in the same category as a report submitted by the Man-

datory and explained by it point by point, if necessary, at the meetings of the Committee. The supervising authority is thus deprived of an authentic source of information which is one of the two main pillars of the system of supervision. There is a gap here and a resulting diminution of the degree of supervision as previously existing and as envisaged by the Court in its Opinion of 1950. It is consistent with that Opinion to interpret it in a manner which authorizes the filling of that gap—provided that the result is not to increase the total degree of supervision of the system as a whole.

The second main source of information which forms an important part of the system of supervision and to which the Opinion of the Court of 1950 refers in passages of particular emphasis are petitions sent by the inhabitants of the administered territory. Under the League of Nations only petitions in writing were admissible. These, when supplemented by the observations of the Mandatory and the explanations supplied by him in the course of the proceedings of the supervising organ, are a weighty instrument of supervision and an important factor in the formation of the judgment of the supervising authority. As the result of the attitude of non co-operation adopted by the Union of South Africa, the efficacy of that source has been substantially reduced. The Mandatory, who is absent from the meetings of the Committee, provides no comment of his own and does not assist the supervisory body by explanations supplied at its request during or subsequent to its meetings. Moreover, the Mandatory has declined to transmit petitions submitted by the inhabitants of the administered territory. If the procedure of the Mandates Commission were adhered to in this respect, it is difficult to see how written petitions from the inhabitants of the territory could come at all before the Committee on South West Africa. That Committee has now adopted a deliberate change in the procedure obtaining under the Mandates System. The rules of procedure as adopted in 1923 by the League of Nations provided that petitions by communities or sections of the population of mandated territories shall be sent to the Secretariat of the League through the mandatory governments concerned and that any petitions received by the Secretary-General of the League through any channel other than the mandatory government should be returned to the signatories with the request that they should re-submit the petitions in accordance with the above procedure. As the Government of South Africa has refused to transmit the petitions thus received, the Committee on South West Africa has provided in its Provisional Rules of Procedure—Rule 26—that on receipt of a petition the Secretary-General shall request the signatories to submit the petition to the Committee through the Government of South Africa but that if, after a period of two months, the petition has not been received through the Government of South Africa, the Com-

mittee shall regard the petition as validly received. It is also provided that the Committee shall subsequently notify the Government of South Africa as to the conclusions it has reached on the petition. It does not appear that objection has been raised against that particular—and important—departure from the procedure obtaining under the Mandates System.

However, although thus made available to the supervising organ, the written petition no longer fulfils the same function and no longer partakes of the same effectiveness as written petitions examined in the presence and with the co-operation of the Mandatory. It is in the nature of *ex parte* information which may or may not be capable of verification. This does not mean that the written petition examined without the assistance of the Mandatory is without value or that it can never provide a basis for the conclusions of the supervising Committee. But it is clear that it is not the same thing as and that it is a lesser thing than written petitions within the framework of a machinery operating with the participation of the Mandatory.

* * *

The interpretation, in this matter, of the Opinion of the Court of 11 July 1950 is thus confronted with the fact that owing to the attitude of South Africa the potency of the two principal instruments of supervision is substantially reduced and that other means, not fundamentally inconsistent with that Opinion, must be found in order to give effect to its essential purpose. The crucial question which the Court has now to answer is: Are oral hearings one of these means? Are they truly necessary and effective for filling the gap that has arisen? Do they secure the reality of the task of supervision otherwise reduced below the level contemplated by and underlying the Opinion of 1950? I am of the view that, in the circumstances, they fulfil that purpose. Oral hearings contribute one of the tangible elements of supervision which otherwise—i.e., in the absence of other means of supervision—operates in an atmosphere of unreality. Undoubtedly, the information received through oral hearings may be exaggerated, false and misleading. Oral hearings may be abused by fanatics and seekers for self-advertisement. But these difficulties and dangers are also present, and less capable of correction, in the case of written petitions—especially when examined in the absence of the Mandatory. Moreover, it is clear that the importance of oral hearings increases in proportion as the effectiveness of the other instruments of supervision has been reduced as the result of the attitude of the Union of South Africa. If the United Nations were not confronted with the refusal of the Union of South Africa to abide by its obligations as a Mandatory in conformity with the Opinion of the Court of 1950 and if there remained, in their full effectiveness, the other instruments of supervision therein

provided, then the advantages of oral hearings, considerable as they may be and though being, according to some, in keeping with the recognition within the United Nations of the right of oral hearing as a corollary of the fundamental right of petition, would be no more than an improvement on the existing machinery of supervision. They would not be essential to it. In fact, being in the nature of an excess of supervision as it existed under the League of Nations, they would be contrary, on that account, to the Opinion of 1950. But this is not the position with which the Court is confronted. The Court is not here called upon to express a view on the controversial question of the merits of oral hearings in general. The question before it is the necessity for oral hearings in a situation amounting to a substantial drying up of other sources of information.

There is therefore little force in the argument that, after all, oral hearings are not the only source of information. Admittedly, they are not. There are other sources. In particular, written petitions are still available. However, if the effectiveness of these available means has become drastically reduced owing to the attitude of the Mandatory, then it is open to the Committee on South West Africa, as a matter of effectiveness of the instrument which it has to apply, to fulfil that duty by other means.

It may be objected that oral hearings in the absence of the Mandatory are a procedure which amounts to passing of judgment in default upon that authority in its absence and that for that, if no other, reason it constitutes a particularly flagrant excess of supervision. But is that so ? When the Committee on South West Africa examines written petitions in the absence of the Mandatory, that procedure may also be said to amount to passing of judgment by default. The Committee simply informs the Government of South Africa of its conclusions. But it has not been denied that the Committee is entitled to do so and that the rule of procedure which it has adopted for that purpose is in accordance with the Opinion of the Court of 11 July 1950. Moreover, when the supervising authority hears petitioners in person it has the opportunity of checking and verifying their statements by a direct and efficacious method which is not available when written petitions are examined in the absence of their authors.

This, then, is the principal question before the Court. Is the need for oral hearings real ? If permitted, would they, in the situation before the Court, contribute to exceeding the total degree of supervision as circumscribed in the Opinion of the Court of 1950 ? For it is only under the following two conditions that oral hearings of petitioners can be held to be consistent with that Opinion : the need for them must be real in terms of implementing the two

basic provisions of that Opinion of the Court ; secondly, they must not add to the degree of supervision in such a way that in the aggregate it becomes more stringent than under the League of Nations. Oral hearings of petitioners would not be permissible if they were attempted not because of that real need but as an expression of the disapproval of the attitude of South Africa. Any such innovation implying that the Opinion of 1950 has lost its regulating and restraining force would not be permissible. The Opinion of 1950 is not a treaty whose provisions can be discarded for the reason that South Africa has declined to comply with them. It gives expression to an objective legal status recognized by the United Nations and it must be acted upon. But it must be acted upon in a reasonable—and not in a one-sided and literal—manner.

My conclusion is, therefore, that there is a true need for oral hearings in order to supplement sources of information which have become incomplete in consequence of the attitude of the Union of South Africa and that, if adopted, they would not result in exceeding the total degree of supervision as laid down in the Opinion of 11 July 1950. This being so, they must be held to be consistent with that Opinion. They would be so consistent even if the Opinion of 11 July 1950 were in absolute terms, namely, if it did not contain the qualification "as far as possible".

V

In view of the preceding observations I need only refer briefly to the second qualifying clause of the Opinion of 11 July 1950, namely, that "the degree of supervision ... should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations". The expression "as far as possible" is a form of words of pronounced elasticity. Its interpretation is a matter of degree. It is "possible" for a system of supervision to continue without reports of the Mandatory, without written petitions accompanied by his comments and explanations, without the representatives of the latter being present at the meetings of the supervisory organ, and without oral hearings filling the gap which has thus arisen. But that would not be a supervision as contemplated by the Opinion of 1950. It would be a supervision falling short not only of the assumption of effectiveness which underlay that Opinion of the Court, but also of what must be regarded as a reasonable measure of effectiveness. It has been suggested that the Committee would meet with no difficulty if it were to abstain from oral hearings of petitioners. Admittedly, there is as a rule no difficulty encountered by doing nothing or little, but this is hardly a reasonable standard by which to gauge the fulfilment of the task of the supervising authority. There is no occasion to go to the extreme length

in thus interpreting away the requirements of satisfactory supervision in deference to a persistent attitude of non co-operation on the part of the Mandatory. There is no general interest involved in weakening the system of supervision so considerably below the level contemplated in the Opinion of 1950. For these reasons I find no difficulty in accepting the view that the saving expression "so far as possible" can properly be relied upon in this case so as to permit oral hearings of petitioners. I cannot accept the argument that the expression "as far as possible" should be reduced to insignificance for the reason that the Opinion of 1950 intended to crystallize the substantive and procedural *status quo* as it then existed. Reasons have been given above why there is no merit in the view that the Court ought to lend its authority to the continued and unaltered maintenance of that *status quo* by upholding the two qualifying clauses of its Opinion of 1950 after the two basic provisions which it thus qualified have ceased to be operative as the result of the attitude of the Mandatory.

* * *

There is one point which requires some explanation in this connection. In its Opinion of 7 June 1955 on the *Voting Procedure*, the Court, in explaining the expression "as far as possible" as being "designed to allow for adjustments and modifications necessitated by legal or practical considerations" (at p. 77)—an explanation which fully covers the issue now before the Court—seemed to give a restricted scope to that expression. It explained that phrase as "indicating that in the nature of things the General Assembly, operating under an instrument different from that which governed the Council of the League of Nations, would not be able to follow precisely the same procedures as were followed by the Council" *(ibid.)*. It might thus appear that the Court was limiting the operation of the "as far as possible" principle to the exigencies of the Charter and of the procedure of the General Assembly. It is not believed that this is so. In the case of the *Voting Procedure* the Court was concerned with this particular aspect of the question and it was therefore natural that its reasoning should have concentrated on that issue. There is no reason to assume that it intended to limit generally the apparent comprehensiveness of the clause "as far as possible". Similar considerations apply to those passages of the Opinion of 1955 in which the Court attached importance to stating that the expression "degree of supervision", inasmuch as it related to the "measure and means of supervision" and to "the means employed by the supervisory authority in obtaining adequate information", should not be interpreted as relating to procedural

matters (at p. 72). The correct view is that the issue of oral hearings is both a question of substantive supervision and of procedure. It is clear that a procedural measure may decisively affect the rights and obligations of the parties. There would be a disadvantage in basing the Judgments and Opinions of the Court not on legal considerations of general application but on controversial technicalities and artificial classifications.

VI

There remains the question whether, assuming that there has been created a real gap in the system of supervision and that oral hearings may be instrumental to some extent in filling that gap, the consistency of oral hearings with the Opinion of 11 July 1950 can be ascertained by way of judicial interpretation or whether it can only be decreed, by way of legislative change, by the General Assembly. This question, it is believed, must be answered affirmatively in the light of the general legal considerations outlined above.

There are three possible methods of approach for a court of law confronted with a situation such as the present, namely, that of a party refusing to recognize or to act upon a legal instrument which purports to express the legal obligations of that party and whose validity must, as in the present case, be regarded as continuing:

(1) It is possible to hold that, even if that party refuses to be bound by any of the obligations or limitations of the legal instrument in question, the other party—in this case the United Nations and the Committee on South West Africa are the other party—must fulfil literally and abide by all the restraining provisions enacted for the benefit of the recalcitrant party even if such one-sided application results in reducing substantially the effectiveness of the instrument. Any such method I consider to be unsound.

(2) The second method is to assert that, as the legal instrument in question has been repudiated by one party, a new factual and legal situation has arisen in which the other party is free to act as it pleases and to disregard all the restraints of the instrument. This, I believe, is not the view which the Court can properly adopt. The Opinion of 1950 continues to be the law. It established —or recognized—a legal status of the Territory. It is the law binding upon the Committee for South West Africa.

(3) The third possibility, which appears to me most appropriate as a legal proposition and in accordance with good faith and common sense, is to interpret the instrument as continuing in validity and as fully applicable subject to reasonable re-adjust-

ments calculated to maintain the effectiveness, though not more than that, of the major purpose of the instrument.

Similarly, it is in the light of the general principle as thus stated that there must be considered the contention that if as the result of the attitude of South Africa and the situation which has thus arisen it is necessary to effect changes in the Opinion of the Court of 11 July 1950, such changes must be accomplished by the General Assembly and not by the Court. For it would appear that that argument begs the question. The Court, in finding that oral hearings are consistent with its Opinion of 11 July 1950, is not changing the law as laid down in that Opinion. It interprets it in accordance with good sense and sound legal principle. This in fact was the method which the Court followed in its Opinion of 11 July 1950, when it was called upon to interpret the relevant clauses of the Covenant of the League of Nations and of the Charter of the United Nations. In answering the question as to the existing international legal position of South West Africa it applied the relevant international instruments in so far as this was possible. It did not change the law as contained therein. The essence of that Opinion was that the Court declined to apply literally the legal régime which it was called upon to interpret. It declined to admit that the continuity of the mandatory system meant necessarily that only the League of Nations—and no one else—could act as the supervising authority. On the face of it, the Opinion, inasmuch as it held that the United Nations must be substituted for the League of Nations as the supervisory organ, signified a change as compared with the letter of the Covenant. Actually, the Opinion did no more than give effect to the main purpose of the legal instruments before it. That is the true function of interpretation. The Opinion gave effect to the existing law in a situation in which otherwise its purpose, as the Court saw it, would have been endangered. This is essentially the situation with which the Court is confronted in the present case.

There is one further consideration which must be borne in mind in relation to the suggestion that although the Court cannot declare oral hearings of petitioners to be consistent with its Opinion of 1950, the General Assembly—and the General Assembly only—has the power to do so. The Preamble to the request for the present Opinion begins as follows: "The General Assembly, having been requested by the Committee on South West Africa to decide whether or not the oral hearing of petitioners on matters relating to the territory of South West Africa is admissible before that Committee..." The Court is requested to advise the General Assembly whether, as a matter of law embodied in the Opinion of the Court of 11 July 1950, the General Assembly is entitled to decide that oral hearings are admissible. In view of this, it is hardly possible for the Court to give a negative answer to the question put to it and to say—or imply—that if any change

is required as the result of the attitude of South Africa then that change must be effected by the General Assembly and not the Court. For this is the very question which the Court has been asked to answer. It is not possible for the Court to say that it would be contrary to the Opinion of 11 July 1950 for the General Assembly to authorize oral hearings and at the same time to say, or imply, that the General Assembly may do it. If the General Assembly had felt at liberty to authorize oral hearings regardless of whether such authorization is consistent with the Opinion of 11 July 1950 or not, it would have hardly found it necessary to request the Court to give the present Advisory Opinion. This being so, the Court could not, in the present case, renounce its legitimate function on the ground that the appropriate result can be achieved by the legislative action of the political organ. Reluctance to encroach upon the province of the legislature is a proper manifestation of judicial caution. If exaggerated, it may amount to unwillingness to fulfil a task which is within the orbit of the functions of the Court as defined by its Statute. The Court cannot properly be concerned with any political effects of its decisions. But it is important, as a matter of international public policy, to bear in mind the indirect consequences of any pronouncement which, by giving a purely literal interpretation of the Opinion of 11 July 1950, would have rendered it impotent in face of obstruction by one party.

In fact, from whatever angle the request for the present Advisory Opinion is viewed, a substantive answer to it seems indicated by reference to general legal considerations such as outlined in this and in the preceding parts of this Separate Opinion. This applies also to that part of the Opinion in which I have come to the conclusion that oral hearings of petitioners would—apart from the situation actually confronting the United Nations—be inconsistent with the Opinion of 11 July 1950 inasmuch as they depart from the system which obtained under the League of Nations. But, as explained, that system was predicated on the fulfilment by the Mandatory of his obligations in the matter of reports and petitions. As the result of the attitude now adopted by the Union of South Africa, that assumption no longer applies. The maxim *cessante ratione cessat lex ipsa* is a trite legal proposition. This circumstance does not affect the propriety and the necessity of its judicial application.

* * *

It is necessary in this connection to refer to the apparent inconsistency between the view which is put forward in this Separate Opinion (and which in effect underlies the present Opinion of the Court) and that on which the Court seems to have based its Opinion

of 18 July 1950 on the *Interpretation of the Peace Treaties (Second Phase)*. In the latter case the Court declined to hold that the failure, contrary to their international obligations, of certain States to appoint representatives to the Commissions provided by the treaties in question for settling disputes justified some alternative method of appointment not contemplated by these treaties. As in the present case, the conduct of the States in question had thus created a gap—in fact, a breakdown—in the operation of the system of supervision contemplated by the treaties. Yet the Court refused to admit the legality of an alternative method designed to remedy the situation. It said :

> "The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing ; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them." (*I.C.J. Reports 1950*, p. 229.)

The resemblance of the two cases is as striking as the apparent discrepancy between the present Opinion of the Court and that in the case of the *Interpretation of the Peace Treaties*. In view of this it is appropriate and desirable to state the reasons, if any, for this seeming departure from a previous Opinion. Without expressing a view as to the merits of the Opinion of the Court on the *Interpretation of the Peace Treaties*, I consider that, in fact, the two cases are dissimilar in a vital respect. The clauses of the Peace Treaties of 1947 relating to settlement of disputes were, as shown in their wording and the protracted history of their adoption, formulated in terms which clearly revealed the absence of agreement to endow them with a full measure of effectiveness—including safeguards to be resorted to in the event of the failure of one of the parties to participate in the procedure of settlement of disputes. This was a case in which the application of the principle of effectiveness in the interpretation of treaties found, in the view of the Court, a necessary limit in the circumstance that the parties had failed—not accidentally, but by design—to render them fully effective. This is not the position in the present case when the Court is confronted with the interpretation of provisions concerning a régime in the nature of an international status of established and continuous operation ; provisions in relation to which the Court, in the Opinion of 11 July 1950 and that of 7 June 1955 on *Voting Procedure*, affirmed in emphatic language the necessity of securing the unimpeded and effective application of the system of supervision in accordance with the fundamental provisions of the Covenant and the Charter ; and with regard to which it qualified the notion of any literal and rigid continuity of the Mandates System by making it obligatory only "so far as possible"—an expression expressly

"designed to allow for adjustments and modifications necessitated by legal or practical considerations" (*I.C.J. Reports 1955*, p. 77).

This being so, the present Advisory Opinion of the Court seems to be fully in accordance with its previous practice of interpreting treaties and other international instruments in a manner calculated to secure their effective operation. For this reason, subject to some doubts as to the formulation of the operative part of the Opinion and as to some aspects of its reasoning such as the extent of the reliance on the implied powers of the Council of the League of Nations, I have no hesitation in concurring in the Opinion of the Court.

(Signed) H. LAUTERPACHT.

Annex 120

United Nations A/HRC/RES/53/6

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Human Rights Council
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19 June–14 July 2023
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Resolution adopted by the Human Rights Council on 12 July 2023

53/6. Human rights and climate change

The Human Rights Council,

Guided by the Charter of the United Nations, and reaffirming the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination and the Vienna Declaration and Programme of Action,

Recalling the 2030 Agenda for Sustainable Development and its commitment to leave no one behind, including, inter alia, its Goal 13 on taking urgent action to combat climate change and its impacts,

Reaffirming the Addis Ababa Action Agenda as an integral part of the 2030 Agenda,

Reaffirming also that all human rights are universal, indivisible, interdependent and interrelated,

Recalling all previous Human Rights Council resolutions on human rights and climate change,

Reaffirming the United Nations Framework Convention on Climate Change and the Paris Agreement adopted under the United Nations Framework Convention on Climate Change,[1] and the objectives and principles thereof, and emphasizing that parties should, in all climate change-related actions, fully respect, promote and consider their respective obligations on human rights,

Recalling that the Paris Agreement acknowledges that climate change is a common concern of humankind and that parties should, when taking action to address climate change, respect, promote and consider their respective obligations with regard to human rights, including the right to food, the right to health, the rights of Indigenous Peoples, local communities, peasants, migrants, children, persons with disabilities and persons in vulnerable situations, including people living in small island developing States and least

[1] See FCCC/CP/2015/10/Add.1, decision 1/CP.21, annex.

developed countries, and in conditions of water scarcity, desertification, land degradation and drought, and the right to development, as well as gender equality, the empowerment of women and intergenerational equity,

Reaffirming the commitment to realize the full, effective and sustained implementation of the United Nations Framework Convention on Climate Change and the Paris Agreement adopted under the Convention, including in the context of sustainable development and efforts to eradicate poverty, end hunger and malnutrition and promote livelihood resilience, in order to achieve the ultimate objective of the Convention,

Stressing the importance of holding the increase in the global average temperature to well below 2°C above pre-industrial levels and of pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, while recognizing that this would significantly reduce the risks and impact of climate change,

Noting with serious concern the findings contained in the synthesis report of the Intergovernmental Panel on Climate Change Sixth Assessment Report and the findings from the contribution of Working Group III to the Assessment Report, which set out that limiting warming to around 1.5°C requires global greenhouse gas emissions to peak before 2025 at the latest, and to be reduced by 43 per cent by 2030 relative to 2019 levels, to achieve net zero by 2050,

Acknowledging that, as stated in the United Nations Framework Convention on Climate Change, the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions, and acknowledging also that article 2, paragraph 2 of the Paris Agreement states that the Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,

Recalling General Assembly resolution 77/276 of 29 March 2023, in which the Assembly requested an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, and Assembly resolution 76/300 of 28 July 2022, on the human right to a clean, healthy and sustainable environment,

Noting the importance of the work of the scientific community and the Intergovernmental Panel on Climate Change, including its assessment reports and special reports, in support of strengthening the global response to climate change, including considering the human dimension, and Indigenous Peoples', peasants' and local communities' knowledge,

Acknowledging that, as stated in the United Nations Framework Convention on Climate Change, responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding an adverse impact on the latter, taking into full account the legitimate priority needs of developing countries to achieve sustained economic growth, eradicate poverty, end hunger and malnutrition, and achieve livelihood resilience in the face of loss and damage brought about by extreme weather and slow-onset events,

Recognizing that poverty in all its forms and dimensions, including extreme poverty, is one of the greatest global challenges, and that eradicating poverty and ending hunger and malnutrition are critical to the implementation of the Sustainable Development Goals, climate change resilience and the promotion and protection of human rights, inter alia the full realization of the right to an adequate standard of living, and maintaining resilient livelihoods, particularly of people living in developing countries, including small island developing States and least developed countries, and other climate-vulnerable countries who are disproportionately affected by the negative impacts of climate change,

Stressing that human rights obligations, standards and principles have the potential to inform and strengthen international, regional and national policymaking in the area of climate change, thereby promoting policy coherence, legitimacy and sustainable outcomes,

Emphasizing that the adverse effects of climate change have a range of implications, both direct and indirect, that increase with greater global warming, for the effective enjoyment of human rights, including, inter alia, the right to life, the right to adequate food, the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate housing, the right to self-determination, the rights to safe drinking water and sanitation, the right to work and the right to development, and recalling that in no case may a people be deprived of its own means of subsistence,

Expressing concern that, while these implications affect individuals and communities around the world, the adverse effects of climate change are felt most acutely by those segments of the population that are already in vulnerable situations owing to factors such as geography, poverty, gender, age, race, ethnicity, indigenous or minority status where applicable, national or social origin, birth or other status, and disability, among others,

Expressing extreme concern that climate change poses an existential threat to some countries, and has already had an adverse impact on the full and effective enjoyment of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments,

Noting with serious concern the findings contained in the synthesis report of the Intergovernmental Panel on Climate Change Sixth Assessment Report and the findings from the contribution of Working Group II to the Assessment Report, entitled *Climate Change 2022: Impacts, Adaptation and Vulnerability*, in which the Intergovernmental Panel on Climate Change stated that human-induced climate change had caused widespread adverse impacts and related losses and damages to nature and people affecting livelihoods through, inter alia, destruction of homes and infrastructure, loss of property and income, human health and food security, which has a negative impact on the full and effective enjoyment of human rights of persons living in affected areas,

Noting with grave concern that soft adaptation limits have been reached in some ecosystems and that without deep, rapid and sustained mitigation and accelerated adaptation actions, losses and damages will continue to increase, including projected adverse impacts in Africa, least developed countries, small island developing States, Central and South America, Asia and the Arctic, disproportionately affecting the human rights of persons in the most vulnerable situations,

Expressing concern that loss and damage to livelihoods caused by sudden- and slow-onset events directly and disproportionately affect women and girls, children, youth, older persons, persons with disabilities, Indigenous Peoples, migrants, persons living in poverty and others in vulnerable situations, undermining their well-being and their enjoyment of a whole of range of human rights,

Recognizing that the erosion of livelihoods through, inter alia, the destruction of homes and infrastructure, loss of property and income, human health and food security, partly caused by the adverse effects of climate change, is a push factor for displacement and migration, especially from rural to urban areas, and may contribute to increased risk of exploitation, including trafficking in persons on the move, in particular women and girls,

Emphasizing that social security is a human right and a potent tool in the promotion of social inclusion and human dignity, especially the most marginalized, and underscoring that efforts to realize the right to social security should be inclusive and accessible to all,

Expressing concern at the inadequate social protection schemes for workers in the informal economy and low coverage and penetration of crop insurance schemes in vulnerable farming populations, which would provide income security in the event of contingency,

Recognizing that women and girls are disproportionately affected by the effects of climate change, inter alia, concerning the realization and enjoyment of their human rights, and stressing the importance of the participation of women, including older women, Indigenous women and girls, in the context of climate change, environmental and disaster risk reduction policy and decision-making processes,

Reaffirming the need for the continuing implementation of the Sendai Framework for Disaster Risk Reduction 2015–2030, adopted at the Third United Nations World Conference

on Disaster Risk Reduction, and its references to human rights, livelihood protection and food security,

Expressing concern that developing countries, particularly least developed countries and small island developing States, lacking the resources to implement their adaptation plans and programmes of action and effective adaptation strategies, may suffer from higher exposure to extreme weather events in both rural and urban areas,

Taking into account the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities,

Emphasizing the importance of implementing the commitments undertaken under the United Nations Framework Convention on Climate Change regarding mitigation, adaptation and the provision and mobilization of finance, technology transfer and capacity-building to developing countries, and emphasizing also that realizing the goals of the Paris Agreement would enhance the implementation of the Framework Convention and help to ensure the greatest possible adaptation and mitigation efforts in order to avert, minimize and address loss and damage from the adverse impact of climate change on present and future generations,

Recalling the outcomes adopted at the twenty-seventh session of the Conference of the Parties to the United Nations Framework Convention on Climate Change and the fourth session of the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement, held in Sharm el-Sheikh, Egypt in November 2022, and noting the commitments made at both conferences,

Welcoming the decision adopted at the twenty-seventh session of the Conference of the Parties to establish new funding arrangements to assist developing countries, including those that are particularly vulnerable to the adverse effects of climate change, in responding to economic and non-economic loss and damage, by providing and assisting in mobilizing new and additional resources, and that these new arrangements complement and include sources, funds, processes and initiatives both under and outside the Convention and the Paris Agreement,

Looking forward to the adoption of more ambitious commitments at the twenty-eighth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, the eighteenth session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol and the fifth session of the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement, to be held in Dubai, United Arab Emirates, from 30 November to 12 December 2023,

Looking forward also to the convening of the Climate Ambition Summit and the Sustainable Development Goals Summit by the Secretary-General in September 2023, ahead of the completion of the global stocktake,

Noting with appreciation the continued efforts of the United Nations High Commissioner for Human Rights in highlighting the need to respond to the global challenge of climate change, including by reaffirming the commitments to ensure effective climate action while advocating for the promotion and protection of human rights,

Welcoming the convening of a panel discussion, held pursuant to Human Rights Council resolution 50/9 of 7 July 2022, on the adverse impact of climate change on the full realization of the right to food for all people and ways forward to address the challenges thereto, as well as on best practices and lessons learned, including science-based approaches and local and Indigenous knowledge,

Taking note of the report of the Secretary-General on the adverse impact of climate change on the full realization of the right to food, submitted pursuant to Human Rights Council resolution 50/9,[2]

[2] A/HRC/53/45.

Noting that the human rights obligations and responsibilities as enshrined in the relevant international human rights instruments provide roles for States as duty bearers and responsibility bearers, including businesses, to promote, protect and respect, as would be appropriate, human rights, when taking action to address climate change and the adverse effects thereof,

Noting with appreciation the work of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, and taking note of the mandate holder's most recent reports,[3] and recalling the reports of the Special Rapporteur on trafficking in persons, especially women and children, focusing on addressing the gender dimensions of trafficking in persons in the context of climate change, displacement and disaster reduction,[4] the Special Rapporteur on the right to food, focusing on the right to food in the context of natural disasters[5] and on the impact of climate change on the right to food,[6] the reports of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, focusing on climate change and human rights[7] and on air pollution and human rights,[8] and the report of the Special Rapporteur on extreme poverty and human rights, on climate change and poverty,[9]

Welcoming the work of the Climate Vulnerable Forum, which asserts that climate change is a major threat to the enjoyment of human rights and fundamental freedoms, and taking note of its Traffic Light Assessment of nationally determined contributions,[10]

Noting the importance of facilitating meaningful interaction between the human rights and climate change communities at both the national and international levels in order to build capacity to deliver responses to climate change that respect and promote human rights, taking into account the Geneva Pledge for Human Rights in Climate Action and other similar efforts,

Noting also the establishment and work of regional, subregional and other initiatives, such as the Small Island Developing States Accelerated Modalities of Action (Samoa Pathway) on addressing the adverse impact of climate change,

Noting further the importance for some of the concept of "climate justice" when taking action to address climate change,

Affirming that prioritizing equity, climate justice, social justice, inclusion and just transition processes can enable adaptation and ambitious mitigation actions and climate-resilient development,

1. *Expresses grave concern* that climate change has contributed and continues to contribute to the increased frequency and intensity of both sudden-onset natural disasters and slow-onset events, and that these adversely affect the full enjoyment of all human rights;

2. *Emphasizes* the importance of continuing to address urgently, as they relate to States' human rights obligations, climate change and its adverse consequences for all, particularly in developing countries and for the people whose situation is most vulnerable to climate change;

3. *Calls upon* States to consider, among other aspects, human rights within the framework of the United Nations Framework Convention on Climate Change;

4. *Urges* States that have not yet ratified or acceded to the Paris Agreement to do so;

5. *Recognizes* the importance for all countries of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow-onset events, and the role of sustainable development in

[3] A/HRC/53/34 and Add.1 and A/77/226.
[4] A/77/170.
[5] A/HRC/37/61.
[6] A/70/287.
[7] A/HRC/43/53 and A/74/161.
[8] A/HRC/40/55.
[9] A/HRC/41/39.
[10] https://thecvf.org/wp-content/uploads/2022/11/CVF_PTLAReport_2022.pdf.

reducing the risk of loss and damage, and in that regard looks forward to the further operationalization of the Santiago Network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, and encourages the Parties to constructively engage in the Glasgow Dialogue and to support the work of the Transitional Committee to operationalize expeditiously the new funding arrangements, including a fund for assisting developing countries, including those that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage associated with the adverse impacts of climate change, in the context of relevant decisions of the Conference of the Parties to the United Nations Framework Convention on Climate Change and of the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement;

6. *Calls for* deep and rapid cuts in global emissions to avert, minimize and address loss and damage from sudden and slow-onset climate events that have an adverse impact on the enjoyment of human rights;

7. *Calls upon* States to enhance international cooperation and reiterates the urgency of scaling up action, in particular in financing, the transfer of technology and capacity-building, for mitigation and adaptation measures and to assist developing countries in averting, minimizing and addressing loss and damage, especially those that are particularly vulnerable to the adverse effects of climate change;

8. *Calls upon* all States to adopt a country-driven, comprehensive, integrated, gender-responsive, age-inclusive and disability-inclusive approach to climate change adaptation and mitigation policies, consistent with the United Nations Framework Convention on Climate Change and the objective and principles thereof, to address efficiently the economic, cultural and social impact and human rights challenges that climate change presents, for the full and effective enjoyment of human rights for all;

9. *Calls upon* States to better promote the human rights of persons in vulnerable situations, their inclusion in risk reduction decision-making and their access to livelihoods, food and nutrition, safe drinking water and sanitation, social protection, health-care services and medicines, education and training, adequate housing and decent work, clean and low-emission energy, science and technology, including digital technology and early warning systems, and ensure that services can be adapted to emergency and humanitarian contexts;

10. *Urges* States to develop and effectively implement policies that promote sustainable agriculture, forest management, fisheries, aquaculture practices and marine environment management in order to enhance the adaptive capacities and livelihood resilience of communities for the full and effective enjoyment of human rights;

11. *Recognizes* the link between the adverse impacts of climate change, including on livelihoods, and displacement and migration, and the need for adaptation measures that benefit the most vulnerable, facilitate safe and voluntary movement, minimize forced movement and address human rights protection gaps in order to, inter alia, reduce the risk of trafficking and exploitation of people on the move, especially women and girls;

12. *Urges* States, consistent with the Guiding Principles on Business and Human Rights, to uphold the principle of corporate responsibility to respect human rights, including the responsibility to avoid causing or contributing to adverse human rights impacts through business activities that may harm the environment and the climate system;

13. *Calls upon* business enterprises, both transnational and others, to meet their responsibility to respect human rights, including in the context of climate change and the environment;

14. *Reaffirms* its commitment to advocate for combating climate change and addressing its adverse impact on the full and effective enjoyment of human rights, and recognizes the importance of the safe and meaningful participation of civil society in climate action and the work of the Human Rights Council and its mechanisms in the context of climate change, conducted in a regular, systematic and transparent manner;

15. *Recalls* the decision to incorporate into its annual programme of work, beginning in 2023, at a minimum a panel discussion, and decides that the annual panel discussion to be held at the fifty-sixth session shall focus on ensuring livelihood resilience in

the context of the risk of loss and damage relating to the adverse effects of climate change for achieving progressively the full realization of all human rights and ways forward to address the challenges thereto on the basis of equity and climate justice, and also decides that the panel discussion will have International Sign interpretation and captioning;

16. *Requests* the United Nations High Commissioner for Human Rights to submit a summary report on the panel discussion held at the fifty-sixth session to the Human Rights Council at its fifty-eighth session, and to make the report available in accessible formats, including in easy-to-read versions;

17. *Requests* the Secretary-General, in consultation with and taking into account the views of States, the special procedures of the Human Rights Council, the United Nations Environment Programme, the World Meteorological Organization, the International Telecommunication Union, the International Organization for Migration, the International Federation of Red Cross and Red Crescent Societies, and other relevant international organizations and intergovernmental bodies, including the Intergovernmental Panel on Climate Change and the secretariat of the United Nations Framework Convention on Climate Change, and other stakeholders, to conduct an analytical study on the impact of loss and damage from the adverse effects of climate change on the full enjoyment of human rights, exploring equity-based approaches and solutions to addressing the same, and to submit the study to the Human Rights Council at its fifty-seventh session, to be followed by an interactive dialogue, and also requests the Secretary-General to make the report available in accessible formats, including in easy-to-read versions;

18. *Encourages* relevant special procedure mandate holders to continue to consider the issue of climate change and human rights, including the adverse impact of climate change on the full and effective enjoyment of human rights, particularly the rights of persons in vulnerable situations, within their respective mandates;

19. *Requests* the Secretary-General and the United Nations High Commissioner for Human Rights to provide all the human, technical and financial assistance necessary for the effective and timely realization of the above-mentioned panel discussion, reports and interactive dialogue;

20. *Decides* to remain seized of the matter.

34th meeting
12 July 2023

[Adopted without a vote.]

Annex 121

United Nations Committee on
the Rights of the Child

General Comment No. 26

on

Children's rights and the environment with a special focus on climate change

Version for Children

2023

The United Nations Convention on the Rights of the Child is an important agreement by countries to promise to protect children's rights. The Convention explains who children are, all their rights, and the responsibilities of governments to protect, promote and fulfil children's rights.

The Committee on the Rights of the Child is a group of 18 experts in children's rights who come from all over the world. The Committee meets three times each year in Geneva, Switzerland, to discuss how children's rights are being promoted and protected in each country that has signed the Convention. The Committee also makes recommendations to each country on how they should improve children's rights.

The Committee has written a document called a General Comment which explains to governments how children's rights are related to the environment and climate change, and what governments must do to protect them. You are now reading a version of the General Comment that has been created for children, together with members of a global Children's Advisory Team which was created to help the Committee to develop General Comment No.26.

Introduction

Environmental harm is a significant threat to children's rights globally. Children are demanding immediate action, and their rights must be protected. A clean, healthy and sustainable environment is both a human right itself, and necessary for children to enjoy their rights. This General Comment explains why urgent environmental and climate action is needed and what governments must do to protect **all** the rights children have. It also makes it clear that governments must protect the rights of children today as well as children in future generations.

Children's efforts to stand up for their environmental rights motivated the Committee to create this General Comment and children have played a very important role in shaping it: **16,333 children** from **121 countries** shared their views and ideas in consultations designed with members of the Children's Advisory Team for General Comment No. 26. The quotes from children in the General Comment are from the consultations that took place.

"I would like to tell them [adults] that we are the future generations and if you destroy the planet, where will we live?!

(Boy, aged 13, India)

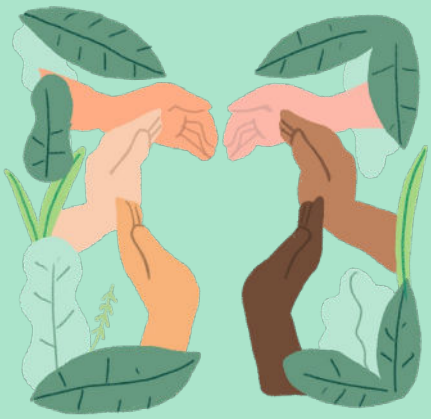
An animated video and poster version can be found at:

childrightsenvironment.org

How are children's rights related to the environment and climate change?

All children's rights are connected and equally important. Some rights are particularly threatened by environmental harm and climate change. Some rights also play an important role in helping to protect children's rights - such as their right to education.

Article 2 Right to non-discrimination



Environmental harm can be a bigger threat for certain groups of children, especially Indigenous children, children of minority groups, children with disabilities, and children living in places more affected by disasters and climate change. Governments need to collect information to learn more about the inequalities between groups, and take specific actions to resolve them. When governments take action on environmental issues, they must take extra care to not have a negative effect on children.

Article 3 Best interests of the child

When making decisions about the environment and climate change, governments must consider how children will be impacted, and how they will support the wellbeing and development of children growing up today and in the future.

Article 6 Right to life, survival and development

Children should be able to live, grow up and develop in healthy, safe environments and have the support they need. Their lives should never be put at risk because of environmental harm like pollution or lead exposure.

Article 12 Right to be heard

Children should be taken seriously by adults and have a say on issues related to the environment and climate change. Governments should involve children when making decisions about the environment and climate change, and make sure they give feedback to children about how their views were considered.

Articles 13, 15 Right to freedom of expression, association and peaceful assembly

Children often stand up for their environmental rights as human rights defenders. Many children also spend time with friends and groups where they exchange information and ideas. Governments should support children to express themselves by providing safe and empowering spaces for them to do so. Governments should adopt laws to protect child human rights defenders.

Articles 13, 17 Access to information

Governments should make sure that children have access to clear, accurate environmental and climate-related information, including information about plans and decisions being made, and about actions that children can take themselves. Information should be shared in different ways so that children of different ages and backgrounds can understand it.

Article 19 The right to freedom from all forms of violence

Environmental harm and climate change can lead to unstable situations, conflicts and inequalities, leaving children at more risk of physical and psychological violence. Governments should make more effort to protect children by investing in services that are for children and by working to solve the root causes of violence.

Article 24 Right to health

Children's physical and mental health should not be affected by climate change, pollution, unhealthy ecosystems, and loss of biodiversity. If a child experiences health issues, they must be able to access healthcare and support.

Articles 26, 27 Right to social security and decent standard of living

Children should be able to access safe food, clean water, decent housing and materials needed for them to live and grow. Governments need to make sure children are not living in poverty or unsafe conditions.

Articles 28, 29 Right to education

Children should be given environmental education that is accurate and in ways that they understand. Environmental education should support children to connect with, and respect, the environment. The places where children learn should be safe from environmental harm.

Article 30 The rights of Indigenous children and children of minority groups

Indigenous children and children of minority groups' lives, survival and cultural practices are often very connected to their natural environment. Governments should make sure to protect their rights and involve children in all decisions being made about their environment.

Article 31 Right to rest and play

Children should be able to play and be active in clean, safe places and connect with our natural world. Governments need to consider where and how children can play and rest when they make plans for new neighbourhoods or places where children may visit.

Right to a clean, healthy and sustainable environment

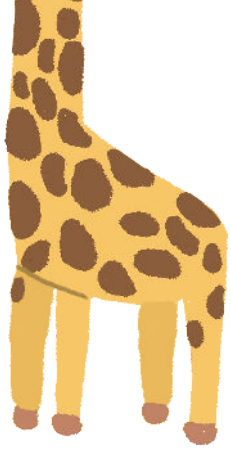
The Committee explains that children have the right to a clean, healthy and sustainable environment. Children need a clean environment in order to enjoy all of their human rights. Children should have access to clean air and water, safe climates, healthy ecosystems and biodiversity, healthy food and non-polluted environments.

What do governments need to do to protect children's rights, including their right to a clean, healthy and sustainable environment?

- **Respect, protect, and fulfil** children's rights by taking bold, concrete steps and keeping their promises to make sure every child grows up in a clean, healthy and sustainable environment.
- Carry out regular **Child Rights Impact Assessments** to understand (and resolve) how their decisions about the environment will impact (or are impacting) children – paying special attention to how children of all ages and backgrounds might be impacted differently.
- Make sure **businesses** also respect children's rights by creating laws, regulations and policies to prevent companies from polluting the environment and harming children, and to make sure businesses do not hide their environmental impact.
- Make sure children are supported to **access justice** - that is, solutions, support and compensation for the harm and consequences they are experiencing – at national, regional and international levels.
- **Cooperate internationally** with other governments as environmental problems do not stop at a country's border. Countries that are most responsible for negatively impacting the environment and have the most resources should take more action than others, and support countries that are impacted the most.

"Global warming and other problems cannot be solved unless there is global cooperation."

(Girl, 11, China)



Governments should consider children's rights in all decisions made about **climate change** and consider climate change in all decisions being made about children.

They should:

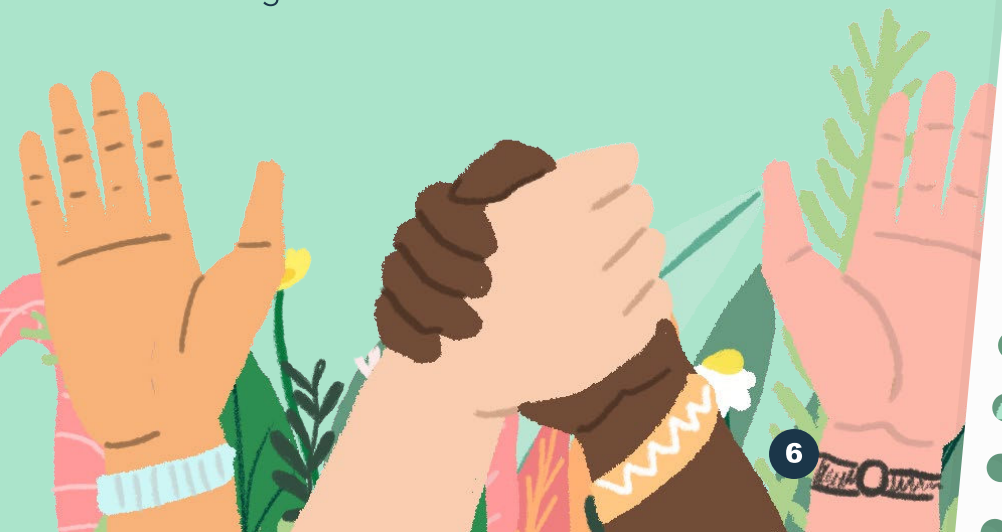
- **Mitigate** the impact of climate change. This includes keeping their promises to limit the warming of the planet, following what scientists tell us about climate change, and taking urgent action.

- Include children in the development of **adaptation** plans, decisions and solutions and protecting children who are already experiencing the effects of climate change. This includes strengthening school buildings and water pipes against storms, flooding and other weather extremes, and providing food supplies in cases of emergency.

- Provide financial and technical assistance to countries experiencing **losses and damages** that are impacting children's rights.

- Make sure **businesses**, including global businesses in more than one country, do not negatively impact children's rights by ensuring businesses rapidly reduce their emissions and encouraging renewable energies.

- Make sure that **climate finance** does not support action that may violate children's rights.



"Adults [should] stop making decisions for the future they won't experience. [We] are the key means to solving climate change as it is [our] lives at stake."

(Girl, aged 17, Croatia)

General Comment

Child rights, environment and climate change

Terre des Hommes
International Federation

Children's
Environmental
Rights Initiative

UNITED NATIONS
HUMAN RIGHTS
TREATY BODIES

Annex 122

United Nations A/77/226

General Assembly

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Seventy-seventh session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights in the context of climate change

Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, Ian Fry, in accordance with Human Rights Council resolution 48/14.

* A/77/150.
** The present report was submitted after the deadline in order to reflect recent developments.

22-11696 (E) 040822

Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change

Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation

Summary

We are faced with a global crisis in the name of climate change. Throughout the world, the rights of people are being negatively affected or violated as a consequence of climate change. The Special Rapporteur on the promotion and protection of human rights in the context of climate change highlights the reference to human rights included in the preamble to the Paris Agreement and considers the human rights implications of mitigation actions. Considerable attention is given to the extensive and disastrous lack of action to address loss and damage as a result of the impacts of climate change and its related human rights impacts. The Special Rapporteur also highlights the serious disconnect between those that continue to support the fossil fuel economy and those that are most affected by the impacts of climate change. Also highlighted is the fact that those most affected by climate change have the least participation and representation in political and decision-making processes. The Special Rapporteur provides various recommendations on eliminating the use of fossil fuels, addressing the funding gap on loss and damage, improving participation and protecting the rights of indigenous and environmental human rights defenders. We are already confronted with a climate change emergency that comes with inherent serious human rights abuses. We can no longer delay. The time to actively address this emergency is now.

I. Introduction

1. We are faced with a global crisis in the name of climate change. Throughout the world, human rights are being negatively affected and violated as a consequence of climate change. For many millions, climate change constitutes a serious threat to the ability of present and future generations to enjoy the right to life.[1] Human-induced climate change is the largest, most pervasive threat to the natural environment and human societies the world has ever experienced. In its article 28, the Universal Declaration of Human Rights guarantees that all human beings are entitled to a social and international order in which their rights and freedoms can be fully realized. Climate change already undermines this order and the rights and freedoms of all people. We are being confronted with an enormous climate change crisis of catastrophic proportions. It is happening now.

2. There is an enormous injustice being manifested by developed economies against the poorest and least able to cope. Unwillingness by developed economies and major corporations to take responsibility for drastically reducing their greenhouse gas emissions has led to demands for "climate reparations" for losses incurred. Some have suggested the term "atmospheric colonization" to explain the global imbalance between the impacts of climate change and the emitters of greenhouse gases.[2] When ranked by income, the economically most privileged 50 per cent of countries are responsible for 86 per cent of the cumulative global carbon dioxide emissions, while the economically vulnerable half are responsible for only 14 per cent.[3]

3. The Special Rapporteur on the promotion and protection of human rights in the context of climate change highlights the reference to human rights included in the preamble to the Paris Agreement, in which parties should, inter alia, "consider their respective obligations on human rights".

4. The present report explores the functional arrangements of the United Nations Framework Convention on Climate Change and the Paris Agreement. The report will focus primarily on three key themes: mitigation (emissions reduction), loss and damage (the impacts of climate change) and participation in decision-making processes in the climate change regime. Underpinning all of these themes is the need for adequate and predictable finance and support. The implications for human rights will be considered in each of these three themes. The present report complements and updates the report by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[4]

5. To prepare the present report, throughout June and July 2022, the Special Rapporteur on the promotion and protection of human rights in the context of climate change held extensive in-person consultations in Bonn, Germany, as well as in Geneva and Lisbon, and numerous online consultations. In particular, he convened a number of meetings with civil society organizations, States that have signed the Geneva Pledge for Human Rights in Climate Action, members of the Climate Vulnerable Forum, small island developing States, and other stakeholders. These consultations complemented a call for inputs to which the Special Rapporteur received approximately 90 submissions.[5]

[1] Human Rights Committee, general comment No. 36 (2018) on the right to life, para. 62.

[2] Erin Fitz-Henry, "Climate change is white colonization of the atmosphere. It's time to tackle this entrenched racism" (12 July 2022). Available at https://phys.org/news/2022-07-climate-white-colonization-atmosphere-tackle.html.

[3] Submission from Alana Institute.

[4] A/74/161.

[5] See www.ohchr.org/en/calls-for-input/2022/call-input-promotion-and-protection-human-rights-context-mitigation-adaptation.

II. Human rights implications of mitigation actions

6. Mitigation efforts to reduce greenhouse gas emissions have two implications on the enjoyment of human rights. First, an inadequate response to reducing greenhouse gas emissions has a significant negative impact on the enjoyment of human rights. Second, some mitigation actions have a significant impact on the exercise of human rights.

A. Mitigation: a catastrophically inadequate response

7. The global response to reducing greenhouse gas emissions has been grossly inadequate. The overall effect of inadequate actions to reduce such emissions is creating a human rights catastrophe. Parties to the Paris Agreement are required to produce nationally determined contributions as an indication of their actions to reduce greenhouse gas emissions. The Intergovernmental Panel on Climate Change notes that there is an implementation gap between the projected emissions with current policies and the projected emissions resulting from the implementation of the unconditional and conditional elements of the nationally determined contributions.[6] Subsequently, the International Energy Agency has called for an immediate end to fossil fuel expansion if the world is to decarbonize by 2050 and limit warming to 1.5°C, as required under the Paris Agreement.[7]

8. Tragically, there remains a huge disparity in effort and a lack of commitment by States that have been the primary historical contributors of greenhouse gas emissions, leading to the negative impact on the enjoyment of human rights. The negative impacts of failing to reduce greenhouse gas emissions are disproportionately felt by persons and communities who are already in a disadvantageous situation owing to a number of factors. Climate change aggravates already existing inequalities, marginalization and exclusion and further increases vulnerabilities.[8] These aspects are covered in section III of the present report.

9. Against this backdrop, the Special Rapporteur emphasizes the human rights obligation of States relating to mitigation actions. States must limit greenhouse gas emissions to prevent the current and future negative human rights impacts of climate change. Furthermore, States are obliged to take measures to mitigate climate change and to regulate the emissions of those businesses under their jurisdictions in order to prevent foreseeable negative impacts on human rights.

1. Human rights obligation to prevent by limiting greenhouse gas emissions

10. States are failing in their human rights obligation to mitigate climate change and prevent its negative human rights impacts. The Intergovernmental Panel on Climate Change notes that global net anthropogenic greenhouse gas emissions during the period 2010–2019 were higher than at any previous time in human history.

11. In 2019, the world's major emitters of carbon dioxide – China, the United States of America, India, the European Union plus the United Kingdom of Great Britain and Northern Ireland, the Russian Federation and Japan – together accounted for 67 per

[6] Intergovernmental Panel on Climate Change, working group III contribution to the sixth assessment report (2022). Available at https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_TechnicalSummary.pdf.

[7] International Energy Agency, "Net Zero by 2050: A Roadmap for the Global Energy Sector" (Paris, 2021). Available at https://iea.blob.core.windows.net/assets/7ebafc81-74ed-412b-9c60-5cc32c8396e4/NetZeroby2050-ARoadmapfortheGlobalEnergySector-SummaryforPolicyMakers_CORR.pdf.

[8] Intergovernmental Panel on Climate Change, working group III contribution.

cent of total fossil carbon dioxide emissions.[9] The members of the Group of 20 account for 78 per cent of emissions over the past decade.[10] Collectively, the members of the Group of 20 are not on track to achieve their unconditional nationally determined contribution commitments, based on pre-COVID-19 projections. Five members of the Group of 20 – Australia, Brazil, Canada, the Republic of Korea and the United States – are projected to fall short and therefore require further action. By contrast, the world's 55 most vulnerable economies have lost over half their economic growth potential owing to the impacts of the climate crisis.

12. The highest historical emitter of greenhouse gas emissions appears to be making little progress with its obligations under the United Nations Framework Convention on Climate Change or the Paris Agreement. Despite promises by the Biden Administration to reduce emissions through the 2015 Clean Power Plan, there have been legal challenges in the United States Supreme Court to the Administration's attempts to act. The Court found that it was unlawful for federal agencies to make "major" decisions without a clear authorization from the United States Congress.[11]

2. Human rights obligation to protect by regulating

13. While there is a grave urgency to the action required to reduce emissions, the global economy is driving in the opposite direction. Studies suggest that subsidies for fossil fuels are estimated to be around $500 billion annually.[12] Current nationally determined contributions provided by parties to the Paris Agreement remain seriously inadequate to achieve the climate goals of the Paris Agreement and would lead to a temperature increase of at least 3°C by the end of the century.[13]

14. Gaps exist in regulating major greenhouse gas emitting industries and sectors both within and outside national boundaries, making the achievement of the Paris Agreement goals more difficult. As an example, the international transport sector is a significant source of such emissions and yet this industry is taking limited action to reduce its emissions. Calls have been made for the International Maritime Organization to adopt stringent global measures to phase out the sector's greenhouse gas emissions in line with the Paris Agreement's 1.5°C goal.[14] Concerns have also been expressed that the International Civil Aviation Organization's carbon offsetting scheme is a measure that only delays action to reduce emissions at the source.[15]

15. States must take substantive measures to limit emissions of greenhouse gases and mitigate climate change, including through regulatory measures, in order to protect all persons from human rights harms. Urgent and drastic action is required by States and business enterprises to reduce their emissions. The Secretary-General stated in 2022 that high emitting Governments and corporations are not just turning a blind eye, they are adding fuel to the flames.[16] This is exemplified by the fact that

[9] Environmental Justice Foundation, "In Search of Justice" (London, 2022). Available at https://ejfoundation.org/resources/downloads/EJF-Climate-Inequality-report-2021.pdf.

[10] United Nations Environment Programme (UNEP), *Emissions Gap Report 2020* (Nairobi, 2020). Available from www.unep.org/emissions-gap-report-2020.

[11] *Supreme Court of the United States, Syllabus, West Virginia et al., v Environmental Protection Agency et al.*, Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 20-1530, Decided June 30, 2022.

[12] See https://sdg-tracker.org/sustainable-consumption-production#12.C.

[13] UNEP, *Emissions Gap Report 2020*.

[14] Submission from Opportunity Green.

[15] FERN, "Cheating the climate: the problems with aviation industry plans to offset emissions", briefing note (September 2016). Available at https://aragge.ch/wp-content/uploads/2018/04/GB_Fern_20160919_ICAO_CORSIA_Cheating-the-climate_en.pdf.

[16] Rachel LaFortune (Human Rights Watch News), "Report Shows Climate Crisis Solutions Exist but Action Is Lacking", 5 April 2022. Available at www.hrw.org/news/2022/04/05/report-shows-climate-crisis-solutions-exist-action-lacking.

fossil fuel producers are using investor-State dispute settlements within the Energy Charter Treaty to sue States for compensation if they take positive policy actions to reduce the use of fossil fuels. It has been estimated that legal claims by oil and gas investors against those States that impose laws to limit fossil fuel activities could reach a total cost of $340 billion.[17]

B. Human rights implications of certain mitigation actions

16. A number of mitigation actions being employed by States and business enterprises have significant human rights implications. Some of these include forest-based mitigation and hydroelectric dams. Others include the location of wind turbines. New mitigation technologies associated with atmospheric changes and geoengineering also have the potential for significant human rights impacts. The impact of new technologies will be the theme of the Special Rapporteur's report to the Human Rights Council at its fifty-ninth session, in 2024.

1. Forest-based mitigation actions

17. The Intergovernmental Panel on Climate Change states that the agriculture, forestry and other land use sector offers significant near-term mitigation potential at relatively low cost. Nevertheless, these predictions do not match global trends in deforestation. Deforestation in the Amazon has risen again over the past four years. Other parts of the world also face steady, or rapidly increasing, deforestation. It is estimated that while 15 billion trees are cut down every year, only 5 billion are replanted – resulting in an annual net loss of 10 billion trees.[18] Emissions by the agriculture, forestry and other land use sector account for around 11 per cent of the global total, with the bulk of the emissions occurring in relatively few countries.[19] The group of indigenous peoples that the Special Rapporteur met with in Bonn in June 2022 have indicated that forest fires in the Amazon as a result of droughts have had enormous impacts on the livelihoods of indigenous peoples.

18. Other studies suggest that the value of using forestry as a means of reducing global temperature limits may be overstated and that, while restoring ecosystems is crucial for planetary health, it is no substitute for preventing emissions from fossil fuels.[20] The Special Rapporteur concurs with this conclusion. It is preferable to address emissions at the source.

19. Forest-based mitigation actions have negative consequences on the exercise of human rights, particularly those that are related to land and land tenure. According to Oxfam, instead of reducing emissions at the scale and speed required to stay within a relatively safe level of warming, too many Governments and corporations are hiding behind planting trees and unproven technologies in order to claim that their 2050 climate change plans will achieve net zero emissions. Studies suggest that these land-hungry plans would require at least 1.6 billion hectares of new forests. The explosion of net zero commitments, many of which lack clarity and transparency, could lead to a surge in demand for land, particularly in low- and middle-income countries, which, if not subject to robust safeguards, could pose increasing risks to the enjoyment of

[17] Nour Ghantous (Energy Monitor), "The Energy Charter Treaty has not aged well", 13 July 2022. Available at www.energymonitor.ai/policy/international-treaties/the-energy-charter-treaty-has-not-aged-well.

[18] Phys.Org, "Why can't we simply plant more trees to clean carbon dioxide from the air?" (8 July 2022). Available at https://phys.org/news/2022-07-simply-trees-carbon-dioxide-air.html.

[19] UNEP, *Emissions Gap Report 2020*.

[20] K. Dooley et al. (One Earth), "Carbon removals from nature restoration are no substitute for steep emission reductions", 1 July 2022. Available at https://doi.org/10.1016/j.oneear.2022.06.002.

human rights to food, water, sanitation and housing, especially for people and communities whose livelihoods depend on land.[21]

20. Another related response with human rights implications is the mechanism for reducing emissions from deforestation and forest degradation (REDD+) developed by the United Nations Framework Convention on Climate Change in response to high deforestation rates, particularly in tropical forests. There are mixed views regarding the efficacy of the mechanism's programmes and whether they deliver real emissions reductions. The mechanism itself and associated voluntary carbon market programmes have been the source of human rights infringements, particularly of indigenous peoples in rainforest areas.[22] The allocation of rights to the protection of carbon in forests has been referred to as "neo-colonialism" as the land occupied by indigenous peoples is set aside for the protection of carbon stores.[23] This can deny indigenous peoples their traditional rights and practices.

21. Another mitigation action, associated with biomass burning, has implications for land appropriation and the exercise of human rights. Biomass burning and bioenergy, carbon capture and storage is a process where wood or other plant-based carbon (biomass) is burned as an alternative to fossil fuels. Providing the feedstock for energy production from biomass burning as a fuel source requires using existing forests or new land to grow the biomass.

22. Concerns have been expressed that sourcing trees from plantations for biomass electrical power generators in Latin American is adversely affecting the rights of indigenous peoples.[24] The Special Rapporteur heard concerns expressed by the Sámi indigenous peoples that their land will be appropriated for biomass fuel production.

2. Hydroelectric dams

23. The development of hydroelectric dams is creating significant human rights implications for people displaced by dams and for downstream users of water. Climatological studies suggest that downstream countries along the Mekong River have suffered low water supplies despite ample upstream rainfall, because of water being withheld by upstream dams.[25] This has significant implications for access to safe drinking water and food security for downstream countries.

24. Indigenous peoples of the Amazon region are also experiencing the effects of hydroelectric dams. Dam construction and related infrastructure have displaced indigenous peoples from their land. The Special Rapporteur heard from indigenous peoples that changes to river flows have had significant implications for the ecological maintenance of riverine systems, which in turn affect the ability for indigenous peoples to seek sources of sustenance.

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[21] Aditi Sen and Nafkote Dabi, *Tightening the Net: Net zero climate targets – implications for land and food security* (Oxfam, 2021). Available at https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621205/bp-net-zero-land-food-equity-030821-en.pdf?sequence=1.

[22] John Cannon (Mongabay), "Indigenous leader sues over Borneo natural capital deal", 17 December 2021. Available at https://news.mongabay.com/2021/12/indigenous-leader-sues-over-borneo-natural-capital-deal/.

[23] Renata Bessi and Santiago Navarro F (Avispa Media), "REDD, Neo-Colonialism in the Land of the Pataxo Warriors", 14 December 2014. Available at https://avispa.org/redd-neo-colonialism-in-the-land-of-the-pataxo-warriors/.

[24] Global Forest Coalition, "Annual Report 2021". Available at https://globalforestcoalition.org/wp-content/uploads/2022/07/GFC-Annual-Report-2021.pdf.

[25] Paul G. Harris (Hong Kong Free Press), "Water is power: How Southeast Asia pays the price for China's dam-building frenzy", 10 July 2022. Available at https://hongkongfp.com/2022/07/10/water-is-power-how-southeast-asia-pays-the-price-for-chinas-dam-building-frenzy/.

3. Other technologies

25. The Sámi indigenous peoples have expressed concern to the Special Rapporteur that they were not properly consulted and had not given free, prior informed consent to the erection of wind turbines on their land. Furthermore, serious concerns have been brought to the attention of the Special Rapporteur about the potential environmental and human rights impacts from deep seabed exploration and mining for minerals that could be used in battery production for electric vehicles and other forms of electrical storage.

III. Loss and damage: a litany of human rights impacts

26. In its article 8, the Paris Agreement states that "Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change". From a human rights perspective, loss and damage are closely related to the right to remedy and the principle of reparations, including restitution, compensation and rehabilitation.

27. In its sixth assessment report, the Intergovernmental Panel on Climate Change describes how observed and predicted changes in climate are adversely affecting billions of people and the ecosystems, natural resources and physical infrastructure upon which they depend. This number is rising dramatically.[26] Many of these effects are highlighted in the present report.

28. Climate change has already harmed human physical and mental health. In all regions, health impacts often undermine efforts for inclusive development.

A. Loss and damage by climate change disasters (in physical form)

29. About 3.3 billion people are living in countries with high human vulnerability to climate change. Analysis by the International Federation of Red Cross and Red Crescent Societies found that 97.6 million people were affected by climate- and weather-related disasters in 2019.[27] The intersection of gender with race, class, ethnicity, sexuality, indigenous identity, age, disability, income, migrant status and geographical location often compound vulnerability to climate change impacts, exacerbate inequity and create further injustice. Climate change manifests itself in many physical forms, which in turn, creates a multitude of human rights impacts. The hard realities of the enormity of the losses and damages suffered by people, particularly by those in the global South, are explored below.

1. Floods, heavy rains and strong winds

30. By 2050, the number of people at risk of floods will increase from its current level of 1.2 billion to 1.6 billion. In the early to mid-2010s, 1.9 billion people, or 27 per cent of the global population, lived in potential severely water-scarce areas. In

[26] Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, Working Group II Contribution to the Sixth Assessment Report, Technical Summary (Intergovernmental Panel on Climate Change and World Meteorological Organization, 2022). Available at www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_TechnicalSummary.pdf.

[27] International Federation of Red Cross and Red Crescent Societies and International Committee of the Red Cross, "Humanitarian sector joins forces to tackle 'existential threat' of climate change" (News Release, 21 June 2022). Available at www.icrc.org/en/document/red-cross-red-crescent-humanitarian-sector-joins-forces-tackle-existential-threat-climate.

2050, this number will increase to 2.7 to 3.2 billion people.[28] Citing initial reports, the United Nations High Commissioner for Refugees said more than 12,000 refugees had been affected by heavy rainfall, while an estimated 2,500 shelters had been damaged or destroyed.[29]

31. The Special Rapporteur received many submissions highlighting examples of tropical cyclones, floods, hurricanes and typhoons in all regional areas of the world. A representative sample of the impacts on the enjoyment of human rights is presented below.

32. In Madagascar, an estimated 4,300 people were temporarily displaced and 2 killed after the adverse impact of tropical cyclones in December 2020 and February 2021. In Zimbabwe, an estimated 60,000 people were internally displaced in 2019, while an estimated 270,000 were affected. In Mozambique, 160,000 people were internally displaced and 1.72 million were affected.[30] In April and May 2022, flooding in the KwaZulu-Natal province in South Africa caused the deaths of 461 people, with 88 people missing. In addition, 8,584 houses were completely destroyed and 13,536 damaged. A total of 6,000 people are still homeless (as at 13 June 2022); 630 schools were affected, with over 100 inaccessible in the aftermath; and the entire province was without water for weeks, with some communities without water two months later.[31] In Malawi, for example, in 2019 the country was hit by Cyclone Idai, which affected about 975,000 people, with 86,976 displaced, 60 killed and 672 injured. In South Sudan, floods have displaced hundreds of thousands of inhabitants, forcing them to move, causing conflicts between herders and farmers. These events have affected women, children and the aged, and have caused property losses and the loss of animal and human life.[32] In the Chimanimani and Chipinge districts of Zimbabwe, people faced risks of statelessness in the aftermath of Cyclone Idai in 2019.[33] In Rwanda, flooding caused the deaths of more than 130 people.[34] In 2021, over 1.2 million people in West and Central Africa were affected by flooding.[35]

33. In 2020, Hurricanes Eta and Iota hit Central America and the Caribbean. Many families lost their crops and the animals they had raised for food. As a consequence, poverty and child malnutrition has increased. The hurricanes caused young people and children to interrupt their education owing to displacement and the initial isolation suffered by many communities.[36] In El Salvador, Guatemala and Honduras, the number of food insecure people reached an estimated 6.4 million people in October 2021.[37] Heavy rains in Guatemala in June 2022 killed at least 15 people in a dozen mudslides affecting more than 500,000 people.[38] In Guatemala, storms have caused internal displacement, thus contributing to irregular migration, school dropouts and the vulnerability of indigenous girls and women.[39] In the period 2010–2020 alone, El Salvador experienced 18 extreme rainfall events of varying

[28] UN-Water, “Water and Climate Change” (2022). Available at www.unwater.org/water-facts/climate-change/.

[29] ABC News, “Bangladesh camp housing Rohingya refugees floods, thousands become homeless” (29 July 2021). Available at www.abc.net.au/news/2021-07-29/bangladesh-coxs-bazar-refugee-camp-flooded-rohingya/100335472.

[30] Submission from Human and Civil Rights Organizations of America.

[31] Submission from Amnesty International and Center for International Environmental Law.

[32] Submission from African Women’s Development and Communications Network.

[33] Submission from Zimbabwe.

[34] Submission from African Women’s Development and Communications Network.

[35] Submission from Association Jeunes Agriculteurs.

[36] Submission from Continental Network of Indigenous Women of the Americas (children).

[37] A/HRC/50/57.

[38] Phys.Org, “15 dead, half million impacted by heavy rains in Guatemala” (4 June 2022). Available at https://phys.org/news/2022-06-dead-million-impacted-heavy-guatemala.html.

[39] Submission from Guatemala.

magnitudes and impacts.[40] In Colombia, Hurricane Iota left the 5,000 inhabitants of the small island of Providencia with practically nothing.[41] In Brazil, in peripheral urban areas with greater socioeconomic vulnerability, children, especially poor children and children of African descent, are the most affected by the greater intensity and occurrence of extreme events of floods and landslides.[42]

34. In 2020, hurricanes devastated the honey and milpas crops of the Mayan people who live on the Yucatán Peninsula of Mexico.[43]

35. In 2022, flooding along the Brahmaputra river in the north-eastern Indian state of Assam inundated close to 1,500 villages, affecting nearly 500,000 people.[44] In the coastal districts of Pondicherry and Villupuram, flooding damaged houses and exacerbated sanitation issues, particularly for women and children.[45] In the state of Odisha, multiple cyclones have caused considerable damage and the loss of identity documents, which are prerequisites for gaining access to compensation payments.[46]

36. In Bangladesh, a single flood in 2007 submerged over 2 million hectares of cropland, destroyed 85,000 homes and caused more than 1,000 deaths.[47] In 2020, Cyclone Amphan caused 500,000 families to lose their homes, and destroyed 149,000 hectares of agricultural lands, along with 18,235 water points and almost 41,000 latrines. In coastal districts, nearly 1,100 km of roads, 200 bridges and numerous dams sustained damage.[48] In July 2021, more than 21,000 Rohingya refugees in Cox's Bazar, Bangladesh, were affected by flash floods and landslides. This compounded existing human rights violations already being suffered by the Rohingya community in Myanmar.[49]

37. In 2020, the Philippines suffered Typhoon Quinta/Molave, followed by Typhoon Rolly/Goni, and Typhoon Ulysses/Vamco. This was preceded by two years of severe drought that affected over 2,444,959 individuals.[50] In 2021, Super-Typhoon Rai killed at least 407 people and caused losses of $336 million to agricultural goods and $75 million to fishing boats and gear, as well as $565 million in damages to homes, roads and electricity and water lines.[51]

2. Coastal storms, floods and sea level rise

38. The Intergovernmental Panel on Climate Change notes that coastal settlements with high inequality, for example, those with a high proportion of informal settlements, as well as deltaic cities prone to land subsidence (e.g., Bangkok; Jakarta; Lagos, Nigeria; New Orleans, United States; and those along the Mississippi, Nile and Ganges-Brahmaputra deltas) and small island developing States are highly vulnerable and have experienced impacts from severe storms and floods in addition to, or in combination with, those from accelerating sea level rise.

[40] Submission from El Salvador.
[41] Submission from CAN Adaptation and Loss and Damage Working Group.
[42] Submission from Alana Institute.
[43] Submission from Interamerican Association for Environmental Defense.
[44] Skand Agarwal (Climate Homes News), "Deadly heatwaves show why India needs to get serious on climate adaptation", 6 July 2022. Available at www.climatechangenews.com/2022/06/07/deadly-heatwaves-show-why-india-needs-to-get-serious-on-climate-adaptation/.
[45] Submission from Good Living Eco Foundation.
[46] Submission from Society for the Protection of the Rights of the Child.
[47] Adam Day and Jessica Caus, *Conflict Prevention in an Era of Climate Change: Adapting the UN to Climate-Security Risks* (United Nations University, New York, 2020).
[48] Submission from International Federation of Red Cross and Red Crescent Societies.
[49] Submission from the Office of the United Nations High Commissioner for Refugees (UNHCR).
[50] Submission from Climate Change Network for Community-based Initiatives, Inc.
[51] Submission from Foundation for Mutual Aid.

39. In small island developing States, the agriculture and fisheries sectors are suffering from the compounded effects of extreme events and slow-onset events. In Timor-Leste, Cyclone Seroja in 2021 washed away houses and belongings, including legal documentation.[52] In the Marshall Islands, climate change displacement dispossessed women of their traditional ownership of land, limiting their access to the resources and opportunities associated with it.[53]

3. Impacts of increased carbon dioxide concentrations

40. Increased carbon dioxide concentrations promote crop growth and yield but reduce the density of important nutrients in some crops with projected increases in undernutrition and micronutrient deficiency.[54] This is leading to malnutrition in children and stunting their growth, with devastating effects on their physical, cognitive and emotional development.[55]

41. Climate change has slowed the productivity gains of world agriculture over the past 50 years. Malnutrition has increased, mainly affecting children, pregnant women and indigenous peoples.[56]

4. Droughts

42. Over 1.4 billion people were affected by droughts in the period 2000–2019. Africa suffered from drought more frequently than any other continent, with 134 droughts, of which 70 occurred in East Africa.[57] It is estimated that one person is likely to die of hunger every 48 seconds in drought-ravaged Ethiopia, Kenya and Somalia.[58]

43. Droughts have claimed the lives of 650,000 people since 1970, mostly in countries that have least contributed to the factors intensifying the effects of drought.[59] Greater burdens and suffering are inflicted on women and girls in emerging and developing countries in terms of education levels, nutrition, health, sanitation and safety. Almost 160 million children are exposed to severe and prolonged droughts; by 2040, it is estimated that one in four children will be living in areas with extreme water shortages.[60]

44. In communities where there is no drinking water, especially when the rivers dry up and there is a shortage of water, diseases proliferate among people, especially children. If water sources dry up, women and girls must walk further to fetch water.[61] In all states of Somalia, drought and COVID-19 have brought about more widespread economic challenges, higher rates of girls dropping out of school and increases in cases of female genital mutilation. Multiple studies show that women are several times more likely to die from climate disasters than men, and the greater the gender

[52] Submission from Oxfam International.
[53] Submission from the Marshall Islands.
[54] Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability*.
[55] Submission from Make Mothers Matter.
[56] Submission from the Alana Institute.
[57] United Nations Convention to Combat Desertification, “Drought in numbers 2022: restoration for readiness and resilience” (2022). Available at www.unccd.int/sites/default/files/2022-06/Drought%20in%20Numbers%20%28English%29.pdf.
[58] Submission from Oxfam.
[59] UNEP (UNEP News), “Around the globe, as the climate crisis worsens, droughts set in”, 15 June 2022. Available at www.unep.org/news-and-stories/story/around-globe-climate-crisis-worsens-droughts-set#:~:text=As%20Riziki%20Bwanake%20walks%20along,and%20an%20abundance%20of%20fish.
[60] United Nations Convention to Combat Desertification, “Drought in numbers”.
[61] Submission from ActionAid International.

and economic inequality, the greater the disparity. In total, 80 per cent of people displaced by climate disasters are women. Due to the power imbalance caused by patriarchal systems, women of various classes, castes and creeds are disproportionately affected socially and economically, in particular indigenous and disabled women.[62] For vulnerable households with minimal economic buffers, which is often the situation for women-headed households, the climate-induced loss of or damage to homes, land, crops, food or livelihoods can push people into spiralling poverty and destitution.[63]

45. In parts of the United Republic of Tanzania, pastoralists whose survival depends on free pastures and land have lost almost a quarter of their livestock owing to prolonged droughts.[64]

46. Since 2010, Chile has suffered a "mega-drought". In total, more than 5,000 people have migrated since 2006, when the drought intensified.[65] In 2013 and 2014, the states of São Paulo, Rio de Janeiro and Minas Gerais in Brazil suffered a prolonged period of drought. This situation left millions of people with limited access to water. In 2020, the Pantanal region in Brazil was hit by the biggest fire in history.[66] In the northwest of Haiti, climate change is making the land drier and unproductive, contributing to crop failure and food shortages.[67]

47. In 2021, abnormally high summer temperatures and the lack of irrigation water during the growing season in Kyrgyzstan caused a reduction in the yield of grain and other crops.[68] In 2019, Afghanistan experienced both drought and flash floods, leading to losses in crop production and subsequent human displacement.[69]

5. Extreme heat

48. Between 2005 and 2015, more than 5 million deaths were associated with non-optimal temperatures annually, with over half of all excess deaths occurring in Asia.[70] The impact of this phenomenon is greater among children: approximately 1 billion children live in extremely high-risk countries, with 820 million children currently highly exposed to heatwaves.[71] Studies have found that heat worsens maternal and neonatal health outcomes, with research suggesting that an increase of 1°C in the week before delivery corresponds with a 6 per cent greater likelihood of stillbirth.

49. Higher sea surface temperatures are causing coral reef bleaching, affecting the viability of reefs and the complex ecosystems they support. This is affecting the right to food for people reliant on coral reefs as a food source.[72]

50. In May and June 2022, at least 90 people were estimated to have died in India and Pakistan owing to heat-related causes. Heat waves in Pakistan in 2021 resulted in disproportionate impacts on people living in poverty and day-wage workers, and women have been particularly exposed to extreme heat.[73] In Australia, discriminatory practices are compounded at times of extreme heat. Studies suggest that indigenous

[62] Submission from Women's Rehabilitation Centre.
[63] Submission from ActionAid International.
[64] Submission from CAN Adaptation and Loss and Damage Working Group.
[65] Submission from Chile.
[66] Submission from LACLIMA.
[67] Submission from Church World Service.
[68] Submission from Kyrgyz Indigo.
[69] Submission from International Federation of Red Cross and Red Crescent Societies.
[70] Ibid.
[71] Environmental Justice Foundation, "In Search of Justice".
[72] Submission from the Alliance of Small Island States.
[73] Ibid.

peoples are denied access to public swimming pools because of segregation policies.[74] Other studies in Australia show how higher temperatures in remote indigenous communities in the Northern Territory will drive inequities in housing, energy and health.[75] In Hong Kong, China, heat stress was deeply distressful for persons with physical and mental disabilities as opportunities for relief were limited.[76]

51. The indigenous peoples of the Sierra Nevada de Santa Marta in Colombia, the Arhuaco, Kogui and Kankuamo, have witnessed the melting of glaciers that threatens their access to water. Indigenous peoples across the Arctic are facing losses to their cultures and traditional ways of living owing to changes to the thaw cycle, drought and unpredictable summer weather.[77]

52. Migrant workers in the Gulf region are vulnerable to occupational heat exposure, or heat stress, which can provoke health problems that increase the risk of certain diseases and affect their ability to maintain healthy and productive lives. A 2020 study on Kuwait found that the overall number of deaths doubles on extremely hot days, but triples for non-Kuwaiti men, who form the majority of the low-income workforce.[78]

B. Economic losses: the overall economic costs of climate change

53. A report by Oxfam found that United Nations humanitarian appeals in response to extreme weather disasters rose by more than 800 per cent between 2000 and 2021. Since 2017, funder nations have met 54 per cent of these appeals on average, leaving an estimated $28 billion to $33 billion shortfall. By 2030, the unavoidable economic losses due to climate change are projected to reach $290 billion to $580 billion.[79] A report on 55 economies hit hard by climate change found they had lost about $525 billion in the past two decades owing to the impacts of global warming.[80] According to the United Nations Convention to Combat Desertification, between 1998 and 2017, droughts had led to global economic losses of approximately $124 billion.[81]

54. Annual funding requests related to climate-linked disasters stood on average at $15.5 billion in the period 2019–2021, up from about $1.6 billion in the period 2000–2002 – but rich countries have only met just over half of these appeals since 2017, leaving a huge shortfall.[82]

55. In 2020, Cyclone Amphan was one of the strongest storms on record in the Bay of Bengal. The economic loss in South Asia amounted to $15 billion, making it the costliest tropical cyclone of the year. It affected 10 million people in Bangladesh.[83]

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[74] Submission from Beth Goldblatt.

[75] Simon Quilty and Norman Frank Jupurrurla (Phys.Org), “How climate change is turning remote Indigenous houses into dangerous hot boxes”, 17 June 2022. Available at https://phys.org/news/2022-06-climate-remote-indigenous-houses- dangerous.html.

[76] Submission from CarbonCare InnoLab.

[77] Submission from Amnesty International and Center for International Environmental Law.

[78] Submission from Migrant-Rights.org.

[79] Tracy Carty and Lyndsay Walsh, *Footing the bill: Fair finance for loss and damage in an era of escalating climate impacts* (Oxfam International, 2022). Available at https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621382/bp-fair-finance-loss-and-damage-070622-en.pdf.

[80] Thomson Reuters Foundation (Eco-Business), “Vulnerable nations demand funding for climate losses, fearing UN ‘talk shop’”, 10 June 2022. Available at www.eco-business.com/news/vulnerable-nations-demand-funding-for-climate-losses-fearing-un-talk-shop/.

[81] United Nations Convention to Combat Desertification, “Drought in numbers”.

[82] Ibid.

[83] Environmental Justice Foundation, “In Search of Justice”.

56. In the past 40 years, climate-linked disasters have affected more than 150 million people in Southern Africa, left about 3 million homeless and led to economic damages of more than $14 billion.[84] In Durban, South Africa, flooding has cost $760 million in damage.[85] It has been estimated that the cost of climate-related disasters per year will increase from $250 billion to $300 billion today to $415 billion by 2030.[86]

57. In the Pacific, it is estimated that climate change-induced migration of tuna stocks will potentially reduce total annual fishing access fees earned by the 10 Pacific small island developing States by an average of $90 million per year compared with the average annual revenue received between 2015 and 2018.[87] The economies of the Vulnerable Twenty Group of countries[88] have lost on aggregate $525 billion because of the effects of climate change during the period 2000–2019.[89]

58. It has been estimated that the United States alone has inflicted more than $1.9 trillion in damage to other countries from the effects of its greenhouse gas emissions.[90] This puts the United States ahead of China, currently the world's leading emitter, and the Russian Federation, India and Brazil, the next largest contributors to global economic damage through their emissions. The total estimated cost of the emissions by the United States, China, the Russian Federation, India and Brazil comes to $6 trillion in losses worldwide, or about 11 per cent of annual global gross domestic product, since 1990.

C. Non-economic losses of climate change, including climate change displacement

59. The impacts of climate change are also contributing to losses that are not easy to place in economic terms. These are known as non-economic losses and include, inter alia, loss of life, human health, cultural heritage and sovereignty.[91] In Samoa, for instance, sea level rise and storm surges are eroding cultural sites.[92]

60. Climate change displacement can be considered a non-economic loss, although the movement of people away from regular employment often has significant economic costs. According to the Intergovernmental Panel on Climate Change, since 2008, an annual average of over 20 million people have been internally displaced annually by weather-related extreme events, with storms and floods being the most

[84] Mongabay, "In Africa, temperatures rise, but adaptation lags on West's funding failure" (19 January 2022). Available at https://news.mongabay.com/2022/01/in-africa-temperatures-rise-but-adaptation-lags-on-wests-funding-failure/.

[85] Chloé Farand (Climate Home News), "Vulnerable nations set to design and test loss and damage funding facility", 25 April 2022. Available at www.climatechangenews.com/2022/04/25/vulnerable-nations-set-to-design-and-test-loss-and-damage-funding-facility/.

[86] Submission from Maat for Peace Development and Human Rights.

[87] J.D. Bell et al, "Pathways to sustaining tuna-dependent Pacific Island economies during climate change", *Nature Sustainability,* No. 4, pp. 900–910 (2021). Available at https://doi.org/10.1038/s41893-021-00745-z.

[88] The current members of the V20 Group that self-identify as those most vulnerable to the impacts of climate change now number 55. See www.v-20.org/members.

[89] Vulnerable Twenty Group, "Climate Vulnerable Economies Loss Report: 2000–2019" (2022). Available at https://www.v-20.org/resources/publications/climate-vulnerable-economies-loss-report.

[90] C.W. Callahan and J.S. Mankin, "National attribution of historical climate damages", Climatic Change, No. 172 art. 40. Available at https://link.springer.com/article/10.1007/s10584-022-03387-y.

[91] A. Telesetsky, "Climate-Change Related 'Non-economic Loss and Damage' and the Limits of Law", *San Diego Journal of Climate and Energy Law*, Vol. 11, No. 97, 2020. Available at https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1096&context=jcel.

[92] Submission from Samoa.

common.[93] Studies estimate that up to 216 million people could be forced to migrate by 2050, largely owing to drought, together with other factors such as water scarcity, declining crop productivity, sea-level rise and overpopulation.[94]

61. In India alone, more than 3.8 million people were internally displaced in 2020, mostly owing to weather-related disasters. In the same period, China counted more than 5 million and the United States more than 1.7 million new displacements.[95]

62. Displaced people now make up more than 80 per cent of the urban population of Bangladesh, the vast majority working in the informal sector and residing in insecure slums.[96]

63. Climate change fuels disasters and displacement within and across borders in Southern Africa. Southern Africa has experienced slow-onset disasters, notably in Madagascar, where 1.5 million people are affected by emergency-level food crisis following consecutive droughts. It has also caused internal displacement as people flee in search of food and work. An estimated 2.3 million people in Angola are also affected by drought, which has generated the internal displacement of approximately 60,000 people, in addition to 10,000 people crossing the border to Namibia.[97]

64. Climate change-induced displacement has many linkages between non-economic losses and the enjoyment of human rights. Displacement has affected the mental health of communities owing to the trauma of losing their habitats, homes and livelihoods.[98] Other studies suggest that climate-displaced persons face economic vulnerability, social exclusion and limited support for upholding cultural identity. Relocation may lead to loss of nationality of origin, particularly for individuals who do not have or retain identity documentation.[99]

65. Risks of statelessness can arise for persons forcibly displaced owing to climate change. In these circumstances, statelessness may result in such situations where individuals are unable to prove their nationality because of a loss of documentation or the inability to obtain replacement documentation. In addition, protracted or permanent displacement outside of one's country can sometimes result in passive loss of citizenship. Being stateless or undocumented implies that people may not be able to enjoy access to food, water, medical services or any support or subsidies provided by the Government.

66. The Special Rapporteur will dedicate his report to the Human Rights Council at its fifty-third session, in 2023, to the theme "Addressing the human rights implications of climate change displacement, including legal protection of people displaced across international borders".

D. Response to loss and damage

1. International response and funding gap

67. In response to growing concerns about loss and damage, in 2012, the parties to the United Nations Framework Convention on Climate Change established the Warsaw International Mechanism for Loss and Damage associated with Climate Change

[93] Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability*.
[94] United Nations Convention to Combat Desertification, "Drought in numbers".
[95] Environmental Justice Foundation, "In Search of Justice".
[96] Day and Caus, *Conflict Prevention*.
[97] Submission from UNHCR.
[98] Submission from Laiakini Waqanisau.
[99] Submission from International Center for Advocates Against Discrimination.

Impacts. To date, the Mechanism has focused mainly on enhancing knowledge and understanding and strengthening dialogue, coordination, coherence and synergies. The Special Rapporteur notes that, despite considerable resistance from the United States and the European Union, parties to the Framework Convention agreed to include loss and damage as a separate article under the Paris Agreement (article 8).

68. Since then, progress on advancing action and support, a key pillar of article 8, has been extremely limited.[100] The Special Rapporteur has observed that the United States continues to stall negotiations on the basis of a procedural debate as to whether the Mechanism now only serves the Paris Agreement. Furthermore, the Special Rapporteur observes that negotiations around the operationalization of the Santiago Network for Averting, Minimizing and Addressing Loss and Damage, which was created at the twenty-fifth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change to catalyse technical assistance, continue to be stalled by developed countries.

69. Despite a unanimous call from the Group of 77 and China at the twenty-sixth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, held in Glasgow, United Kingdom, for a new funding mechanism for loss and damage, the proposal was rejected by influential developed countries. In the end, developing countries were pressured by wealthy nations into settling for a three-year "dialogue" on a funding arrangement for loss and damage, with no decision-making powers.[101] Nevertheless, there were some funding pledges made at the twenty-sixth session of the Conference of the Parties. Scotland pledged $2.4 million for a loss and damage fund, the Wallonia Region of Belgium dedicating $1 million to the fund, and Germany pledged $10.4 million to support the Santiago Network. While welcomed, these piecemeal pledges do little to bridge the gap in what is needed for loss and damage finance. Effectively, the major emitting countries have abandoned their duty to cooperate in line with the principles of international cooperation.

70. While funding is provided internationally through the United Nations and bilateral disaster relief support, this funding is generally on an ad hoc basis and well below what is needed.[102] Furthermore, there is also a large time gap between the event of the disaster and the receipt of the relief money.[103] Other funding for disaster risk reduction agendas primarily focus on risk assessment and place the onus on affected countries and communities to fund their own losses. Views expressed to the Special Rapporteur and submissions received suggest that these arrangements are inadequate to address loss and damage both in the short and longer term.[104] Data presented in the present report would strongly support this perception. Current funding arrangements at the international, regional and national levels are either difficult to gain access to, do not address all loss and damage or are poorly capitalized. Ironically, existing funding arrangements may incur more debt in the process of gaining access to them.[105] Little funding is provided to help particularly vulnerable developing countries, especially small island developing States, to cover the costs of loss and damage associated with slow-onset events, such as the resettlement of populations from areas

[100] Submission from Amnesty International and Center for International Environmental Law.

[101] J. Lo and C. Farand (Climate Homes News), "EU blocks bespoke fund for climate victims as rich nations moot alternatives", 17 June 2022. Available at https://www.climatechangenews.com/2022/06/17/eu-blocks-bespoke-fund-for-climate-victims-as-rich-nations-moot-alternatives/.

[102] Carty and Lyndsay Walsh, *Footing the bill.*

[103] Submission from Good Living Eco Foundation.

[104] Submission from Alliance of Small Island States.

[105] Submission from Samoa.

rendered uninhabitable owing to climate change and measures to address permanent loss of, among other things, ecosystems and heritage.[106]

2. National approaches to funding loss and damage

71. Despite the lack of progress on funding at the international level, some States have established national funding arrangements to address loss and damage. Many government agencies have "quick response funds" or built-in budget allocation that represent pre-disaster or standby funds for agencies in order to immediately assist areas stricken by disasters and calamities. These funds are used to purchase family food packs, implement cash or food-for-work programmes, provide shelter assistance and send additional relief supplies.[107] But too often, these are intermittent, short-term and location-specific.[108]

72. It has been found that disaster insurance schemes can increase inequalities, as without substantial and well-targeted subsidies, women are more likely to be excluded from microinsurance schemes owing to affordability, political, social discrimination or economic marginalization.[109] Overall national funding for loss and damage relies on the fact that the countries that are affected by loss and damage are the ones having to pay for the financial costs incurred by major greenhouse gas polluting countries. This is not consistent with the polluter-pays principle.

IV. Participation and the protection of climate rights defenders

A. "Participation disconnect"

73. It is a regretful indictment of the current decision-making process that those who are most affected and suffering the greatest losses are the least able to participate in current decision-making. New participatory processes need to be found urgently.

74. There is a serious disconnect between those that continue to support the fossil fuel economy and those that are most affected by the impacts of climate change. While this disconnect continues, actions to address climate change will be limited. Furthermore, it is evident that business elites with interests in the fossil fuel and carbon intensive industries have disproportionate access to decision-makers, a phenomenon that is described as "corporate capture". These fossil industry elites and the politicians they sponsor have a human rights responsibility and need to be held accountable for the human rights abuses they are underwriting.

75. There is also a disconnect between those who are most vulnerable to climate change impacts and those who actually participate and are represented in political and decision-making processes. The Special Rapporteur reiterates that the voices of those most affected must be heard and the losses and damages they are suffering must be understood and accounted for. During consultations, oral testimonies provided to the Special Rapporteur by youth groups, gender groups, indigenous peoples, persons with disabilities, faith-based groups, groups representing children, people of African descent and other people from ethnic minorities all emphasized the need for greater participation in decision-making processes. Many are calling for far greater participation of and climate justice for vulnerable groups. The Special Rapporteur lends support to those calls.

[106] Submission from Alliance of Small Island States.
[107] Submission from Community Organizers Multiversity.
[108] Submission from Indigenous Peoples' International Centre for Policy Research and Education the Indigenous Peoples Rights International and Elatia.
[109] Submission from Oxfam.

B. Levels of participation

76. There are many levels of participation that need to be addressed. At the international level, these include the United Nations and its institutions, and leaders' summits (such as the Group of Seven and the Group of 20), and their participation in international, national and local courts, meetings of the parties to the United Nations Framework Convention on Climate Change and the Paris Agreement, and other bodies associated within the process of the Framework Convention. At the national level, these include national parliaments, central and local government meetings and communities. Within all these forums, it must be recalled that "public participation is one of the fundamental pillars of instrumental or procedural rights, because it is through participation that the individual exercises democratic control of a State's activities and is able to question, investigate and assess compliance with public functions".[110]

1. Conferences of the parties to the United Nations Framework Convention on Climate Change and to the Paris Agreement

77. Among the many forums in which participation must be a fundamental pillar, the Special Rapporteur wishes to highlight the conferences of the parties to the United Nations Framework Convention on Climate Change and to the Paris Agreement. The Special Rapporteur heard numerous calls for such conferences to be opened up for greater participation by indigenous peoples, young people and other civil society representatives. The Special Rapporteur observed that indigenous peoples and civil society organizations are often excluded from observing some negotiations and have virtually no input into the negotiation of outcomes apart from brief interventions in the opening plenary meetings of these conferences. Other international bodies are not so restrictive. For example, the Special Rapporteur draws attention to the Convention on Biological Diversity, which allows for textual inputs from civil society organizations. Furthermore, he notes that the conferences of the parties to the Framework Convention and to the Paris Agreement are virtually two unconnected meetings in one. One meeting involves negotiations of textual decisions held by government representatives, and the other is a series of side events and discussions organized by non-State actors. There is little cross-fertilization of inputs and exchanges of views apart from daily newsletters, such as "Eco".

78. Despite some progress, the participation of women in these conferences of the parties is still problematic. Despite the fact that the numbers of women and men in party delegations are almost equal (49 per cent women and 51 per cent men), men accounted for 60 per cent of the speakers and 74 per cent of the speaking time in plenaries.[111] The Special Rapporteur concurs with calls that have been made to revise the Gender Action Plan of the United Nations Framework Convention on Climate Change to make it more relevant and effective. Others affected by the impacts of climate change have the least ability to make change in the Conference of the Parties process. The Special Rapporteur refers to this as "the participation disconnect". The Special Rapporteur regrets that the process of conferences of the parties to the

[110] Inter-American Court of Human Rights, Advisory Opinion) C-23/17 of 15 November 2017. Requested by the Republic of Colombia: The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: Interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights.

[111] A. Dazé and C. Hunter, "Gender-Responsive National Adaptation Plan (NAP) Processes: Progress and promising examples – NAP Global Network synthesis report, 2021–2022" (International Institute for Sustainable Development, Winnipeg, Canada, 2022). Available from https://napglobalnetwork.org/resource/gender-responsive-nap-processes-progress-promising-examples/.

Framework Convention and to the Paris Agreement is denying some people the right to participate effectively.

79. Youth groups have demanded the establishment of a youth advisory committee on loss and damage to allow their participation in the decision-making processes at the national and international levels.[112] With respect to the Santiago Network for Averting, Minimizing and Addressing Loss and Damage, there has been a call for the operational modalities to be inclusive and transparent.[113] Similarly, there have been calls for indigenous peoples to be involved in the decision-making mechanisms to define climate finance, specifically in the setting up of a financial mechanism on loss and damage.[114]

80. Furthermore, during interactions in Bonn, the Special Rapporteur heard several concerns that procedural arrangements set up under the United Nations Framework Convention on Climate Change and the Paris Agreement, such as the Local Communities and Indigenous Peoples Platform, are not adequate substitutes for meaningful and active participation in negotiations. In addition, the Conference of the Parties process has become more like a "world expo" rather than a venue for negotiations and meaningful participation. The locations of such conferences are becoming more expensive and difficult to attend for indigenous peoples and civil society organizations. Stateless people displaced by climate change or people who have lost their identification papers due to climate change disasters have little or no chance of being represented at these conferences.

2. Inclusion in governmental planning processes

81. In the process of preparing, implement and monitoring the planning for nationally determined contributions, adaptation plans and loss and damage planning, there is a call for indigenous peoples, especially women and young people, to be included in decision-making.[115] If done well, social protection measures can be a critical way for States to fulfil their commitments to protect human rights and advance sustainable development, including through responsive and scaling-up approaches to address climate impacts and strengthen resilience as needed.[116]

3. National and local courts

82. Regarding access to climate change litigation and other judicial processes, in a consultation, the Special Rapporteur was presented with a call for children and young people to be able to have full access to courts. While youth groups have been successful in a number of climate change litigation cases, standing and justiciability remain challenges.[117]

4. National parliaments

83. There have been calls for young people to be represented in national parliaments to ensure that public authorities comply with their obligations under multilateral

[112] Loss and Damage Youth Coalition, open letter to the Presidency of the twenty-seventh session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, available at https://actionnetwork.org/petitions/open-letter-to-cop27-presidency.

[113] Submission from Amnesty International and Center for International Environmental Law.

[114] Submission from Indigenous Peoples' International Centre for Policy Research and Education, Indigenous Peoples Rights International and Elatia.

[115] Submission from Continental Network of Indigenous Women of the Americas.

[116] Submission from ActionAid International.

[117] E. Donger, "Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization", *Transnational Environmental Law*, vol. 11, iss. 2, pp. 263-289, July 2022. Available at https://doi.org/10.1017/S2047102522000218.

treaties, such as the United Nations Framework Convention on Climate Change and the Paris Agreement.[118] In this respect, some useful examples have been tried. Twelve members of the organization Children's Parliament aged 7 to 12 years participated in the deliberative Climate Assembly process in Scotland.

C. Protecting climate rights defenders

84. As groups and communities become increasingly frustrated with the lack of action on climate change and the subsequent loss and damage that has occurred and will occur into the future, protests and public interventions have taken place to bear witnesses to the climate emergency. Protests and other forms of intervention have precipitated reprisals from Governments and businesses supporting the fossil fuel industry. Some climate rights defenders have been killed. In one country in Latin America, for instance, a Government has been accused of criminalizing popular leaders and social movements that dare to question the socio-environmental impacts of climate change and large mitigation projects in the region. In one country in Asia, the passing of anti-terrorism legislation endangered the lives of climate justice advocates. Furthermore, some civil society organizations are being red-tagged and vilified, and some human rights advocates have been imprisoned on the basis of false charges, while others have been murdered.

85. In North America, at least one environmental organization has been labelled by a national enforcement agency as a domestic terrorist threat.[119] Trade unions' campaigns on climate change and its impact on workers have been targeted in some countries.[120]

86. Indigenous peoples defending their rights have been the target of serious attacks and human rights abuses. In 2020, there was a total of 227 lethal attacks against land and environmental defenders. A disproportionate five out of seven mass killings of defenders recorded in 2020 were of indigenous peoples. Indigenous women acting as environmental defenders face additional obstacles to their well-being, such as sexual violence, sexual discrimination, harassment of their children and families and increased vulnerability to mistreatment from State forces and armed groups.[121]

87. Concerns have also been expressed to the Special Rapporteur that climate change activists may be targeted for recrimination and harassment if they are involved in protests during the twenty-seventh session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, to be held in Egypt.[122] The Special Rapporteur is particularly concerned about the safety of activists based in Egypt.

V. Conclusion and recommendations

88. **We are faced with a global crisis in the name of climate change. Throughout the world, the rights of people are being denied as a consequence of climate change. This includes a denial of the right to, inter alia, life, health, food, development, self-determination, water and sanitation, work, adequate housing and freedom from violence, sexual exploitation, trafficking and slavery. Human-**

[118] Submission from Alana Institute.

[119] H. Alberro (The Conversation), "Radical environmentalists are fighting climate change – so why are they persecuted?", 11 December 2018. Available at https://theconversation.com/radical-environmentalists-are-fighting-climate-change-so-why-are-they-persecuted-107211.

[120] Submission from International Trade Union Confederation.

[121] Submission from Natural Justice.

[122] Oral testimony by civil society organizations, Bonn, June 2022.

induced climate change is the largest, most pervasive threat to the natural environment and human societies the world has ever experienced. The human right to a clean, healthy and sustainable environment was endorsed by the Human Rights Council in its resolution 48/13. Urgent action is needed to address the climate change crisis. The set of recommendations below require urgent attention by the General Assembly.

Recommendations with respect to bridging the mitigation gap

89. **The Special Rapporteur maintains that all of the recommendations made by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment in his report to the General Assembly in 2019 with respect to mitigation action[123] are still relevant and should be considered as recommended in the present report. In addition, the below recommendations should be considered.**

90. **With respect to mitigation, the Special Rapporteur on the promotion and protection of human rights in the context of climate change recommends that the General Assembly:**

(a) **Request the Secretary-General to host a high-level mitigation commitment forum as part of the Summit of the Future conference. The aim of the forum would be to deliver commitments to reduce global emissions by at least 55 per cent by 2030;**

(b) **Recommend the repeal of the Energy Charter Treaty;**

(c) **Agree to establish an internationally legally binding fossil fuel financial disclosure mechanism, to require Governments, businesses and financial institutions to disclose their investments in the fossil fuel and carbon intensive industries;**

(d) **Establish an international human rights tribunal to hold accountable Governments, business and financial institutions for their ongoing investments in fossil fuels and carbon intensive industries and the related human rights effects that such investments invoke;**

(e) **Pass a resolution to ban any further development of fossil fuel mining and other harmful mitigation actions;**

(f) **Recommend that the International Criminal Court include an indictable offense of ecocide.**

91. **Also with respect to mitigation, the Special Rapporteur recommends that the parties to the United Nations Framework Convention on Climate Change agree to the following at the twenty-seventh session of the Conference of the Parties:**

(a) **Include human rights considerations in their nationally determined contributions and other planning processes and ensure that market-based mechanisms have effective means for protecting human rights and effective compliance and redress mechanisms to this effect;**

(b) **Ensure that food security and the protection of the rights of indigenous peoples take precedent over land-based mitigation actions.**

92. **With respect to loss and damage, the Special Rapporteur recommends that the General Assembly:**

[123] A/74/161, sect. IV.A.

(a) **Agree to establish a loss and damage finance facility;**

(b) **Agree to establish a consultative group of finance experts to define the modalities and rules for the operation of the loss and damage finance facility;**

(c) **Agree that the consultative group of finance experts should be appointed by the Secretary-General and should comprise representatives from financial institutions that have experience in funding loss and damage, and should include representatives from various rights holders mentioned in the present report and not include State climate change negotiators;**

(d) **Agree that the consultative group of finance experts be given one year to complete its work and provide recommendations for agreements to the General Assembly at its seventy-eighth session;**

(e) **Agree that the consultative group of finance experts, in undertaking its work, shall be guided by the following modalities and principles:**

(i) **Funding for the group should be new and not repurposed climate finance;**

(ii) **The group should be based on the "polluter pays" principle;**

(iii) **The group should be based on an inclusive, human rights-based approach and give priority to marginalized groups and other rights holders in situations vulnerable to the impacts of climate change;**

(iv) **Funding for the group should come from innovative sources and should be at scale to meet current and future needs with respect of loss and damage. Such sources could include: a climate damages tax on the fossil fuel industry; the redirection of fossil fuel subsidies; international levies on commercial air passenger travel and emissions from international shipping; and a debt cancellation and debt relief mechanism;**

(f) **Develop international legal measures to address the permanent loss of land and ocean territories and their associated ecosystems, livelihoods, culture and heritage;**

(g) **Create a sovereign debt relief mechanism as a means of restructuring or cancelling debts in an equitable manner with all creditors as a means of delivering on climate justice;**

(h) **Create a redress and grievance mechanism to allow vulnerable communities to seek recourse for damages incurred, including legal measures to determine criminal, civil or administrative liability, and providing comprehensive restitution and guarantee of non-repetition;**

(i) **Establish international legal protections to persons internally displaced and displaced across international borders as a consequence of climate change;**

(j) **Explore legal options to close down tax havens as a means of freeing up taxation revenue for loss and damage.**

93. **Also with respect to loss and damage, the Special Rapporteur recommends that the parties to the United Nations Framework Convention on Climate Change agree to the following at the twenty-seventh session of the Conference of the Parties:**

(a) **Establish an interim financial window for funding urgent loss and damage under the Green Climate Fund;**

(b) **Invite the United Nations Environment Programme to create an annual loss and damage finance and action gap report, with a view that the present report will inform the global stocktake.**

Recommendations for enhancing the participation and protection of climate rights defenders

94. **The Special Rapporteur recommends that the International Law Commission be mandated to develop, within a two-year time frame, an international legal procedure to give full and effective protection to environmental and indigenous human rights defenders, including by establishing an international tribunal for the prosecution of perpetrators of violence against and the killing of environmental and indigenous human rights defenders.**

95. **The Special Rapporteur recommends that the International Law Commission be mandated to include in the definition of ecocide those actions against environmental and indigenous human rights defenders.**

96. **The Special Rapporteur recommends that the General Assembly request the Secretary-General to call for all major meetings, such as those of the Group of Seven and the Group of 20, to include the participation of human rights holders affected by the impacts of climate change.**

97. **The Special Rapporteur also recommends that the General Assembly encourage all Member States to include youth representatives in national parliaments to highlight climate change concerns.**

98. **The Special Rapporteur further recommends that the General Assembly encourage all States to give standing to children and young people, including indigenous children and young people international, national and subnational court systems.**

99. **With respect to the participation and protection of human right defenders, the Special Rapporteur recommends that the parties to the United Nations Framework Convention on Climate Change agree to the following at the twenty-seventh session of the Conference of the Parties:**

(a) **Pass an omnibus decision that allows for the full and effective participation of indigenous peoples and civil society organizations in decision-making processes at all levels of the Conference of the Parties process;**

(b) **Establish a youth advisory committee on loss and damage;**

(c) **Establish a process to revise and improve the Gender Action Plan, for agreement at the twenty-eighth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change.**

Summit of the Future recommendation

100. **The Special Rapporteur encourages the Summit of the Future to endorse all of the recommendations contained in the present report.**

Annex 123

HUMAN RIGHTS AND LOSS AND DAMAGE

Key messages

UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

KEY MESSAGES ON HUMAN RIGHTS AND LOSS & DAMAGE

International human rights law applies to loss and damage associated with the adverse effects of climate change, including extreme weather events and slow-onset events, resulting from anthropogenic emissions of greenhouse gases. Climate change is already having negative impacts on a wide range of human rights, such as the rights to a clean, healthy and sustainable environment, food, water and sanitation, health, housing, an adequate standard of living, life, culture, development, self-determination, and peace among others. For example, the Intergovernmental Panel on Climate Change found that climate change has exposed millions of people to acute food insecurity and reduced water security, with the largest adverse impacts observed in many locations and/or communities in Africa, Asia, Central and South America, LDCs, Small Islands and the Arctic, and globally for Indigenous Peoples, small-scale food producers and low-income households. The occurrence of climate-related food-borne and water-borne diseases and the incidence of vector-borne diseases have also increased. These losses and damages have exacerbated inequalities, including with respect to the effective enjoyment of human rights. They require a response grounded in human rights. The following Key Messages describe human rights obligations related to loss and damage from climate change.

01

Apply a human rights-based approach to averting, minimizing and addressing loss and damage from climate change

Human rights law requires urgent action to prevent climate change related violations of human rights and establish guarantees of non-repetition. It further requires that harms caused by climate change are remedied. Action to avert, minimize and address loss and damage from climate change should be structured and implemented to respect, protect and fulfil human rights by stopping future harms and ensuring the rights to access justice and effective remedy for all people. Under human rights law, the actors responsible for climate change related harms (primarily States and businesses) should be accountable for remedying them. Human rights principles and standards should inform all action to address loss and damage including needs assessments and specific measures to respect, protect and fulfil the rights of those who are often disproportionately affected by climate change such as women and girls, children, youth, older persons, persons with disabilities, Indigenous Peoples, minorities, migrants, rural workers, persons living in poverty and others in vulnerable situations.

Those experiencing loss and damage due to the adverse effects of climate change are entitled to access effective remedy. Action to address economic and non-economic loss and damage should include the following key elements provided for under international human rights law: equal and effective access to justice and to an effective remedy; adequate, effective and prompt reparation for harm suffered, in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, including as guided by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (GA res. 60/147); and access to relevant information concerning violations and reparation mechanisms, including through the provision of such information in accessible formats. Effective, inclusive, transparent, participatory, accountable and adequately funded mechanisms for loss and damage are needed to advance the rights of those impacted by climate change to access justice and effective remedies.

02
Operationalize the right to effective remedy for loss and damage

03
Mobilize maximum available resources to address the human rights impacts of loss and damage

International human rights law, including the International Covenant on Economic, Social and Cultural Rights, requires States, individually and through international assistance and cooperation, to mobilize the maximum available resources for the progressive realization of economic, social and cultural rights and the right to a healthy environment. States should establish domestic mechanisms to mobilize resources to address human rights harms caused by climate change and measurably advance the effective enjoyment of economic, social and cultural rights by those affected. States should adopt innovative measures to finance efforts to address loss and damage including equitable and progressive carbon taxes; wealth taxes; levies on certain sectors, e.g. fossil fuels, aviation, and shipping; and legal and policy measures to increase the accountability of businesses for climate change related harms.

In line with the principles of equity, common but differentiated responsibilities and respective capabilities, and polluter pays, wealthier States with higher historical and present responsibilities for causing climate change have greater responsibilities to provide resources for less wealthy and less responsible States to remedy human rights harms from loss and damage. These principles and the obligations of States to cooperate internationally to advance human rights apply to relevant UNFCCC negotiations and processes such as those for the establishment of the Santiago Network on loss and damage, the operationalization of a new fund for loss and damage, and the creation of a new collective quantifiable goal on climate finance. In this context, a human rights-based approach to loss and damage entails, among other things: including express references to human rights as guiding principles for the operationalization of these mechanisms; adopting human rights-based policies and safeguards applicable to decision-making, monitoring and accountability; ensuring meaningful and informed participation, particularly of those most affected by loss and damage, including in the governing bodies of mechanisms to address loss and damage; specifically addressing non-economic losses, including those arising from climate-related human mobility; respecting Indigenous, and local knowledge and cultural heritage; ensuring that sufficient financial and other resources are directly accessible to the people and communities most affected by loss and damage; and taking a gender-responsive, disability-inclusive, intersectional and intergenerational approach in the assessment, design and implementation of loss and damage measures. Care should be taken to tailor international funding to the needs of the people and States most affected by climate change, protecting against debt increases and ensuring additionality to existing funding commitments.

04
Ensure equitable, cooperative action to address loss and damage

05
Respect, protect and fulfil the human rights of persons in vulnerable situations

The Human Rights Council has expressed concern that loss and damage caused by sudden- and slow-onset events directly and disproportionately affects women and girls, children, youth, older persons, persons with disabilities, Indigenous Peoples, migrants, persons living in poverty and others in vulnerable situations, undermining their well-being and their enjoyment of a whole of range of human rights.

05

Respect, protect and fulfil the human rights of persons in vulnerable situations (cont'd)

Persons in vulnerable situations may have reduced adaptive capacity making them particularly at-risk from human rights harms caused by climate change. Under human rights law, States should take action to empower persons at-risk from or experiencing climate change related loss and damage and uphold their rights. This includes taking action to:

5.1

Advance women's rights and gender equality

Women and persons with diverse gender identities often face systemic discrimination, harmful stereotypes and social, economic and political barriers that can limit their adaptive capacity. These include limited or inequitable access to financial assets and services, education, land, property, resources, and decision-making processes, as well as fewer opportunities and less autonomy, including relating to work and care responsibilities. As a result, women are particularly exposed to human rights harms resulting from loss and damage. Indigenous women, women with disabilities, rural women, women living in poverty, and older women, among others, face even higher risks of experiencing discrimination and loss and damage. At the same time, women can and do make important contributions to rights-based climate action. A human-rights based approach to loss and damage empowers women, protects their rights, and addresses the gendered impacts of climate change, integrating intersectional approaches. This includes: specific consideration and integration of women's rights and gender equality in all policies and programmes; improved understanding of the gendered impacts of loss and damage and climate action informed by lived experiences; effective measures to address and prevent sexual and gender-based violence in the context of climate change, including through women's meaningful and effective participation in the design and implementation of humanitarian, migration and disaster risk reduction plans and policies; and ensuring that climate funding systematically integrates women's human rights and gender equality into governance structures, project approval, implementation processes, and public participation mechanisms.

5.2
Advance children's rights

Children are often disproportionately impacted by climate change due to their unique metabolism, physiology and developmental needs. The negative impacts of climate change, including the increasing frequency and intensity of natural disasters, changing precipitation patterns, food and water shortages, and the increased transmission of communicable diseases, threaten the enjoyment by children of a wide range of rights. A Climate change also has a disproportionate impact on, inter alia, children with disabilities, children on the move, poor children, children separated from their families, and Indigenous children. A human-rights based approach to loss and damage requires specific consideration and action by States to respect, protect and fulfil the rights of children. As noted in General Comment 26 of the Committee on the Rights of the Child, governments should consider children's rights in all decisions made about climate change and consider climate change in all decisions being made about children. This includes ensuring that: children's rights are specifically addressed in climate, disaster risk reduction, and development policies and programmes; adequate resources are mobilized domestically and through international cooperation to address the specific situation of children, in particular those children disproportionately impacted by climate change; children are empowered to participate in climate policymaking through education and consultative mechanisms; and children have access to effective remedies when they suffer harm from climate action and inaction, including by businesses.

5.3
Advance the rights of Indigenous Peoples

According to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Indigenous Peoples around the world are exposed to the worst impacts of climate change. The displacement of Indigenous Peoples and the potential loss of their traditional lands, territories and resources threatens their cultural survival, traditional livelihoods and right to self-determination. A human-rights based approach to loss and damage requires specific consideration and action by States to respect, protect and fulfil the rights of Indigenous Peoples, in accordance with the requirements inter alia of International Labour Organization Convention (No. 169) concerning Indigenous and tribal peoples and the United Nations Declaration on the Rights of Indigenous Peoples.

5.3 Advance the rights of Indigenous Peoples (cont'd)

These include: ensuring that the rights of Indigenous Peoples are specifically addressed in climate, disaster risk reduction and development policies and programmes; mobilizing adequate resources domestically and through international cooperation to address their specific situation, including the possibility of granting them direct access to international funding arrangements for loss and damage; ensuring meaningful and informed participation in decision-making processes; ensuring access to effective remedies when Indigenous Peoples suffer harm from climate action and inaction, including by businesses; and developing adequate domestic and international measures to address the permanent loss of land and territories and their associated ecosystems, livelihoods, culture and heritage.

5.4 Advance the rights of migrants

Climate-induced mobility increases exposure to climatic hazards, reduces adaptive capacity and increases vulnerability to discrimination, inequality and structural dynamics that lead to diminished and unequal enjoyment of rights. People on the move, including especially women and girls, children, and persons with disabilities, often have less or no access to basic necessities, such as food, water, adequate healthcare and housing. A human-rights based approach to loss and damage requires specific consideration and action by States to respect, protect and fulfil the rights of persons moving in response to climate change, including: promoting and expanding safe, regular, dignified and accessible pathways for human mobility such as specific protection mechanisms; refraining from returning migrants to territories affected by climate change that can no longer sustain livelihoods consistent with their human rights; providing protection for persons who are unable to return to their homes as a result of climate change; facilitating the integration of climate change-related migrants in host communities, the regularization of their legal status and their access to labour markets; ensuring meaningful and informed participation of all in decision-making processes relating to climate change and human mobility; and establishing legal protections, globally regionally, and nationally, for persons internally displaced and displaced across international borders as a consequence of climate change.

5.5 Advance the rights of persons with disabilities

Persons with disabilities suffer from disproportionately higher rates of morbidity and mortality in emergencies, and face challenges in accessing emergency support. Both sudden-onset natural disasters and slow-onset events can affect the access of persons with disabilities to safe drinking water and sanitation, food and nutrition, health-care services and medicines, adequate housing, education and decent work. A human-rights based approach to loss and damage requires specific consideration of the rights of persons with disabilities under the Convention on the Rights of Persons with Disabilities including: ensuring that their situation is specifically addressed in climate, disaster risk reduction, development, housing, education and healthcare policies and programmes; mobilizing adequate resources domestically and through international cooperation to address their specific situation; ensuring meaningful and informed participation in decision-making processes, including through the provision of relevant information in accessible formats; and providing access to effective remedies when they suffer harm from climate action and inaction, including by businesses.

Annex 124

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NATIONS

CCPR

International covenant on civil and political rights

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HUMAN RIGHTS COMMITTEE
Eightieth session

General Comment No. 31 [80]

The Nature of the General Legal Obligation Imposed on States Parties to the Covenant

Adopted on 29 March 2004 (2187th meeting)

1. This General Comment replaces General Comment No 3, reflecting and developing its principles. The general non-discrimination provisions of article 2, paragraph 1, have been addressed in General Comment 18 and General Comment 28, and this General Comment should be read together with them.

2. While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty. In this connection, the Committee reminds States Parties of the desirability of making the declaration contemplated in article 41. It further reminds those States Parties already having made the declaration of the potential value of availing themselves of the procedure under that article. However, the mere fact that a formal interstate mechanism for complaints to the Human Rights Committee exists in respect of States Parties that have made the declaration under article

41 does not mean that this procedure is the only method by which States Parties can assert their interest in the performance of other States Parties. On the contrary, the article 41 procedure should be seen as supplementary to, not diminishing of, States Parties' interest in each others' discharge of their obligations. Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.

3. Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction (see paragraph 10 below). Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.

4. The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.

5. The article 2, paragraph 1, obligation to respect and ensure the rights recognized by ~~in~~ the Covenant has immediate effect for all States parties. Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. The Committee has as a consequence previously indicated in its General Comment 24 that reservations to article 2, would be incompatible with the Covenant when considered in the light of its objects and purposes.

6. The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

7. Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.

8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant

itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.]

9. The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention he rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.

10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

11. As implied in General Comment 29[1], the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

12. Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

13. Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the

[1] General Comment No.29 on States of Emergencies, adopted on 24 July 2001, reproduced in Annual Report for 2001, A/56/40, Annex VI, paragraph 3.

Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.

14. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.

18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).

Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable. States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.

19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim

measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.

20. Even when the legal systems of States parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice. Accordingly, States parties are requested to provide information on the obstacles to the effectiveness of existing remedies in their periodic reports.

Annex 125

United Nations

Framework Convention on Climate Change

FCCC/CP/2018/10/Add.1

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Conference of the Parties

Report of the Conference of the Parties on its twenty-fourth session, held in Katowice from 2 to 15 December 2018

Addendum

Part two: Action taken by the Conference of the Parties at its twenty-fourth session

Contents

Decisions adopted by the Conference of the Parties

GE.19-03298(E)

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Decision 1/CP.24

Preparations for the implementation of the Paris Agreement and the first session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement

The Conference of the Parties,

Recalling the Paris Agreement, adopted under the Convention,

Also recalling decisions 1/CP.21, 1/CP.22, 1/CP.23, 1/CMA.1 and 3/CMA.1,

Further recalling decisions 6/CP.1, 6/CP.2, 25/CP.7, 5/CP.13, 12/CP.20 and 10/CP.21,

Recalling, in particular, decision 1/CP.21, paragraph 91, in which the Ad Hoc Working Group on the Paris Agreement was requested to develop recommendations for modalities, procedures and guidelines in accordance with Article 13, paragraph 13, of the Paris Agreement, and to define the year of their first and subsequent review and update, as appropriate, at regular intervals, for consideration by the Conference of the Parties at its twenty-fourth session with a view to forwarding them to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement for consideration and adoption at its first session,

Also recalling, in particular, decision 1/CP.21, paragraph 98, in which it was decided that the modalities, procedures and guidelines of the enhanced transparency framework under the Paris Agreement shall build upon and eventually supersede the measurement, reporting and verification system established by decision 1/CP.16, paragraphs 40–47 and 60–64, and decision 2/CP.17, paragraphs 12–62, immediately following the submission of the final biennial reports and biennial update reports,

I. Paris Agreement work programme

1. *Congratulates* Parties that have ratified, accepted, approved or acceded to the Paris Agreement;

2. *Expresses its appreciation* to the subsidiary and constituted bodies for their work on the implementation of the work programme under the Paris Agreement pursuant to decisions 1/CP.21, 1/CP.22 and 1/CP.23;

3. *Reaffirms* that, in the context of nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 of the Paris Agreement with a view to achieving the purpose of this Agreement as set out in its Article 2;

4. *Decides* to forward the following draft decisions for consideration and adoption by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at the third part of its first session:[1]

Matters relating to Article 4 of the Paris Agreement and paragraphs 22–35 of decision 1/CP.21

(a) Draft decision -/CMA.1 titled "Further guidance in relation to the mitigation section of decision 1/CP.21" (now decision 4/CMA.1);

[1] In addition to the draft decisions listed, draft decision -/CMA.1 titled "Common time frames for nationally determined contributions referred to in Article 4, paragraph 10, of the Paris Agreement" (now decision 6/CMA.1) and draft decision -/CMA.1 titled "Ways of enhancing the implementation of education, training, public awareness, public participation and public access to information so as to enhance actions under the Paris Agreement" (now decision 17/CMA.1) were forwarded by the Subsidiary Body for Implementation at its forty-ninth session and at its forty-eighth session, respectively, for consideration and adoption by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at the third part of its first session.

(b) Draft decision -/CMA.1 titled "Modalities and procedures for the operation and use of a public registry referred to in Article 4, paragraph 12, of the Paris Agreement" (now decision 5/CMA.1);

(c) Draft decision -/CMA.1 titled "Modalities, work programme and functions under the Paris Agreement of the forum on the impact of the implementation of response measures" (now decision 7/CMA.1);

Matters relating to Article 6 of the Paris Agreement and paragraphs 36–40 of decision 1/CP.21

(d) Draft decision -/CMA.1 titled "Matters relating to Article 6 of the Paris Agreement and paragraphs 36–40 of decision 1/CP.21" (now decision 8/CMA.1);

Matters relating to Article 7 of the Paris Agreement and paragraphs 41, 42 and 45 of decision 1/CP.21

(e) Draft decision -/CMA.1 titled "Further guidance in relation to the adaptation communication, including, inter alia, as a component of nationally determined contributions, referred to in Article 7, paragraphs 10 and 11, of the Paris Agreement" (now decision 9/CMA.1);

(f) Draft decision -/CMA.1 titled "Modalities and procedures for the operation and use of a public registry referred to in Article 7, paragraph 12, of the Paris Agreement" (now decision 10/CMA.1);

(g) Draft decision -/CMA.1 titled "Matters referred to in paragraphs 41, 42 and 45 of decision 1/CP.21" (now decision 11/CMA.1);

Matters relating to Article 9 of the Paris Agreement and paragraphs 52–64 of decision 1/CP.21

(h) Draft decision -/CMA.1 titled "Identification of the information to be provided by Parties in accordance with Article 9, paragraph 5, of the Paris Agreement" (now decision 12/CMA.1);

(i) "Modalities for the accounting of financial resources provided and mobilized through public interventions in accordance with Article 9, paragraph 7, of the Paris Agreement";[2]

(j) Draft decision -/CMA.1 titled "Matters relating to the Adaptation Fund" (now decision 13/CMA.1);

Matters relating to Article 10 of the Paris Agreement and paragraphs 66–70 of decision 1/CP.21

(k) Draft decision -/CMA.1 titled "Technology framework under Article 10, paragraph 4, of the Paris Agreement" (now decision 15/CMA.1);

(l) Draft decision -/CMA.1 titled "Scope of and modalities for the periodic assessment referred to in paragraph 69 of decision 1/CP.21" (now decision 16/CMA.1);

Matters relating to Article 13 of the Paris Agreement and paragraphs 84–98 of decision 1/CP.21

(m) Draft decision -/CMA.1 titled "Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement" (now decision 18/CMA.1);[3]

[2] The outcome on this matter is incorporated in chapter V of the annex to draft decision -/CMA.1 titled "Modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement" (adopted as decision 18/CMA.1).

[3] As footnote 2 above.

Matters relating to Article 14 of the Paris Agreement and paragraphs 99–101 of decision 1/CP.21

(n) Draft decision -/CMA.1 titled "Matters relating to Article 14 of the Paris Agreement and paragraphs 99–101 of decision 1/CP.21" (now decision 19/CMA.1);

Matters relating to Article 15 of the Paris Agreement and paragraphs 102 and 103 of decision 1/CP.21

(o) Draft decision -/CMA.1 titled "Modalities and procedures for the effective operation of the committee to facilitate implementation and promote compliance referred to in Article 15, paragraph 2, of the Paris Agreement" (now decision 20/CMA.1);

5. *Also decides* that the work of the Ad Hoc Working Group on the Paris Agreement conducted in accordance with decision 1/CP.21 has been completed;

II. High-level ministerial dialogue on climate finance

6. *Welcomes* the third high-level ministerial dialogue on climate finance, convened in accordance with decision 3/CP.19, paragraph 13;

7. *Notes* that the dialogue highlighted progress in and remaining barriers to translating climate finance needs into action and enhancing developing countries' access to climate finance;

8. *Welcomes with appreciation* the pledges and announcements of Parties, including pledges to the Green Climate Fund, the Least Developed Countries Fund and the Adaptation Fund, and of international financial institutions, which provide further clarity to and predictability of climate finance flows to 2020;

9. *Also welcomes with appreciation* the 2018 Biennial Assessment and Overview of Climate Finance Flows of the Standing Committee on Finance, in particular its key findings and recommendations highlighting the increase in climate finance flows from developed country Parties to developing country Parties;[4]

10. *Notes* that the dialogue underscored the urgent need to scale up the mobilization of climate finance, including through greater engagement of the private sector, to increase finance for adaptation, and to align financial flows with the objectives of the Paris Agreement and the United Nations Sustainable Development Goals;

11. *Also notes* that the dialogue highlighted the recently initiated replenishment process of the Green Climate Fund as a clear opportunity for enhancing ambition, as well as the importance of transparency and predictability of climate finance, clear eligibility criteria for funding and strong national policy and regulatory frameworks to enhance the mobilization of and access to climate finance;

12. *Further notes* that the President of the Conference of the Parties at its twenty-fourth session will summarize the deliberations of the dialogue for consideration by the Conference of the Parties at its twenty-fifth session (December 2019) in accordance with decision 3/CP.19, paragraph 13;

III. Implementation and ambition

13. *Notes with concern* the current, urgent and emerging needs related to extreme weather events and slow onset events in developing countries that are particularly vulnerable to the adverse effects of climate change;

14. *Stresses* the urgency of enhanced ambition in order to ensure the highest possible mitigation and adaptation efforts by all Parties;

[4] FCCC/CP/2018/8, annex II.

15. *Recognizes* the urgent need to enhance the provision of finance, technology and capacity-building support by developed country Parties, in a predictable manner, to enable enhanced action by developing country Parties;

Pre-2020

16. *Emphasizes* that enhanced pre-2020 ambition can lay a solid foundation for enhanced post-2020 ambition;

17. *Congratulates* Parties that have accepted the Doha Amendment to the Kyoto Protocol;

18. *Underscores* the urgent need for the entry into force of the Doha Amendment and *urges* Parties to the Kyoto Protocol that have yet to ratify the Doha Amendment to the Kyoto Protocol to deposit their instruments of acceptance with the Depositary as soon as possible;

19. *Welcomes* the 2018 stocktake on pre-2020 implementation and ambition, and *reiterates* its decision[5] to convene another stocktake at its twenty-fifth session;

20. *Urges* developed country Parties to continue to scale up mobilized climate finance, recalling the commitment of developed country Parties in the context of meaningful mitigation actions and transparency on implementation, to a goal of mobilizing jointly USD 100 billion per year by 2020 to address the needs of developing countries, in accordance with decision 1/CP.16;

Post-2020

21. *Reiterates* its invitation[6] to Parties to communicate, by 2020, mid-century, long-term low greenhouse gas emission development strategies in accordance with Article 4, paragraph 19, of the Paris Agreement, and *welcomes* the strategies that have already been communicated;

22. *Also reiterates* its request[7] to those Parties whose intended nationally determined contribution pursuant to decision 1/CP.20 contains a time frame up to 2025 to communicate by 2020 a new nationally determined contribution and to do so every five years thereafter pursuant to Article 4, paragraph 9, of the Paris Agreement;

23. *Further reiterates* its request[8] to those Parties whose intended nationally determined contribution pursuant to decision 1/CP.20 contains a time frame up to 2030 to communicate or update by 2020 the contribution and to do so every five years thereafter pursuant to Article 4, paragraph 9, of the Paris Agreement;

IV. Special Report of the Intergovernmental Panel on Climate Change

24. *Recognizes* the role of the Intergovernmental Panel on Climate Change in providing scientific input to inform Parties in strengthening the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty;

25. *Expresses* its appreciation and gratitude to the Intergovernmental Panel on Climate Change and the scientific community for responding to the invitation of the Conference of the Parties and providing the Special Report on Global Warming of 1.5 °C,[9] reflecting the best available science;

[5] Decision 1/CP.23, paragraph 18.
[6] Decision 1/CP.21, paragraph 35.
[7] Decision 1/CP.21, paragraph 23.
[8] Decision 1/CP.21, paragraph 24.
[9] Intergovernmental Panel on Climate Change. 2018. *Global Warming of 1.5 °C: An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*. Available at http://ipcc.ch/report/sr15/.

26. *Welcomes* the timely completion of the Intergovernmental Panel on Climate Change Special Report on Global Warming of 1.5 °C in response to the invitation from Parties in decision 1/CP.21, paragraph 21;

27. *Invites* Parties to make use of the information contained in the report referred to in paragraph 25 above in their discussions under all relevant agenda items of the subsidiary and governing bodies;

28. *Requests* the Subsidiary Body for Scientific and Technological Advice to consider at its fiftieth session (June 2019) the report referred to in paragraph 25 above with a view to strengthening the scientific knowledge on the 1.5 °C goal, including in the context of the preparation of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change and the implementation of the Convention and the Paris Agreement;

29. *Encourages* Parties to continue to support the work of the Intergovernmental Panel on Climate Change;

V. Talanoa Dialogue

30. *Recalls* its decision[10] to convene a facilitative dialogue among Parties in 2018 to take stock of the collective efforts of Parties in relation to progress towards the long-term goal referred to in Article 4, paragraph 1, of the Paris Agreement and to inform the preparation of nationally determined contributions pursuant to Article 4, paragraph 8, of the Paris Agreement;

31. *Expresses its appreciation* to the Presidents of the twenty-third and twenty-fourth sessions of the Conference of the Parties for their leadership in the organization, conduct and conclusion of the Talanoa Dialogue;

32. *Also expresses its appreciation* to the people of Fiji and the Pacific region for having brought into the UNFCCC process the tradition of Talanoa, whose purpose is to share stories, build empathy and generate trust;

33. *Acknowledges* that the Talanoa Dialogue was an inclusive and participatory process that incentivized exchanges between Parties and non-Party stakeholders following the Pacific tradition of Talanoa;

34. *Also acknowledges* that the Talanoa Dialogue took stock of the collective efforts of Parties in relation to progress towards the long-term goal referred to in Article 4, paragraph 1, of the Paris Agreement and provided information for the preparation of nationally determined contributions pursuant to Article 4, paragraph 8, of the Paris Agreement;

35. *Takes note* of the outcome, inputs and outputs[11] of the Talanoa Dialogue and their potential to generate greater confidence, courage and enhanced ambition;

36. *Recognizes* the efforts and actions that Parties and non-Party stakeholders are undertaking to enhance climate action;

37. *Invites* Parties to consider the outcome, inputs and outputs of the Talanoa Dialogue in preparing their nationally determined contributions and in their efforts to enhance pre-2020 implementation and ambition;

VI. Matters relating to the modalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement

38. *Decides* that, pursuant to decision 1/CP.21, paragraph 98, for Parties to the Convention that are also Parties to the Paris Agreement, the final biennial reports shall be those that are submitted to the secretariat no later than 31 December 2022, and the final

[10] Decision 1/CP.21, paragraph 20.

[11] For information on the outcome, inputs and outputs, see https://talanoadialogue.com/.

biennial update reports shall be those that are submitted to the secretariat no later than 31 December 2024;

39. *Reaffirms* that, consistently with decision 1/CP.21, paragraph 98, for Parties to the Paris Agreement, following the submission of the final biennial reports and biennial update reports, the modalities, procedures and guidelines contained in the annex to decision 18/CMA.1 will supersede the measurement, reporting and verification system established by decision 1/CP.16, paragraphs 40–47 and 60–64, and decision 2/CP.17, paragraphs 12–62;

40. *Also reaffirms* the reporting obligations under Articles 4 and 12 of the Convention;

41. *Decides* in this context that, for Parties to the Paris Agreement, the biennial transparency reports, technical expert review and facilitative, multilateral consideration of progress prepared and conducted in accordance with the modalities, procedures and guidelines referred to in paragraph 39 above shall replace the biennial reports, biennial update reports, international assessment and review, and international consultation and analysis referred to in decision 2/CP.17;

42. *Also decides* that, to fulfil national inventory reporting obligations under the Convention, Parties to the Paris Agreement submitting annual national inventory reports under the Convention shall use the modalities, procedures and guidelines for national inventory reports contained in chapter II of the annex to decision 18/CMA.1 by the date that the reports are first due under the Paris Agreement, with the technical expert review to be conducted in accordance with the corresponding modalities, procedures and guidelines contained in chapter VII of the annex to decision 18/CMA.1, in place of the greenhouse gas inventory reporting guidelines contained in the annex to decision 24/CP.19 and the review guidelines in the annex to decision 13/CP.20, respectively, including in years in which a biennial transparency report is not due under the Paris Agreement;

43. *Further decides* that, with respect to the reporting and review of national communications under the Convention every four years, starting from the date that reports are first due under the Paris Agreement:

(a) Parties may submit their national communication and biennial transparency report as a single report in accordance with the modalities, procedures and guidelines included in the annex to decision 18/CMA.1 for information also covered by the national communication reporting guidelines contained in, as applicable, decisions 4/CP.5 and 17/CP.8;

(b) In addition, Parties shall include in the report:

(i) Supplemental chapters on research and systematic observation and on education, training and public awareness, in accordance with the guidelines contained in, as applicable, decisions 4/CP.5 and 17/CP.8;

(ii) For those Parties that have not reported under chapter IV of the annex to decision 18/CMA.1, an additional chapter on adaptation, in accordance with the relevant guidelines contained in, as applicable, decisions 4/CP.5 and 17/CP.8;

(c) For those Parties whose national communications are subject to review under decision 13/CP.20, the review shall be conducted in accordance with the relevant guidelines contained in chapter VII of the annex to decision 18/CMA.1, and shall also include a review of the information submitted under paragraph 43(b) above, in accordance with relevant guidance in decision 13/CP.20, as applicable;

44. *Reiterates* that for Parties to the Convention that are not Parties to the Paris Agreement, reporting obligations under Articles 4 and 12 of the Convention and existing measurement, reporting and verification arrangements under the Convention shall continue to apply, in accordance with relevant decisions, as applicable, and *decides* that, to enhance comparability of information, those Parties may use the modalities, procedures and guidelines contained in the annex to decision 18/CMA.1, as well as the information referred to in paragraph 43(b) above with respect to national communications, to meet their reporting commitments under Articles 4 and 12 of the Convention, in lieu of guidance adopted under the Convention;

45. *Decides* that the technical annex referred to in decision 14/CP.19, paragraph 7, containing modalities for measuring, reporting and verifying the activities referred to in decision 1/CP.16, paragraph 70, shall be submitted as an annex to the biennial transparency report;

46. *Also decides* that the technical analysis referred to in decision 14/CP.19, paragraph 11, containing modalities for measuring, reporting and verifying the activities referred to in decision 1/CP.16, paragraph 70, shall be carried out concurrently with the technical expert review under Article 13 of the Paris Agreement;

VII. Leaders' Summit

47. *Welcomes* the participation of Heads of State and Government in the Leaders' Summit convened in Katowice on 3 December 2018;

48. *Notes* the Solidarity and Just Transition Silesia Declaration,[12] which recognizes the need to take into account the imperatives of a just transition of the workforce and the creation of decent work and quality jobs;

VIII. United Nations Climate Summit 2019

49. *Welcomes* the initiative of the United Nations Secretary-General to convene the 2019 Climate Summit;

50. *Calls on* Parties to participate in the Summit and to demonstrate, through such participation, their enhanced ambition in addressing climate change;

IX. Administrative and budgetary matters

51. *Takes note* of the estimated budgetary implications of the activities to be undertaken by the secretariat referred to in this decision;

52. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

9th plenary meeting
15 December 2018

[12] Available at https://cop24.gov.pl/presidency/initiatives/just-transition-declaration/.

Decision 2/CP.24

Local Communities and Indigenous Peoples Platform

The Conference of the Parties,

Recalling the Charter of the United Nations and United Nations General Assembly resolution 66/288,

Also recalling the Paris Agreement, decision 1/CP.21 and decision 2/CP.23,

Emphasizing that the purpose and functions of the Local Communities and Indigenous Peoples Platform and its Facilitative Working Group will be carried out consistent with international law,

Also emphasizing, in its entirety, the United Nations Declaration on the Rights of Indigenous Peoples in the context of the implementation of the functions of the Local Communities and Indigenous Peoples Platform involving indigenous peoples,

Further emphasizing that in the context of the implementation of the functions of the Local Communities and Indigenous Peoples Platform involving local communities, none of the activities should authorize or encourage any action, which will dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States,

1. *Decides* to establish the Local Communities and Indigenous Peoples Platform Facilitative Working Group;

2. *Affirms* that the Facilitative Working Group is established with the objective of further operationalizing the Local Communities and Indigenous Peoples Platform and facilitating the implementation of its functions;

3. *Decides* that the Facilitative Working Group shall comprise 14 representatives, as follows:

(a) One representative of a Party from each of the five United Nations regional groups;

(b) One representative of a Party from a small island developing State;

(c) One representative of a least developed country Party;

(d) Seven representatives from indigenous peoples organizations, one from each of the seven United Nations indigenous sociocultural regions;

4. *Requests* the Subsidiary Body for Scientific and Technological Advice to consider, in the context of the review referred to in paragraph 27 below, and taking into account progress related to the representation of local communities, the addition of at least three additional representatives to represent local communities, as well as a process for the appointment of such representatives, and an equal number of Party representatives, with a view to recommending a draft decision on the representation of local communities on the Local Communities and Indigenous Peoples Platform for consideration and adoption by the Conference of the Parties at its twenty-seventh session (November 2021);

5. *Decides* that Party representatives shall be appointed by their respective regional groups and constituencies, and that the Chair of the Subsidiary Body for Scientific and Technological Advice shall be notified of these appointments;

6. *Also decides* that indigenous peoples representatives shall be appointed by the indigenous peoples, through their focal points, and that the Chair of the Subsidiary Body of Scientific Technological Advice shall be notified of these appointments;

7. *Further decides* that, along with each representative, one alternate may be designated, in accordance with the appointment process referred to in paragraphs 3–6 above; the alternate representative will participate in meetings when the representative is unable to attend, and will replace the representative for the remainder of the term if the representative cannot complete the functions of the assigned office;

8. *Decides* that representatives of the Facilitative Working Group shall serve for a term of three years and shall not be eligible to serve two consecutive terms, and that the representatives shall remain in office until their successors have been elected;

9. *Also decides* that the Facilitative Working Group shall elect annually two co-chairs and two vice co-chairs from among its representatives to serve for a term of one year each, with one co-chair and one vice co-chair being a representative from a Party and the other co-chair and vice co-chair being a representative from indigenous peoples and, as appropriate, local communities;

10. *Further decides* that the election and rotation of the co-chairs and vice co-chairs will take into account regional geographic balance, and strive for gender balance;

11. *Decides* that if one of the co-chairs is temporarily unable to fulfil the obligations of the office, the respective vice co-chair shall serve as the co-chair;

12. *Also decides* that if one of the co-chairs or vice co-chairs is unable to complete the term of office, the Facilitative Working Group shall elect a replacement to complete that term of office, in accordance with paragraphs 9 and 10 above;

13. *Invites* Parties to promote the engagement of local communities in the Local Communities and Indigenous Peoples Platform with a view to enhancing their participation in the Facilitative Working Group and the Platform;

14. *Stresses* the importance of striving for gender balance in the appointment processes of representatives in accordance with decisions 36/CP.7, 23/CP.18 and 3/CP.23;

15. *Decides* that the Facilitative Working Group shall operate on the basis of consensus;

16. *Invites* Parties, local communities and indigenous peoples to take into consideration the Local Communities and Indigenous Peoples Platform and its functions at the local, national and regional level in order to enhance the engagement and inclusion of indigenous peoples and local communities to facilitate the exchange of experience and the sharing of best practices and lessons learned on mitigation and adaptation in a holistic and integrated manner;

17. *Decides* that the Facilitative Working Group shall meet twice per year in conjunction with the sessions of the subsidiary bodies and the session of the Conference of the Parties;

18. *Also decides* that the Facilitative Working Group, under the incremental approach, will propose an initial two-year workplan for the period 2020–2021 for implementing the functions of the Local Communities and Indigenous Peoples Platform for consideration by the Subsidiary Body for Scientific and Technological Advice at its fifty-first session (December 2019);

19. *Further decides* that the workplan referred to in paragraph 18 above should take into account experiences from any activities that have already taken place under the Local Communities and Indigenous Peoples Platform, and that the workplan may include annual in-session events in conjunction with the sessions of the Conference of the Parties and the Subsidiary Body for Scientific and Technological Advice, on which summary reports, which could be of a technical nature, would be prepared by the Facilitative Working Group;

20. *Encourages* the Facilitative Working Group to collaborate with other bodies under and outside the Convention, as appropriate, aiming at enhancing the coherence of the actions of the Local Communities and Indigenous Peoples Platform under the Convention;

21. *Requests* the secretariat, with the support of the Facilitative Working Group, to make the work of the Local Communities and Indigenous Peoples Platform widely accessible, including through the development of a dedicated web portal on the Local Communities and Indigenous Peoples Platform on the UNFCCC website;

22. *Also requests* the secretariat to organize a thematic in-session workshop, in conjunction with the fiftieth session (June 2019) of the Subsidiary Body for Scientific and Technological Advice, on enhancing the participation of local communities, in addition to indigenous peoples, in the Local Communities and Indigenous Peoples Platform;

23. *Further requests* the secretariat to develop, under the incremental approach for the operationalization of the Local Communities and Indigenous Peoples Platform, activities related to the implementation of all three functions of the Platform,[1] at each session of the Subsidiary Body for Scientific and Technological Advice until the workplan is adopted, and *invites* Parties, observers and other stakeholders to submit their views on possible activities via the submission portal[2] by 28 February 2019;

24. *Requests* the Facilitative Working Group to report on its outcomes, including a draft second three-year workplan, and on the activities of the Local Communities and Indigenous Peoples Platform, for consideration by the Conference of the Parties at its twenty-seventh session through the Subsidiary Body for Scientific and Technological Advice at its fifty-fourth session (May–June 2021);

25. *Decides* to endorse the draft workplan referred to in paragraph 24 above at its twenty-seventh session;

26. *Requests* the secretariat to make the reports referred to in paragraph 24 above publicly available on the UNFCCC website;

27. *Decides* that the Subsidiary Body for Scientific and Technological Advice will review the outcomes and activities of the Facilitative Working Group, taking into account the reports referred to in paragraph 24 above, at its fifty-fourth session and make recommendations to the Conference of the Parties at its twenty-seventh session with a view to the Conference of the Parties adopting a decision on the outcome of this review;

28. *Also decides* that the initial mandate for the Facilitative Working Group will span three years, to be extended as determined by the review referred to in paragraph 27 above;

29. *Further decides* that the meetings of the Facilitative Working Group shall be open to Parties and observers under the Convention;

30. *Requests* the secretariat to support and facilitate the work of the Facilitative Working Group;

31. *Takes note of* the estimated budgetary implications of the activities to be undertaken by the secretariat referred to in paragraph 30 above;

32. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources;

33. *Invites* interested Parties and organizations to provide financial and technical support, as appropriate, for the implementation of the functions of the Local Communities and Indigenous Peoples Platform.

7th plenary meeting
13 December 2018

[1] Paragraph 6(a–c) of decision 2/CP.23.

[2] https://unfccc.int/submissions_and_statements.

Decision 3/CP.24

Long-term climate finance

The Conference of the Parties,

Recalling Articles 4 and 11 of the Convention,

Also recalling decision 1/CP.16, paragraphs 2, 4 and 97–101, as well as decisions 1/CP.17, 2/CP.17, paragraphs 126–132, 4/CP.18, 3/CP.19, 5/CP.20, 5/CP.21, 7/CP.22 and 6/CP.23,

1. *Welcomes with appreciation* the 2018 Biennial Assessment and Overview of Climate Finance Flows of the Standing Committee on Finance, in particular its key findings and recommendations highlighting the increase in climate finance flows from developed country Parties to developing country Parties;[1]

2. *Also welcomes with appreciation* the continued progress of developed country Parties towards reaching the goal of mobilizing jointly USD 100 billion annually by 2020, in the context of meaningful mitigation action and transparency on implementation, in accordance with decision 1/CP.16;

3. *Recalls* the commitment of developed country Parties, in the context of meaningful mitigation action and transparency on implementation, to a goal of mobilizing jointly USD 100 billion per year by 2020 to address the needs of developing country Parties in accordance with decision 1/CP.16, and *urges* developed country Parties to continue to scale up mobilized climate finance towards achieving this goal;

4. *Urges* developed country Parties to continue their efforts to channel a substantial share of public climate funds to adaptation activities and to strive to achieve a greater balance between finance for mitigation and for adaptation, recognizing the importance of adaptation finance and the need for public and grant-based resources for adaptation;

5. *Welcomes* the biennial submissions received to date from developed country Parties on their strategies and approaches for scaling up climate finance from 2018 to 2020 in accordance with decision 3/CP.19, paragraph 10,[2] and *urges* those developed country Parties that have not yet done so to submit this information;

6. *Requests* the secretariat, in line with decision 5/CP.20, paragraph 11, to prepare a compilation and synthesis of the biennial submissions referred to in paragraph 5 above in order to inform the in-session workshops referred to in paragraph 9 below;

7. *Welcomes* the progress of Parties' efforts to strengthen their domestic enabling environments in order to attract climate finance, and *requests* Parties to continue to enhance their enabling environments and policy frameworks to facilitate the mobilization and effective deployment of climate finance in accordance with decision 3/CP.19;

8. *Notes with appreciation* the summary report[3] on the 2018 in-session workshop on long-term climate finance, and *invites* Parties and relevant institutions to consider the key messages therein;

9. *Decides* that the in-session workshops on long-term climate finance in 2019 and 2020 will focus on:

(a) The effectiveness of climate finance, including the results and impacts of finance provided and mobilized;

(b) The provision of financial and technical support to developing country Parties for their adaptation and mitigation actions in relation to holding the increase in the global

[1] FCCC/CP/2018/8, annex II.

[2] Available at https://www4.unfccc.int/sites/submissionsstaging/Pages/Home.aspx.

[3] FCCC/CP/2018/4.

average temperature to well below 2 ºC above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 ºC above pre-industrial levels;

10. *Requests* the secretariat to organize the in-session workshops referred to in paragraph 9 above and to prepare summary reports on the workshops for consideration by the Conference of the Parties at its twenty-fifth session (December 2019) and twenty-sixth session (November 2020) respectively;

11. *Also requests* the secretariat to continue to ensure that the workshops are well-balanced by, inter alia, inviting both public and private sector actors to attend them and summarizing the views expressed at the workshops in a fair and gender-balanced manner;

12. *Welcomes* the third biennial high-level ministerial dialogue on climate finance, convened in accordance with decision 3/CP.19, and *looks forward* to the summary of the Presidency of the Conference of the Parties of the deliberations of the dialogue for consideration by the Conference of the Parties at its twenty-fifth session;[4]

13. *Decides* that the fourth biennial high-level ministerial dialogue on climate finance, to be convened in 2020 in accordance with decision 3/CP.19, will be informed by the reports on the in-session workshops on long-term climate finance and the 2020 Biennial Assessment and Overview of Climate Finance Flows.

10th plenary meeting
15 December 2018

[4] As per decision 7/CP.22, paragraph 16.

Decision 4/CP.24

Report of the Standing Committee on Finance

The Conference of the Parties,

Recalling Articles 4 and 11 of the Convention,

Also recalling decisions 1/CP.16, paragraph 112, and 2/CP.17, paragraphs 120 and 121, as well as decisions 5/CP.18, 7/CP.19, 6/CP.20, 6/CP.21, 8/CP.22 and 7/CP.23,

1. *Welcomes with appreciation* the report of the Standing Committee on Finance to the Conference of the Parties at its twenty-fourth session, taking note of the recommendations contained therein;[1]

2. *Endorses* the workplan of the Standing Committee on Finance for 2019;[2]

3. *Welcomes with appreciation* the 2018 Biennial Assessment and Overview of Climate Finance Flows of the Standing Committee on Finance,[3] in particular the summary and recommendations as contained in the annex;

4. *Encourages* the Standing Committee on Finance to take into account the best available science in future biennial assessments and overviews of climate finance flows;

5. *Requests* the Standing Committee on Finance to use in the biennial assessment and overview of climate finance flows the established terminology in the provisions of the Convention and the Paris Agreement in relation to climate finance, where applicable;

6. *Expresses its appreciation* for the financial contributions provided by the Governments of Belgium, Germany, Norway, the Republic of Korea, Switzerland and the United Kingdom of Great Britain and Northern Ireland, as well as by the European Commission to support the work of the Standing Committee on Finance;

7. *Welcomes* the 2018 Forum of the Standing Committee on Finance on the topic of climate finance architecture with a focus on enhancing collaboration and seizing opportunities, and takes note of the summary report[4] on the Forum;

8. *Expresses its gratitude* to the Governments of the Netherlands, Norway and the Republic of Korea for their support in ensuring the success of the 2018 Forum of the Standing Committee on Finance;

9. *Welcomes* the decision of the Standing Committee on Finance on the topic of its 2019 Forum, which will be climate finance and sustainable cities;

10. *Requests* the Standing Committee on Finance to map, every four years, as part of its biennial assessment and overview of climate finance flows, the available information relevant to Article 2, paragraph 1(c), of the Paris Agreement, including its reference to Article 9 thereof;

11. *Encourages* the Standing Committee on Finance to provide input to the technical paper of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts on the sources of financial support;[5]

12. *Confirms* the mandates in Article 11, paragraph 3(d), of the Convention, and decisions 12/CP.2, 12/CP.3, 5/CP.19 and 1/CP.21;

13. *Requests* the Standing Committee on Finance to prepare, every four years, a report on the determination of the needs of developing country Parties related to implementing the Convention and the Paris Agreement, for consideration by the Conference of Parties, starting

[1] FCCC/CP/2018/8.
[2] FCCC/CP/2018/8, annex VI.
[3] https://unfccc.int/sites/default/files/resource/2018%20BA%20Technical%20Report%20Final.pdf.
[4] FCCC/CP/2018/8, annex III.
[5] FCCC/CP/2018/8, paragraph 14(g).

at its twenty-sixth session (November 2020), and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, starting at its third session (November 2020);

14. *Also requests* the Standing Committee on Finance, in preparing the report referred to in paragraph 13 above, to collaborate, as appropriate, with the operating entities of the Financial Mechanism, the subsidiary and constituted bodies, multilateral and bilateral channels, and observer organizations;

15. *Further requests* that the actions of the Standing Committee on Finance called for in this decision be undertaken subject to the availability of financial resources;

16. *Requests* the Standing Committee on Finance to report to the Conference of the Parties at its twenty-fifth session (December 2019) on progress in implementing its workplan;

17. *Also requests* the Standing Committee on Finance to consider the guidance provided to it in other relevant decisions of the Conference of the Parties.

Annex

Summary and recommendations by the Standing Committee on Finance on the 2018 Biennial Assessment and Overview of Climate Finance Flows

[English only]

I. Context and mandates

1. The Standing Committee on Finance (SCF) assists the Conference of the Parties (COP) in exercising its functions with respect to the Financial Mechanism of the Convention, inter alia, in terms of measurement, reporting and verification of support provided to developing country Parties, through activities such as the biennial assessment and overview of climate finance flows (BA).[1]

2. Subsequent to the 2014 BA, the COP requested the SCF to consider: the relevant work of other bodies and entities on measurement, reporting and verification of support and the tracking of climate finance;[2] ways of strengthening methodologies for reporting climate finance;[3] and ongoing technical work on operational definitions of climate finance, including private finance mobilized by public interventions, to assess how adaptation and mitigation needs can most effectively be met by climate finance.[4] It also requested the Ad Hoc Working Group on the Paris Agreement, when developing the modalities, procedures and guidelines for the transparency framework for action and support, to consider, inter alia, information in the BA and other reports of the SCF and other relevant bodies under the Convention.

3. The COP welcomed the summary and recommendations by the SCF on the 2016 BA, which, inter alia, encourages Parties and relevant international institutions to enhance the availability of information that will be necessary for tracking global progress on the goals outlined in Article 2 of the Paris Agreement. The COP requested the SCF, in preparing future BAs, to assess available information on investment needs and plans related to Parties' nationally determined contributions (NDCs) and national adaptation plans.

4. The 2018 BA provides an updated overview of climate finance flows in 2015 and 2016 from provider to beneficiary countries, available information on domestic climate finance and cooperation among Parties not included in Annex I to the Convention (non-Annex I Parties), and the other climate-related flows that constitute global total climate finance flows. It also includes information on trends since the 2014 BA. The 2018 BA then considers the implications of these flows and assesses their relevance to international efforts to address climate change. It explores the key features of climate finance flows, including composition and purposes. It also explores emerging insights into their effectiveness, finance access, and ownership and alignment of climate finance with beneficiary country needs and priorities related to climate change. It also provides information on recent developments in the measurement, reporting and verification of climate finance flows at the international and domestic level, and insights into impact reporting practices.

5. The 2018 BA includes, for the first time, information relevant to Article 2, paragraph 1(c), of the Paris Agreement, including methods and metrics, and data sets on flows, stocks and considerations for integration. It also discusses climate finance flows in the broader context.

6. The 2018 BA comprises this summary and recommendations, and a technical report. The summary and recommendations was prepared by the SCF. The technical report was prepared by experts under the guidance of the SCF and draws on information and data from

[1] Decision 2/CP.17, paragraph 121(f).
[2] Decision 1/CP.18, paragraph 71.
[3] Decision 5/CP.18, paragraph 11.
[4] Decision 3/CP.19, paragraph 11.

a range of sources. It was subject to extensive stakeholder input and expert review, but remains a product of the external experts.

II. Challenges and limitations

7. The 2018 BA provides an updated overview of current climate finance flows over the years 2015 and 2016, along with data on trends from 2011 to 2014 collated in previous BA reports. Due diligence has been undertaken to utilize the best information available from the most credible sources. In compiling estimates, efforts have been made to avoid double counting through a focus on primary finance, which is finance for a new physical item or activity. Challenges were nevertheless encountered in collecting, aggregating and analysing information from diverse sources. The lack of clarity with regard to the use of different definitions of climate finance limits the comparability of data.

8. **Data uncertainty.** There are uncertainties associated with each source of data which have different underlying causes. Uncertainties are related to the data on domestic public investments, resulting from the lack of geographic coverage, differences in the way methods are applied, significant changes in the methods for estimating energy efficiency over the years, and the lack of available data on sustainable transport and other key sectors. Uncertainties also arise from the lack of procedures and data to determine private climate finance; methods for estimating adaptation finance; differences in the assumptions of underlying formulas to attribute finance from multilateral development banks (MDBs) to members of the Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee (DAC), minus the Republic of Korea; the classification of data as 'green finance'; and incomplete data on non-concessional flows.

9. **Data gaps.** Gaps in the coverage of sectors and sources of climate finance remain significant, particularly with regard to private investment. Although estimates of incremental investments in energy efficiency have improved, there is still an inadequate understanding of the public and private sources of finance and the financial instruments behind those investments. For sustainable transport, efforts have been made to improve public and private investment in electric vehicles. However, information on sources and instruments for finance in public mass transit remains unreported in many countries. High-quality data on private investments in mitigation and finance in sectors such as agriculture, forests, water and waste management are particularly lacking. In particular, adaptation finance estimates are difficult to compare with mitigation finance estimates due to the former being context-specific and incremental, and more work is needed on estimating climate-resilient investments.

10. The limitations outlined in paragraphs 8 and 9 above need to be taken into consideration when deriving conclusions and policy implications from the 2018 BA. The SCF will contribute, through its activities, to the progressive improvement of the measurement, reporting and verification of climate finance information in future BAs to help address these challenges.

III. Key findings

A. Methodological issues relating to measurement, reporting and verification of public and private climate finance

1. Developments in the period 2015–2016

11. Following the recommendations made by the SCF in the 2016 BA, the 2018 BA identifies the improvements listed in paragraphs 12–16 below in the tracking and reporting of information on climate finance.

(a) Annex II Parties

12. Revision of the biennial report (BR) common tabular format (CTF) tables 7, 7(a) and 7(b) has facilitated the provision of more qualitative information on the definitions and

underlying methodologies used by Parties included in Annex II to the Convention (Annex II Parties) in the documentation boxes in the BR3 CTF tables. The BR3 CTF tables submitted as at October 2018 suggest some increase in the provision of quantitative information, including information on public financial support in CTF table 7(b) and climate-related private finance in the BRs.

(b) International organizations

13. Making data available on private shares of climate co-finance associated with MDB finance and reporting on amounts mobilized through public interventions deployed by other development finance institutions (DFIs) included in the regular OECD-DAC data collection process.

14. Facilitating the increased transparency of information through biennial surveys to collect information from OECD-DAC members on the measurement basis for reporting (i.e. committed, disbursed or "other"), and on the shares of the activity reported as mitigation, adaptation or cross-cutting to the UNFCCC.

15. Institutionalizing the mitigation and adaptation finance tracking and reporting, and ongoing efforts aimed at better tracking and reporting on projects that have mitigation and adaptation co-benefits (i.e. cross-cutting) among MDBs.

16. Measuring and reporting on impact is now common practice among multilateral climate funds, and there is now growing interest in this field by MDBs and the International Development Finance Club (IDFC), which are also undertaking work on methodologies for impact measuring in the light of the Paris Agreement. The ongoing efforts of MDBs to develop additional metrics that demonstrate how MDB financing supports climate-resilient development pathways are an important step in this direction.

(c) Insights into reporting by Annex II Parties and non-Annex I Parties

17. Notwithstanding the improvements in methodologies for reporting climate finance via the BR3 CTF tables 7, 7(a) and 7(b), some reporting issues persist that complicate the aggregation, comparison and analysis of the data. The current "UNFCCC biennial reporting guidelines for developed country Parties"[5] were designed to accommodate reporting on a wide range of climate finance instruments and activities. This required a reporting architecture that was flexible enough to accommodate a diversity of reporting approaches. In some cases, limited clarity with regard to the diversity of reporting approaches limits comparability in climate finance reporting.

18. The current "UNFCCC biennial update reporting guidelines for Parties not included in Annex I to the Convention"[6] for reporting by non-Annex I Parties on financial, technical and capacity-building needs and support received do not require information on underlying assumptions, definitions and methodologies used in generating the information. Nevertheless, the provision of such information is useful.

(d) Insights into broader reporting aspects

19. Notwithstanding ongoing efforts to make information on domestic climate-related finance available through biennial update reports (BURs), published climate public expenditure and institutional reviews, and other tools, collecting and reporting domestic climate-related finance is often not undertaken systematically, thereby limiting the availability of information.

20. There are significant data gaps on climate finance flows in the context of cooperation among non-Annex I Parties.

[5] Decision 2/CP.17, annex I.

[6] Decision 2/CP.17, annex III.

2. Information relevant to Article 2, paragraph 1(c), of the Paris Agreement: methods and metrics

21. Ongoing voluntary efforts to develop approaches for tracking and reporting on consistency of public and private sector finance with the Paris Agreement are important for enhancing the collective understanding of the consistency of the broader finance and investment flows with Article 2, paragraph 1(c), of the Paris Agreement.

22. Some financial actors, such as MDBs and bilateral DFIs, have started to develop approaches for tracking the integration of climate change considerations into their operations. However, there was no publicly available information on the progress made on this matter at the time of preparation of the 2018 BA. Ongoing work for developing climate-resilience metrics is important for enhancing understanding of the consistency of multilateral and bilateral development finance with the Paris Agreement.

B. Overview of current climate finance flows in the period 2015–2016

1. Global finance flows

23. On a comparable basis, climate finance flows increased by 17 per cent in the period 2015–2016 compared with the period 2013–2014. High-bound climate finance estimates increased from USD 584 billion in 2014 to USD 680 billion in 2015 and to USD 681 billion in 2016 (see figure 1). The growth seen in 2015 was largely driven by high levels of new private investment in renewable energy, which is the largest segment of the global total. Despite decreasing technology costs (particularly in solar photovoltaic and wind power generation), which means that every dollar invested finances more renewable energy than it previously did, a significant number of new projects were financed in 2015. In 2016, a decrease in renewable energy investment occurred, which was driven by both the continued decline in renewable technology costs and the lower generation capacity of new projects financed.[7] However, the decrease in renewable energy investment in 2016 was offset by an 8 per cent increase in investment in energy efficiency technologies across the building, industry and transport sectors.

24. The quality and completeness of data on climate finance has improved since the 2016 BA. Methodological improvements in estimating finance flows have changed the comparative basis against previous estimates. In particular, 2014 estimates for energy efficiency have been revised downward owing to a more accurate bottom-up assessment model being employed by the International Energy Agency. This has resulted in a revised estimate of USD 584 billion from USD 741 billion for total global climate finance in 2014. In addition, data coverage in sustainable transport has improved, with estimates for public and private investment in electric vehicle sales in 2015 and 2016.

(a) Flows from Annex II Parties to non-Annex I Parties as reported in biennial reports

25. Climate-specific finance reported in BRs submitted by Annex II Parties has increased in terms of both volume and rate of growth since the previous BA. Whereas the total finance reported increased by just 5 per cent from 2013 to 2014, it increased by 24 per cent from 2014 to 2015 (to USD 33 billion), and subsequently by 14 per cent from 2015 to 2016 (to USD 38 billion). Out of these total amounts, USD 30 billion in 2015 and USD 34 billion in 2016 were reported as climate-specific finance channelled through bilateral, regional and other channels; the remainder flowed through multilateral channels. From 2014 to 2016, both mitigation and adaptation finance grew in more or less equal proportions, namely by 41 and 45 per cent, respectively.

(b) Multilateral climate funds

26. Total amounts channelled through UNFCCC funds and multilateral climate funds in 2015 and 2016 were USD 1.4 billion and USD 2.4 billion, respectively. The significant increase from 2015 to 2016 was a result of the Green Climate Fund (GCF) ramping up

[7] Approximately 52 per cent of the decrease in 2016 was due to reduced technology costs in solar photovoltaic and wind energy.

operations. On the whole, this represents a decrease of approximately 13 per cent compared with the 2013–2014 biennium and can be accounted for by a reduction in the commitments made by the Climate Investment Funds, in line with changes in the climate finance landscape as the GCF only started to scale up operations in 2016.

(c) Climate finance from multilateral development banks

27. MDBs provided USD 23.4 billion and USD 25.5 billion in climate finance from their own resources to eligible recipient countries in 2015 and 2016, respectively. On average, this represents a 3.4 per cent increase from the 2013–2014 period.

28. The attribution of MDB finance flows to members of OECD-DAC, minus the Republic of Korea, is calculated at up to USD 17.4 billion in 2015 and USD 19.7 billion in 2016 to recipients eligible for OECD-DAC official development assistance.

(d) Private climate finance

29. The most significant source of uncertainty relates to the geographic attribution of private finance data. Although efforts have been made by MDBs and OECD since the 2016 BA to estimate private climate finance mobilized through multilateral and bilateral institutions, data on private finance sources and destinations remain lacking.

30. MDBs reported private finance mobilization in 2015 was USD 10.9 billion and increased by 43 per cent the following year to USD 15.7 billion. OECD estimated USD 21.7 billion in climate-related private finance mobilized during the period 2012–2015 by bilateral and multilateral institutions, which included USD 14 billion from multilateral providers and USD 7.7 billion from bilateral finance institutions. It is estimated that, in 2015, USD 2.3 billion was mobilized through bilateral institutions. The Climate Policy Initiative estimated renewable energy flows for new projects ranged from USD 2.4 billion in 2015 to USD 1.5 billion in 2016; this was, however, a significant underestimation given the underlying reporting approaches.

(e) Recipients

31. A total of 34 Parties included in Annex I to the Convention provided information on recipients in the BR3s, while 16 out of 40 BURs submitted as first or second BURs as at October 2018 include, to varying degrees, quantitative information on climate finance received in the 2015–2016 period. Therefore, at the time of the preparation of the 2018 BA, it is not possible to present a clear picture of climate finance received on the basis of the information included in national reports submitted to the secretariat.

32. Other sources of information provide insights on recipients. For example, of the bilateral finance reported to OECD-DAC, national and local governments received 51 and 61 per cent of bilateral climate-related assistance in 2015 and 2016, up from 43 and 42 per cent in 2013 and 2014, respectively. The remainder was received by international organizations, non-governmental organizations and public and private sector organizations from the support-providing countries. No information is available on the channels of delivery for 91–97 per cent of the other official flows of a non-concessional nature in the period 2015–2016. Of the total climate finance committed by MDBs from their own resources, 72 per cent was channelled to public sector recipients in 2015, and 74 per cent in 2016. Adaptation finance, in particular, went predominantly to public sector institutions: 90 per cent in 2015 and 97 per cent in 2016.

2. Domestic climate finance

33. Domestic climate expenditures by national and subnational governments are a potentially growing source of global climate finance, particularly as, in some cases, NDC submissions are translated into specific investment plans and domestic efforts to monitor and track the domestic climate expenditures are stepped up. However, comprehensive data on domestic climate expenditure are not readily available, as these data are not collected regularly or with a consistent methodology over time within or across countries. Of the 30 countries that reported data on climate expenditures included in the 2016 BA, 19 countries provided such data in 2015 or 2016, with the 2015 data for 5 countries being included in the

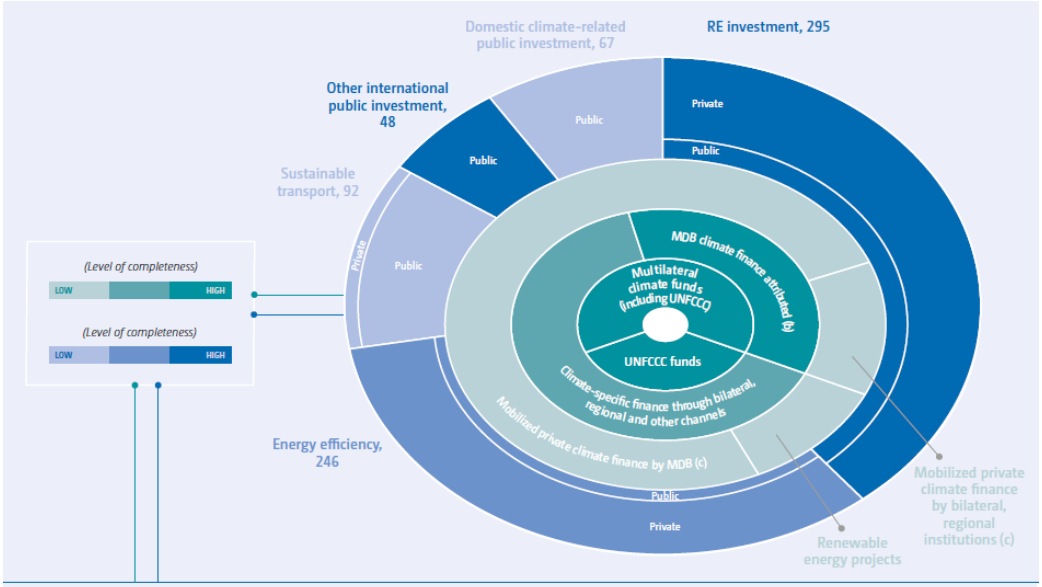
2016 BA. Four countries reported expenditure of USD 0.335 billion in their BURs, while seven countries published climate public expenditure and institutional reviews amounting to USD 16.5 billion.[8] In two other countries, updated data are available amounting to USD 49 billion. In total, this brings domestic public climate finance estimates for the period 2015–2016 to USD 67 billion.

3. Flows among countries that are not members of the Development Assistance Committee of the Organisation for Economic Co-operation and Development, recipients eligible for official development assistance and Parties not included in Annex I

34. Information on climate finance flows among non-Annex I Parties is not systematically tracked, relying on voluntary reporting by countries through the OECD-DAC Creditor Reporting System and DFIs through IDFC that are based in countries that are not members of the Organisation for Economic Co-operation and Development (non-OECD). Total estimates of such flows amounted to USD 12.2–13.9 billion in 2015 and USD 11.3–13.7 billion in 2016. This represents an increase of approximately 33 per cent on average from the 2013–2014 period, driven primarily by non-OECD member institutions of IDFC increasing finance significantly to other non-OECD members. New multilateral institutions include the Asian Infrastructure Investment Bank (AIIB) and the New Development Bank. Together, they provided USD 911 million to renewable energy projects in 2016. The AIIB portion of this amount included outflows that may be attributable to OECD-DAC members that are shareholders in AIIB.

[8] This includes Hebei Province in China, reporting an expenditure of USD 6.1 billion in 2015.

Figure 1
Climate finance flows in the period 2015–2016
(Billions of United States dollars, annualized)



		2015 (USD billion face value)	2016 (USD billion face value)	Sources of data and relevant chapter
Global total flows	Renewable energy investments	320.9	269.5	Chapter 2.2.1
	Public investment	61.7	52.3	CPI based on multiple sources
	Private investment	259.2	217.1	
	Energy efficiency investments	233.9	257.8	Chapter 2.2.2
	Public investment	25.7	32.9	IEA Energy Efficiency Market Reports/CPI
	Private investment (a)	208.2	224.9	
	Sustainable transport	78.0	105.8	Chapter 2.2.3
	Public investment	69.7	92.5	IEA World Energy Investment Report/CPI
	Private investment	8.3	13.3	
	Other sectors public investment	47.3	47.5	Chapter 2.2.2 – 2.2.5
				CPI based on multiple sources
	Domestic climate-related public investment	67.0	67.0	Chapter 2.3
				BURs, CPEIRs (UNDP), I4CE
Flows to non-Annex I Parties	UNFCCC funds	0.6	1.6	Chapter 2.5.2
				Fund financial reports, CFU
	Multilateral climate funds (including UNFCCC)	1.4	2.4	Chapter 2.5.2
				Fund financial reports, CFU
	Climate-specific finance through bilateral, regional and other channels	29.9	33.6	Chapter 2.5.1
				Annex II Party Biennial Reports
	MDB climate finance attributed (b)	17.4	19.7	Chapter 2.5.2
	Renewable energy projects	2.4	1.5	Chapter 2.5.4
				CPI based on multiple sources
	Mobilized private climate finance by MDB (c)	10.9	15.7	Chapter 2.5.4
				MDB Joint Reports
	Mobilized private climate finance by bilateral, regional institutions (c)	2.3		Chapter 2.5.4
				OECD

Abbreviations: BEV = battery electric vehicle, BUR = biennial update report, CPEIR = climate public expenditure and institutional reviews, CPI = Climate Policy Initiative, IEA = International Energy Agency, I4CE = Institute for Climate Economics, MDB = multilateral development bank, OECD = Organisation for Economic Co-operation and Development, UNDP = United Nations Development Programme.

[a] Value discounts transport energy efficiency estimates by 8.5 per cent to account for overlap with electric vehicle estimates.

[b] From members of the OECD Development Assistance Committee (DAC), minus the Republic of Korea, to OECD-DAC recipients eligible for official development assistance. Refer to chapter 2.5.2 of the 2018 Biennial Assessment and Overview of Climate Finance Flows technical report for further explanation.

[c] Estimates include private co-financing with MDB finance.

4. Information relevant to Article 2, paragraph 1(c), of the Paris Agreement: data sets on flows, stocks and integration

35. The 2018 BA includes information on available data sets that integrate climate change considerations into insurance, lending and investment decision-making processes and that

include information that may be relevant to tracking consistency with Article 2, paragraph 1(c), of the Paris Agreement.

36. Across the financial sector, both the reporting of data on financial flows and stocks consistent with low greenhouse gas (GHG) emissions and climate-resilient pathways, and the integration of climate considerations into decision-making are at a nascent stage. The data sets available on bond markets are the most advanced, with regular and reliable data published based on green bond labelling and analysis of bonds that may be aligned with climate themes. Less information is available on bonds that may be inconsistent with low GHG emissions and climate-resilient pathways. Other market segments lack completeness of coverage and reporting quality across peer institutions. With regard to integrating climate change considerations into investment decision-making, some market segments such as listed corporations and institutional investors are participating in emerging reporting initiatives, including through target-setting processes, that will likely improve the availability of data over time. Other market segments such as insurance companies participate in comprehensive and regular survey reporting on climate integration into governance and risk-management processes. Other market segments, particularly in banking, insurance and financial services, lack breadth of coverage in reporting or are at an early stage of considering how to report data.

C. Assessment of climate finance flows

37. An assessment of the data underlying the overview of climate finance flows presented offers insights into crucial questions of interest in the context of the objective of the Convention and the goals outlined in the Paris Agreement. Development banks, DFIs and multilateral climate funds play a vital role in helping countries to deliver on their NDCs. The key features of a subset of these different channels of public climate finance for beneficiary countries are summarized in the figure below, including the areas of support (adaptation, mitigation or cross-cutting) and the instruments used to deliver climate finance.

Figure 2
Characteristics of international public climate finance flows in the period 2015–2016

	Annual average USD billion	Area of support				Financial instrument		
		Adaptation	Mitigation	REDD-plus[a]	Cross-cutting	Grants	Concessional loans	Other
Multilateral climate funds[b]	1.9	25%	53%	5%	17%	51%	44%	5%
Bilateral climate finance[c]	31.7	29%	50%	–	21%	47%	52%	<1%
MDB climate finance[d]	24.4	21%	79%	–	–	9%	74%	17%

Note: All values are based on approvals and commitments.

Abbreviations: MDB = multilateral development bank.

[a] In decision 1/CP.16, paragraph 70, the Conference of the Parties encouraged developing country Parties to contribute to mitigation actions in the forest sector by undertaking the following activities: reducing emissions from deforestation; reducing emissions from forest degradation; conservation of forest carbon stocks; sustainable management of forests; and enhancement of forest carbon stocks.

[b] Including Adaptation for Smallholder Agriculture Programme, Adaptation Fund, Bio Carbon Fund, Clean Technology Fund, Forest Carbon Partnership Facility, Forest Investment Program, Global Climate Change Alliance, Global Environment Facility Trust Fund, Green Climate Fund, Least Developed Countries Fund, Partnership for Market Readiness, Pilot Programme for Climate Resilience, Scaling Up Renewable Energy Program, Special Climate Change Fund and United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries.

[c] Bilateral climate finance data are sourced from biennial reports from Parties included in Annex II to the Convention (that further include regional and other channels) for the annual average. Information related to the United States of America is drawn from preliminary data provided by the United States. The thematic split and the financial instrument data are taken from data from the Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee (DAC), referring only to concessional flows of climate-related development assistance reported by OECD-DAC members. Section C of the summary and recommendations and chapter III of the technical report uses ‘bilateral finance’ to refer only to concessional flows of climate-related development assistance reported by OECD-DAC members.

[d] The annual average and thematic split of MDBs includes their own resources only, while the financial instrument data include data from MDBs and from external resources, due to the lack of data disaggregation.

38. Overall, trends in climate finance point to increasing flows towards beneficiary countries. Bilateral climate finance flows, and those channelled through MDBs, have increased since the 2016 BA, whereas flows from the multilateral climate funds have fluctuated, having decreased in 2015 before rebounding in 2016, although the average remains lower than in the 2013–2014 period, which reflects changes in the climate finance landscape.

39. When considering these flows in aggregate, support for mitigation remains greater than support for adaptation across all sources (noting, however, measurement differences). Bilateral finance flows from OECD-DAC providers had the greatest proportion intended for adaptation (29 per cent) in the period 2015–2016, followed by multilateral climate funds (25 per cent) and MDBs (21 per cent). However, the 2018 BA finds an increase in public climate finance flows that contributes towards both adaptation and mitigation from both bilateral contributors and multilateral climate funds. This makes it more difficult to track the progress made in ramping up adaptation finance. When, however, considering flows based on other groupings, there are variations in the composition of the types of support.

40. Grants continue to be a key instrument for the provision of adaptation finance. In the period 2015–2016 grants accounted for 62 and 94 per cent of the face value of bilateral adaptation finance reported to OECD and of adaptation finance from the multilateral climate funds, respectively. During the same period, 9 per cent of adaptation finance flowing through MDBs was grant-based. Mitigation finance remains less concessional in nature, with 25 per cent of bilateral flows, 31 per cent of multilateral climate fund approvals and 4 per cent of MDB investments taking the form of grants. These figures, however, may not fully capture the added value brought by combining different types of financial instruments, or technical assistance with capital flows, which can often lead to greater innovation or more sustainable implementation.

41. With regard to geographic distribution, Asia remains the principal recipient region of public climate finance flows. In the period 2015–2016, the region received 31 per cent of funding from multilateral climate funds, 42 per cent of bilateral finance reported to OECD and 41 per cent of MDB flows (including to the Pacific region). The Latin America and Caribbean region and sub-Saharan Africa each secured 22 per cent of approvals from the multilateral climate funds in the same period. Latin America and the Caribbean received 17 per cent of MDB financing and 10 per cent of bilateral finance reported to OECD, whereas sub-Saharan Africa received just 9 per cent of MDB financing but 30 per cent of bilateral finance reported to OECD.

42. With regard to flows to the least developed countries (LDCs) and small island developing States (SIDS) in the period 2015–2016, funding directed at the LDCs represented 24 per cent of bilateral flows, whereas that directed at SIDS accounted for 2 per cent of such flows. Of the bilateral finance provided to the LDCs and SIDS, around half was earmarked for adaptation. Similarly, 21 per cent of finance approved by multilateral climate funds went to the LDCs and 13 per cent to SIDS, and more than half of this finance was focused on adaptation. MDBs channelled 15 per cent of their climate finance to the LDCs and SIDS. The percentage of adaptation spending to these countries (41 per cent) is twice their climate finance spending overall.

43. The management of climate finance, as well as the development and implementation of the projects that it supports, necessarily entails costs. The degree of such costs, which are often recovered through mechanisms such as administrative budgets and implementing agency fees, varies across institutions. Among the major multilateral climate change funds, fees account for between 1 and 9 per cent of total fund value, ranging from USD 65,000 to USD 1.2 million per project. Although these costs tend to decrease over time as management and disbursement mechanisms become more streamlined, there is evidence to suggest that the alignment of administrative functions between funds (e.g. the Global Environment Facility administration of the Least Developed Countries Fund and Special Climate Change Fund) offers the best opportunity to keep administrative costs down. This is essential in order to retain the trust that providers and recipients place in the funds.

44. The push to diversify modalities of access to climate finance continues. Institutions in beneficiary countries are increasingly able to meet fiduciary and environmental and social safeguard requirements for accessing funds. There has been a notable increase in the number of regional and national implementing entities to the multilateral climate funds, despite large amounts remaining programmed through multilateral entities.

45. Ownership remains a critical factor in the delivery of effective climate finance. A broad concept of ownership encompasses the consistency of climate finance with national priorities, the degree to which national systems are used for both spending and tracking, and the engagement of a wide range of stakeholders. There have been a number of efforts to build capacity to access and make strategic choices about how to use finance and oversee implementation. With regard to the role of governments, while there has been greater commitment by ministries of finance and planning to integrate climate finance into national budgetary planning, this is often not done fully. National-level institutions in beneficiary countries are playing a greater role in managing climate finance, particularly through domestic tracking systems. NDCs for which further financial resources need to be found are emerging as a platform that governments can use to stimulate engagement and strengthen national ownership of climate finance.

46. Mechanisms for monitoring the impact of climate finance have improved, albeit not uniformly. Thus, although the reporting of results (in terms of outputs) has increased, it is difficult to assess properly the quality of the impacts achieved (i.e. outcomes). These impacts are, moreover, presented in a multitude of formats. The reduction of GHG emissions remains the primary impact metric for climate change mitigation. Core mitigation-related multilateral funds are expected to reduce GHG emissions by over 11 billion tonne of carbon dioxide equivalent (t CO_2 eq), with reported reductions already approaching 37 million t CO_2 eq. GHG reduction results are complemented by other quantitative data, such as the number of beneficiaries and the renewable energy capacity installed. The metrics, benchmarks and frameworks for monitoring the impact of mitigation projects continue to evolve, thereby helping to inform investment decisions.

47. Discussion on impact measurement of adaptation projects continues to be focused on the number and type of people that benefit from them, although the nature and extent of their beneficial effects are still difficult to quantify, both directly and indirectly. Adaptation finance channelled through core multilateral climate funds has so far reached over 20 million direct beneficiaries. The target for the combined number of direct and indirect beneficiaries is 290 million. Further work is necessary to develop adaptation and resilience metrics that can capture the whole spectrum of sectors receiving support and the many different approaches used, while allowing for aggregation of data and comparability between projects and funds.

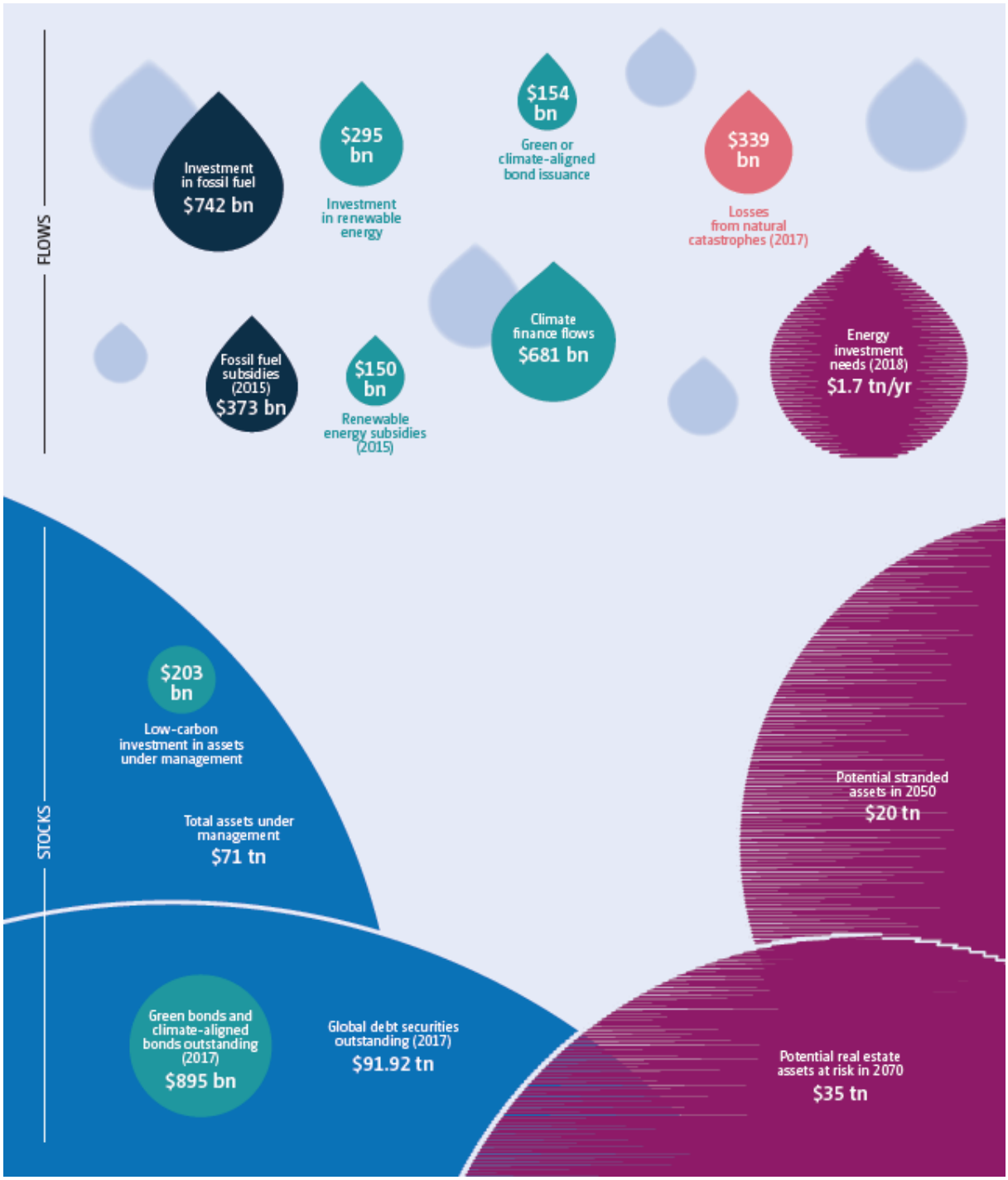
48. The extent of co-financing remains important for the mobilization of private finance, but is challenged in terms of the availability of data, definitions and methods. Research suggests that multilateral climate funds can perform on a par with DFIs with regard to private co-financing ratios. The degree to which such finance can be mobilized, however, is often heavily influenced by the investment conditions in a country, which are in turn created by the policy and regulatory frameworks in place.

Information relevant to Article 2, paragraph 1(c), of the Paris Agreement: climate finance in context

49. Climate finance continues to account for just a small proportion of overall finance flows (see figure 3); the level of climate finance is considerably below what one would expect given the investment opportunities and needs that have been identified. However, although climate finance flows must obviously be scaled up, it is also important to ensure the consistency of finance flows as a whole (and of capital stock) pursuant to Article 2, paragraph 1(c), of the Paris Agreement. This does not mean that all finance flows have to achieve explicitly beneficial climate outcomes, but that they must reduce the likelihood of negative climate outcomes. Although commitments are being made to ensure that finance flows from DFIs are climate consistent, more can be done to understand public finance flows and ensure that they are all are consistent with countries' climate change and sustainable development objectives.

50. Awareness of climate risk in the financial sector has increased over the past few years. Positive developments are being seen in the sector, particularly with regard to the investment and lending policies of both public and private sector actors, and with regard to regulatory and fiscal policies and the information resources that guide decision-making.

Figure 3
Climate finance in context



Note: All flows are global and annual for 2016 unless stated otherwise. Energy investment needs are modelled under a 2 °C scenario. The representation of stocks that overlap is not necessarily reflective of real-world overlaps. The flows represented are not representative of all flows contributing to the stocks presented. Data points are provided to place climate finance in context and do not represent an aggregate or systematic view. Climate finance flows are those represented in section B of the Summary and Recommendations and as reported in chapter 2 of the 2018 Biennial Assessment and Overview of Climate Finance Flows technical report. Investment in renewable energy overlaps with this estimate of climate finance flows.

Source: See figure 3.9 in the 2018 Biennial Assessment and Overview of Climate Finance Flows technical report.

IV. Recommendations

51. The SCF invites the COP to consider the following recommendations:

Chapter I (methodologies)

(a) *Request* developed country Parties and *encourage* developing country Parties, building on progress made so far and ongoing work, to continue enhancing the transparency, consistency and comparability of data on climate finance provided and mobilized through public interventions, and taking into consideration developments in relevant organizations and institutions;

(b) *Encourage* Parties providing climate finance to enhance their reporting of climate finance provided to developing country Parties;

(c) *Invite* Parties, through their board memberships in international financial institutions, to encourage continued efforts in the harmonization of methodologies for tracking and reporting climate finance among international organizations;

(d) *Encourage* developing country Parties, building on progress made so far and ongoing work, to consider, as appropriate, enhancing their reporting on the underlying assumptions, definitions and methodologies used in generating information on financial, technical and capacity-building needs and support received;

Chapter II (overview)

(e) *Encourage* Parties, building on progress made so far, to enhance their tracking and reporting on climate finance flows from all sources;

(f) *Encourage* developing country Parties that provide support to report information on climate finance provided to other developing country Parties;

(g) *Encourage* developed countries and climate finance providers, as well as multilateral and financial institutions, private finance data providers and other relevant institutions, to enhance the availability of granular, country-level data on mitigation and adaptation finance, inter alia, transport, agriculture, forests, water and waste;

(h) *Invite* private sector associations and financial institutions to build on the progress made on ways to improve data on climate finance and to engage with the SCF, including through their participation in the forums of the SCF with a view to enhancing the quality of the BA;

(i) *Request* the SCF to continue its work in the mapping of available data sets that integrate climate change considerations into insurance, lending and investment decision-making processes, and to include information relevant to Article 2, paragraph 1(c), of the Paris Agreement in future BAs;

Chapter III (assessment)

(j) *Invite* Parties to strive for complementarity between climate finance and sustainable development by, inter alia, aligning climate finance with national climate change frameworks and priorities, as well as broader economic development policies and national budgetary planning;

(k) *Encourage* developing countries to take advantage of available resources through the operating entities of the Financial Mechanism to strengthen institutional capacity for programming their priority climate action, as well as tracking climate finance, effectiveness and impacts;

(l) *Encourage* developed countries and climate finance providers to continue to enhance country ownership and consider policies to balance funding for adaptation and mitigation, taking into account beneficiary country strategies, and, in line with the mandates, building on experiences, policies and practices of the operating entities of the Financial Mechanism, particularly the GCF;

(m) *Encourage* climate finance providers to improve tracking and reporting on gender-related aspects of climate finance, impact measuring and mainstreaming;

(n) *Invite*, as in the 2016 BA, multilateral climate funds, MDBs, other financial institutions and relevant international organizations to continue to advance work on tracking and reporting on impacts of mitigation and adaptation finance;

(o) *Encourage* all relevant United Nations agencies and international, regional and national financial institutions to provide information to Parties through the secretariat on how their development assistance and climate finance programmes incorporate climate-proofing and climate-resilience measures, in line with new available scientific information;

(p) *Request* the SCF, in preparing future BAs, to continue assessing available information on the alignment of climate finance with investment needs and plans related to Parties' NDCs and national adaptation plans;

(q) *Request* the SCF, in preparing the 2020 BA, to take into consideration available information relevant to Article 2 of the Paris Agreement.

10th plenary meeting
15 December 2018

Decision 5/CP.24

Report of the Green Climate Fund to the Conference of the Parties and guidance to the Green Climate Fund

The Conference of the Parties,

Noting the draft guidance to the Green Climate Fund prepared by the Standing Committee on Finance,[1]

Recalling decision 10/CP.22, paragraph 5,

1. *Welcomes* the report of the Green Climate Fund to the Conference of the Parties at its twenty-fourth session and its addendum,[2] including the list of actions taken by the Board of the Green Climate Fund (hereinafter referred to as the Board) in response to guidance received from the Conference of the Parties;

2. *Also welcomes* the progress of the Green Climate Fund in 2018, including:

(a) That funding approved by the Board has reached USD 5.5 billion, including USD 4.6 billion in loans, grants, equities and guarantees in the past three years for the implementation of 93 funding proposals for adaptation and mitigation in 96 developing countries;

(b) The work to strengthen the Green Climate Fund's institutional capacity, standards and safeguards, transparency, inclusiveness, pipeline and role within the climate finance landscape;

(c) The decision of the Board[3] to initiate a review of the performance of the Green Climate Fund to assess the progress of the Fund in delivering on its mandate as set out in its Governing Instrument;

(d) The decision of the Board[4] concerning the selection process for the appointment of the Executive Director of the Green Climate Fund secretariat;

(e) The decision of the Board to select and appoint the International Bank for Reconstruction and Development as the trustee of the Green Climate Fund;

(f) Efforts made to improve access to the Green Climate Fund through the structured dialogues and the Readiness and Preparatory Support Programme;

(g) The increase in the number of entities accredited by the Board, including direct access entities;

(h) The implementation of the simplified approvals process, including the approval of four projects worth USD 30.1 million in Green Climate Fund funding to date;

(i) The collaboration in 2018 between the Green Climate Fund and the Technology Executive Committee and the Climate Technology Centre and Network;

(j) The decision of the Board[5] on financial planning in 2019 and the allocation of up to USD 600 million to fund projects submitted in response to requests for proposals and pilot programmes, including the requests for "proposals on REDD-plus results-based payments", mobilizing funds at scale, micro, small and medium-sized enterprises, enhanced direct access and the simplified approvals process;

(k) The first annual report on complementarity and coherence with the Green Climate Fund and other climate finance channels;

[1] FCCC/CP/2018/8, annex IV.
[2] FCCC/CP/2018/5 and Add.1.
[3] Green Climate Fund Board decision B.21/17.
[4] Green Climate Fund Board decision B.21/06.
[5] Green Climate Fund Board decision B.21/14.

3. *Further welcomes* the report on the implementation of the 2018 workplan and the approval of the 2019 workplan of the Board, and *urges* the Board to address remaining policy gaps, including on, as specified in the Fund's Governing Instrument and its rules of procedure:

(a) Policies relating to:

(i) The approval of funding proposals, including project and programme eligibility and selection criteria, incremental costs, co-financing, concessionality, programmatic approach, restructuring and cancellation;

(ii) Prohibited practices as well as the implementation of the anti-money-laundering and countering the financing of terrorism policy;

(b) Review of the accreditation framework;

(c) Pursuing privileges and immunities for the Green Climate Fund;

(d) Consideration of alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests;[6]

(e) The requests for proposals to support climate technology incubators and accelerators, in accordance with Board decision B.18/03;

4. *Urges* the Board to continue its consideration of procedures for adopting decisions in the event that all efforts at reaching consensus have been exhausted, as specified in the Fund's Governing Instrument;

5. *Welcomes* the launching of the first formal replenishment process and the Board's decisions on the inputs and processes related to the Fund's replenishment,[7] which take into account the needs of developing countries;

6. *Stresses* the urgency to reach pledges for the first formal replenishment process aiming to conclude the process in October 2019;

7. *Takes note* of the independent evaluations of the readiness and preparatory support programme and encourages the Board to address the recommendations contained therein, in accordance with paragraph 59 of the Governing Instrument, with a view to improving access to the Green Climate Fund and increasing the Fund's efforts to support country ownership and country programming;

8. *Reaffirms* the necessity to focus on implementation and to speed up disbursement of funds to already approved projects as a key element of the Green Climate Fund's operations in line with agreed disbursement schedules;

9. *Invites* Parties to submit to the secretariat via the submission portal,[8] no later than 10 weeks prior to the twenty-fifth session of the Conference of the Parties (December 2019), their views and recommendations on elements to be taken into account in developing guidance for the Board;

10. *Requests* the Standing Committee on Finance to take into consideration the submissions referred to in paragraph 9 above when preparing its draft guidance for the Board for consideration by the Conference of the Parties;

11. *Also requests* the Board to include in its annual report to the Conference of the Parties information on the steps that it has taken to implement the guidance provided in this decision;

[6] Decision 16/CP.21, paragraph 6, and decision 7/CP.21, paragraph 25.
[7] Green Climate Fund Board decision B.21/18.
[8] https://unfccc.int/submissions_and_statements.

12. *Decides*, in accordance with decision 1/CP.21, paragraph 61, to transmit to the Green Climate Fund the guidance from the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement contained in the decisions referred to in decision 3/CMA.1, paragraph 4.

10th plenary meeting
15 December 2018

Decision 6/CP.24

Report of the Global Environment Facility to the Conference of the Parties and guidance to the Global Environment Facility

The Conference of the Parties,

Noting the draft guidance to the Global Environment Facility prepared by the Standing Committee on Finance,[1]

1. *Welcomes* the report of the Global Environment Facility to the Conference of the Parties and its addendum,[2] including the responses of the Global Environment Facility to guidance from the Conference of the Parties;

2. *Also welcomes* the seventh replenishment of the Global Environment Facility (July 2018 to June 2022);

3. *Recognizes with concern* the decrease in allocation to the climate change focal area, including the System for Transparent Allocation of Resources, compared with the sixth replenishment;

4. *Urges* all Parties that have not made pledges for the seventh replenishment of the Global Environment Facility to do so as soon as possible;

5. *Acknowledges* the increased integration of climate change priorities into other focal areas and the impact programmes in the seventh replenishment of the Global Environment Facility, as well as the increased focus on innovation and enhanced synergies with other focal areas;

6. *Highlights* the importance of enhancing country ownership in the impact programmes of the seventh replenishment of the Global Environment Facility;

7. *Requests* the Global Environment Facility, as appropriate, to ensure that its policies and procedures related to the consideration and review of funding proposals are duly followed in an efficient manner;

8. *Looks forward* to the projected delivery of greenhouse gas emission reductions in the seventh replenishment period, which is twice the amount planned for the sixth replenishment;

9. *Acknowledges* the updated policy on co-financing of the Global Environment Facility,[3] which sets out an ambition for the overall portfolio of the Global Environment Facility to reach an increased ratio of co-financing to its project financing;

10. *Recognizes* that the Global Environment Facility does not impose minimum thresholds and/or specific types or sources of co-financing or investment mobilized in its review of individual projects and programmes;[4]

11. *Welcomes* the inclusion of support for the Capacity-building Initiative for Transparency in the seventh replenishment of the Global Environment Facility, which enhances predictability of funding for the Initiative;

12. *Requests* the Global Environment Facility to continue to manage the Capacity-building Initiative for Transparency to fund a diversity of countries and regions, taking into account each country's capacity, in line with priorities of support as contained in the programming directions of the Capacity-building Initiative for Transparency;[5]

13. *Invites* the Global Environment Facility to enhance the information in its reports to the Conference of the Parties on the outcomes of the collaboration between the Poznan

[1] FCCC/CP/2018/8, annex V.
[2] FCCC/CP/2018/6 and Add.1.
[3] Global Environment Facility Council decision GEF/C.54/10/Rev.01.
[4] Global Environment Facility document GEF/C.54/10/Rev.01, annex I, paragraph 5.
[5] Global Environment Facility document GEF/C.50/06, paragraph 26.

strategic programme on technology transfer's climate technology and finance centres and the Climate Technology Centre and Network;

14. *Requests* the Global Environment Facility to continue to monitor the geographic and thematic coverage, as well as the effectiveness, efficiency and engagement, of the Global Environment Facility Partnership, and to consider the participation of additional national and regional entities, as appropriate;

15. *Welcomes* the establishment of the private sector advisory group;

16. *Encourages* a balanced composition of the private sector advisory group in terms of gender and geographical coverage;

17. *Welcomes* the Global Environment Facility Council's decision[6] to begin the process of developing improved fiduciary standards, including anti-money-laundering and counter-terrorism finance policy and *requests* the Global Environment Facility to include updates on this work in its report to the Conference of the Parties at its twenty-fifth session (December 2019);

18. *Requests* the Global Environment Facility to review and, if necessary, update or adopt policies for preventing sexual harassment and the abuse of authority with the aim of protecting the staff of the Global Environment Facility secretariat as well as its partner organizations against unwanted sexual advances, preventing inappropriate behaviour and abuse of power and providing guidelines for reporting incidents;

19. *Invites* Parties to submit to the secretariat via the submission portal,[7] no later than 10 weeks prior to the twenty-fifth session of the Conference of the Parties, their views and recommendations on elements to be taken into account in developing guidance for the Global Environment Facility;

20. *Requests* the Standing Committee on Finance to take into consideration the submissions referred to in paragraph 19 above when preparing its draft guidance for the Global Environment Facility for consideration by the Conference of the Parties;

21. *Also requests* the Global Environment Facility to include in its annual report to the Conference of the Parties information on the steps that it has taken to implement the guidance provided in this decision;

22. *Decides*, in accordance with decision 1/CP.21, paragraph 61, to transmit to the Global Environment Facility the guidance from the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement contained in the decisions referred to in decision 3/CMA.1 paragraph 4.

10th plenary meeting
15 December 2018

[6] Global Environment Facility Council decision GEF/C.54/09/Rev.01.

[7] https://unfccc.int/submissions_and_statements.

Decision 7/CP.24

Modalities, work programme and functions under the Convention of the forum on the impact of the implementation of response measures

The Conference of the Parties,

Recalling Article 4 of the Convention,

Also recalling Article 2 and Article 3, paragraph 14, of the Kyoto Protocol,

Reaffirming Article 4, paragraph 15, of the Paris Agreement,

Recalling decisions 1/CP.16, 2/CP.17, 8/CP.17, 1/CP.21 and 11/CP.21,

Recognizing that Parties may be affected not only by climate change but also by the impacts of the measures taken in response to it,

Acknowledging that there are both positive and negative impacts associated with measures taken in response to climate change,

Also acknowledging that response measures should be understood in the broader context of the transition towards low greenhouse gas emissions and climate-resilient development,

Reaffirming that Parties should cooperate to promote a supportive and inclusive international economic system that will lead to sustainable economic growth and development in all Parties,

1. *Recalls* decision 5/CMP.7, paragraph 4, and decision 1/CP.21, paragraph 33, by which it was decided, inter alia, that the forum on the impact of the implementation of response measures shall also serve the Kyoto Protocol and the Paris Agreement;

2. *Adopts* the modalities, work programme and functions of the forum on the impact of the implementation of response measures as contained in the annex to decision 7/CMA.1 for the work of the forum under the Convention;

3. *Acknowledges* that there is one single forum that covers the work of the Conference of the Parties, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement on all matters relating to the impact of the implementation of response measures;

4. *Affirms* that the forum on the impact of the implementation of response measures shall continue to report to the Conference of the Parties in respect of matters falling under Article 4, paragraphs 8 and 10, of the Convention where the forum requires the guidance of the Conference of the Parties.

10th plenary meeting
15 December 2018

Decision 8/CP.24

National adaptation plans

The Conference of the Parties,

Recalling decisions 1/CP.16, 3/CP.17, 5/CP.17, 12/CP.18, 18/CP.19, 3/CP.20, 1/CP.21, 4/CP.21 and 6/CP.22,

Acknowledging that progress in the process to formulate and implement national adaptation plans will contribute towards enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change,

1. *Acknowledges* that developing country Parties have made progress in the process to formulate and implement national adaptation plans, and that countries are at different stages of the process;[1]

2. *Also acknowledges* that progress has been made in addressing the objective of the process to formulate and implement national adaptation plans for integrating adaptation into development planning;

3. *Further acknowledges* that there is not enough information to assess the extent to which the process to formulate and implement national adaptation plans is reducing vulnerability to climate change, strengthening resilience and building adaptive capacity;

4. *Notes* that experience from prior work on adaptation, in particular on the national adaptation programmes of action, has provided many lessons for the process to formulate and implement national adaptation plans;

5. *Recognizes* that the process-based approach to formulating and implementing national adaptation plans is proving to be a good practice as it focuses on long-term, iterative capacity development, enabling environments, institutions and policies, and the implementation of concrete actions through projects and programmes;

6. *Also recognizes* the value of learning from various climate shocks in furthering the understanding of vulnerability and risk and in helping to identify adaptation actions that would do the most to save lives and livelihoods;

7. *Welcomes* the submissions from Colombia, Saint Lucia and Togo of their national adaptation plans in NAP Central,[2] bringing the total number of submitted national adaptation plans to 11, and *reiterates* its invitation[3] to Parties to forward outputs and outcomes related to the process to formulate and implement national adaptation plans to NAP Central or other means as appropriate;

8. *Recognizes* that it will be useful for Parties to undertake monitoring and evaluation of the efforts of their adaptation actions at the national, subnational and local level to increase understanding of progress on adaptation;

9. *Notes* that funding has been made available for developing country Parties under the Green Climate Fund, the Least Developed Countries Fund and the Special Climate Change Fund for the process to formulate and implement national adaptation plans, and that other channels of bilateral, multilateral and domestic support have also contributed significantly to enabling developing countries to advance their work in the process to formulate and implement national adaptation plans;

10. *Welcomes* the approval by the Green Climate Fund secretariat, as at 4 December 2018, of 22 proposals from developing countries under the Green Climate Fund Readiness and Preparatory Support Programme to support the formulation of national adaptation plans

[1] See document FCCC/SBI/2018/INF.13, table 4, for a summary of measures undertaken by developing country Parties.

[2] http://www4.unfccc.int/nap/Pages/national-adaptation-plans.aspx.

[3] Decision 3/CP.20, paragraph 9.

and/or other adaptation planning processes amounting to USD 81 million, of which 6 proposals, amounting to USD 15 million, are from the least developed countries;

11. *Also welcomes* the approval by the Least Developed Countries Fund of 11 proposals, as at 30 September 2018, from the least developed countries for funding for the process to formulate and implement national adaptation plans amounting to USD 55 million;

12. *Notes* the value of engaging non-Party stakeholders, including civil society, the private sector, financial institutions, cities and other subnational authorities, and local communities and indigenous peoples, as appropriate, in the process to formulate and implement national adaptation plans;

13. *Also notes with appreciation* the workshop convened by the Adaptation Committee on fostering engagement of the agrifood sector in resilience to climate change;[4]

14. *Welcomes* the progress made by the Adaptation Committee and the Least Developed Countries Expert Group in their respective engagement with the Green Climate Fund on ways to enhance the process of accessing support for the formulation and implementation of national adaptation plans[5] and *encourages* its continuation;

15. *Notes with appreciation* the work of relevant organizations in providing technical support to countries on the process to formulate and implement national adaptation plans;

16. *Notes* that gaps and needs related to the process to formulate and implement national adaptation plans remain;[6]

17. *Requests* the Least Developed Countries Expert Group, within its existing mandate and workplan, to consider gaps and needs related to the process to formulate and implement national adaptation plans that have been identified through the relevant work of the Least Developed Countries Expert Group and the Adaptation Committee and how to address them, and to include relevant information thereon in its report to the Subsidiary Body for Implementation at its fifty-first session (December 2019);

18. *Also requests* the Adaptation Committee, through its task force on national adaptation plans and within its existing mandate and workplan, to consider gaps and needs that have been identified through relevant work of the Least Developed Countries Expert Group and the Adaptation Committee and how to address them, and include relevant information thereon in its annual report for 2019;

19. *Further requests* the Subsidiary Body for Implementation to specify the actions and steps necessary to assess progress in the process to formulate and implement national adaptation plans at its fifty-fifth session (November 2021), with a view to launching the assessment not later than 2025 and noting plans for the first global stocktake;

20. *Notes* the importance of vulnerability and risk assessments in setting priorities, mapping scenarios and understanding progress in implementing adaptation actions, and the important work of partner organizations of the Nairobi work programme on impacts, vulnerability and adaptation to climate change in providing information on methodologies for understanding baselines and progression of vulnerability and risk to developing countries;

21. *Welcomes* the efforts of the World Meteorological Organization and other relevant organizations in providing capacity-building to developing countries, as appropriate, on the analysis of climate data and the development and application of climate change scenarios in vulnerability and risk assessment;

22. *Encourages* relevant organizations to continue coordinating support related to the process to formulate and implement national adaptation plans and to continue sharing lessons learned;

23. *Invites* Parties to continue providing information on progress towards the achievement of the objectives of the process to formulate and implement national adaptation plans and on

[4] See https://unfccc.int/node/182503.
[5] Decision 6/CP.22, paragraph 7.
[6] FCCC/SBI/2018/6, paragraphs 29–32.

experience, best practices, lessons learned, gaps and needs, and support provided and received in the process to formulate and implement national adaptation plans via the online questionnaire[7] on NAP Central or other means as appropriate.

7th plenary meeting
13 December 2018

[7] https://www4.unfccc.int/sites/NAPC/Pages/assessingprogress.aspx.

Decision 9/CP.24

Report of the Adaptation Committee

The Conference of the Parties,

1. *Welcomes* the report of the Adaptation Committee,[1] including the recommendations and the flexible workplan of the Committee for 2019–2021 contained therein;

2. *Notes with appreciation* the progress of the Adaptation Committee in implementing its 2016–2018 workplan;[2]

3. *Welcomes* the technical expert meetings on adaptation[3] organized as part of the technical examination process on adaptation, and the technical paper on opportunities and options for enhancing adaptation planning in relation to vulnerable ecosystems, communities and groups;[4]

4. *Expresses its appreciation* to the Parties and organizations that led and participated in the technical expert meetings on adaptation or organized regional technical expert meetings on adaptation in 2018;

5. *Encourages* Parties and organizations to build on the outcomes of the regional technical expert meetings held in 2018 when planning and implementing adaptation action and to continue to organize such meetings in 2019 with a view to enhancing adaptation action and its overall coherence;

6. *Also encourages* Parties to strengthen adaptation planning, including by engaging in the process to formulate and implement national adaptation plans, taking into account linkages with the United Nations Sustainable Development Goals and possible co-benefits between mitigation and adaptation, and by mainstreaming adaptation in development planning;

7. *Urges* Parties and non-Party stakeholders to mainstream gender considerations in all stages of their adaptation planning processes, including national adaptation plans and the implementation of adaptation action, taking into account available guidance;[5]

8. *Encourages* Parties to apply a participatory approach to adaptation planning and implementation so as to make use of stakeholder input, including from the private sector, civil society, indigenous peoples, local communities, migrants, children and youth, persons with disabilities and people in vulnerable situations in general;

9. *Also encourages* Parties to take an iterative approach to adaptation planning, implementation and investment, with the long-term goal of transformational change, to ensure that adaptation is flexible, robust and not maladaptive and to allow for the integration, at least periodically, of the best available science;

10. *Further encourages* Parties to take into consideration and utilize, as appropriate, various approaches to adaptation planning, including community-based adaptation, ecosystem-based adaptation, livelihood and economic diversification and risk-based approaches, and to ensure that such approaches are not mutually exclusive but rather are complementary, allowing for synergy in enhancing resilience;

11. *Invites* relevant institutions under the Convention and non-Party stakeholders to strengthen support (financial, technical, technological and capacity-building) for adaptation planning, including for collecting climate data and information, noting the urgent need for adaptation action to address current and short- and long-term risks of climate change;

[1] FCCC/SB/2018/3.
[2] Contained in document FCCC/SB/2012/3, annex II.
[3] See http://tep-a.org.
[4] FCCC/TP/2018/3.
[5] See document FCCC/TP/2016/2.

12. *Also invites* Parties and interested organizations to share case studies of initiatives that focus on ecosystems and adaptation planning for vulnerable communities and groups as agents of change;

13. *Requests* that the case studies referred to in paragraph 12 above be disseminated on the adaptation knowledge portal of the Nairobi work programme on impacts, vulnerability and adaptation to climate change with a view to enhancing the translation of knowledge into practice;

14. *Invites* Parties and relevant entities working on national adaptation goals and indicators to strengthen linkages with the monitoring systems of the Sustainable Development Goals and the Sendai Framework for Disaster Risk Reduction 2015–2030 taking into account:

(a) The importance of designing adaptation monitoring and evaluation systems according to countries' overall objectives for adaptation, and of considering the benefits and drawbacks of quantitative and qualitative indicators when developing methodologies;

(b) That although full and complete harmonization of the 2030 Agenda for Sustainable Development, the Sendai Framework for Disaster Risk Reduction 2015–2030 and the Paris Agreement may not be feasible or useful, some degree of synergy could be beneficial;

(c) That enhancing individual and institutional technical capacity for data collection and assessment of adaptation is an ongoing task for many countries, and that increased capacity could help to link data gathering and reporting systems for the three global agendas referred to in paragraph 14(b) above at the national level;

(d) That improved coordination results in a reduced reporting burden for countries and enhanced cost-effectiveness of measures that cut across the three global agendas;

(e) That subnational monitoring and evaluation programmes should be linked with national-level monitoring and evaluation systems to provide a complete picture of adaptation action;

15. *Notes with concern* the shortfall in the resources available to the Adaptation Committee, the need for supplementary financial resources and the estimated budgetary implications of the activities to be undertaken by the secretariat pursuant to decision 1/CP.21;[6]

16. *Encourages* Parties to make available sufficient resources for the Adaptation Committee's successful and timely implementation of its workplan for 2019–2021;

17. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

12th plenary meeting
15 December 2018

[6] Information on the status of contributions is available in document FCCC/SBI/2018/INF.12 and information on budget performance in document FCCC/SBI/2018/16.

Decision 10/CP.24

Report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts

The Conference of the Parties,

Recalling decisions 3/CP.18, 2/CP.19 and 2/CP.20,

Also recalling Article 8 of the Paris Agreement,

Further recalling decision 4/CP.22, in which it recommended that a review of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts be held in 2019 and a technical paper be prepared as input, as well as that the subsidiary bodies finalize terms of reference for the review at their fiftieth sessions (June 2019),

Recalling decision 5/CP.23, in which it invited Parties, relevant organizations and other stakeholders to submit their views and inputs, by 1 February 2019, on possible elements to be included in the terms of reference for the review, for consideration by the subsidiary bodies at their sessions to be held in June 2019,

Noting the Intergovernmental Panel on Climate Change Special Report on Global Warming of 1.5 °C,[1]

1. *Welcomes*:

(a) The annual report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts;[2]

(b) The progress made by the Executive Committee in implementing its five-year rolling workplan;[3]

(c) The report of the task force on displacement[4] and its comprehensive assessment of broader issues of displacement related to climate change in response to decision 1/CP.21, paragraph 49;

(d) The report of the Suva expert dialogue,[5] noting the role of the dialogue in informing the preparation of the technical paper referred to in decision 4/CP.22, paragraph 2(f);

2. *Notes with appreciation* the work undertaken by the organizations[6] comprising the task force on displacement in response to decision 1/CP.21, paragraph 49;

3. *Invites* Parties, bodies under the Convention and the Paris Agreement, United Nations agencies and relevant stakeholders to consider the recommendations contained in the annex when undertaking relevant work, as appropriate;

[1] Intergovernmental Panel on Climate Change. 2018. *Global Warming of 1.5 °C: An IPCC Special Report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*. Available at http://ipcc.ch/report/sr15/.

[2] FCCC/SB/2018/1.

[3] Contained in the annex to document FCCC/SB/2017/1/Add.1.

[4] Available at http://unfccc.int/node/285.

[5] Available at https://unfccc.int/node/182364.

[6] The names of the organizations comprising the task force on displacement are listed in the annex.

4. *Welcomes* the decision[7] of the Executive Committee to extend the mandate of the task force on displacement in accordance with terms of reference to be elaborated by the Executive Committee at its next meeting;

5. *Encourages* the Executive Committee:

(a) To seek ways to continue enhancing its responsiveness, effectiveness and performance in implementing activities in its five-year rolling workplan, particularly those under workstream (e);[8]

(b) To continue its work on human mobility under strategic workstream (d) of its five-year rolling workplan,[9] including by considering the activities set out in paragraphs 38 and 39 of its report referred to in paragraph 1(a) above;

(c) To draw upon the work, information and expertise of bodies under the Convention and the Paris Agreement, as well as international processes, such as the 2030 Agenda for Sustainable Development and the Sendai Framework for Disaster Risk Reduction 2015–2030, including when executing its work through the technical expert group on comprehensive risk management established under workstream (c) of the five-year rolling workplan;[10]

(d) To continue consideration of scientific information needs and knowledge gaps with the Intergovernmental Panel on Climate Change and other scientific organizations;

(e) To increase its consideration of groups vulnerable to the adverse impacts of climate change when implementing its five-year rolling workplan;

6. *Also encourages* Parties and *invites* relevant organizations to make available sufficient resources for the successful and timely implementation of the five-year rolling workplan of the Executive Committee, including, as applicable, the associated expert groups, subcommittees, panels, thematic advisory groups and task-focused ad hoc working groups;

7. *Expresses* its appreciation to the organizers of and participants in the Suva expert dialogue, held during the first part of the forty-eighth sessions of the subsidiary bodies under the guidance of the Executive Committee and the Chair of the Subsidiary Body for Implementation;

8. *Invites* relevant organizations and other stakeholders to collaborate with the Executive Committee, including through partnerships, in developing and disseminating products that support national focal points, loss and damage contact points and other relevant entities in raising awareness of averting, minimizing and addressing loss and damage;

9. *Takes note* of the assistance provided by the Executive Committee to the secretariat in determining the scope of the technical paper referred to in decision 4/CP.22, paragraph 2(f);

10. *Invites* Parties:

(a) To consider developing policies, plans and strategies, as appropriate, and to facilitate coordinated action and the monitoring of progress, where applicable, in their efforts to avert, minimize and address loss and damage;

(b) To take into consideration future climate risks when developing and implementing their relevant national plans and strategies that seek to avert, minimize and address loss and damage and reduce disaster risks, as appropriate;

[7] See document FCCC/SB/2018/1, paragraph 36.

[8] Strategic workstream (e): enhanced cooperation and facilitation in relation to action and support, including finance, technology and capacity-building, to address loss and damage associated with the adverse effects of climate change.

[9] Strategic workstream (d): enhanced cooperation and facilitation in relation to human mobility, including migration, displacement and planned relocation.

[10] Strategic workstream (c): enhanced cooperation and facilitation in relation to comprehensive risk management approaches.

11. *Takes note* of the estimated budgetary implications of the activities to be undertaken by the secretariat referred to in this decision;

12. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

Annex

Recommendations from the report of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts on integrated approaches to averting, minimizing and addressing displacement related to the adverse impacts of climate change

1. The following recommendations of the Executive Committee of the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts are based on the work of the task force on displacement, established by the Executive Committee in response to decision 1/CP.21, paragraph 49:

(a) Acknowledge the inputs and contributions from participants of the stakeholder consultation workshop of the task force on displacement organized by the International Organization for Migration and the Platform on Disaster Displacement, and submissions from others;

(b) Take note of the report on the stakeholder consultation workshop of the task force on displacement;

(c) Strengthen coordination, coherence and collaboration across relevant bodies under the Convention and the Paris Agreement, and institutional arrangements, programmes and platforms, with a view to enhancing understanding of human mobility (including migration, displacement and planned relocation), both internal and cross-border, in the context of climate change, as they undertake their work, and in collaboration with the Executive Committee;

(d) Invite bodies under the Convention and the Paris Agreement, as appropriate and in accordance with their mandates and workplans, to facilitate the efforts of countries to, inter alia, develop climate change related risk assessments and improved standards for data collection on and analyses of internal and cross-border human mobility in a manner that includes the participation of communities affected by and at risk of displacement related to the adverse impacts of climate change;

(e) Invite the Adaptation Committee and the Least Developed Countries Expert Group, in accordance with their mandates and workplans, and in collaboration with the Executive Committee, to assist developing country Parties in integrating approaches to avert, minimize and address displacement related to the adverse impacts of climate change into relevant national planning processes, including the process to formulate and implement national adaptation plans, as appropriate;

(f) Invite Parties to facilitate the efforts of developing country Parties in the implementation of paragraph 2(g) below, as appropriate;

(g) Invite Parties:

(i) To consider formulating laws, policies and strategies, as appropriate, that reflect the importance of integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change and in the broader context of human mobility, taking into consideration their respective human rights obligations and, as appropriate, other relevant international standards and legal considerations;

(ii) To enhance research, data collection, risk analysis and sharing of information to better map, understand and manage human mobility related to the adverse impacts of climate change in a manner that includes the participation of communities affected and at risk of displacement related to the adverse impacts of climate change;

(iii) To strengthen preparedness, including early warning systems, contingency planning, evacuation planning and resilience-building strategies and plans, and

develop innovative approaches, such as forecast-based financing,[1] to avert, minimize and address displacement related to the adverse impacts of climate change;

(iv) To integrate climate change related human mobility challenges and opportunities into national planning processes, as appropriate, by drawing on available tools, guidance and good practices, and consider communicating these efforts undertaken, as appropriate;

(v) To recall the guiding principles on internal displacement and seek to strengthen efforts to find durable solutions for internally displaced people when working to implement integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change, as appropriate;

(vi) To facilitate orderly, safe, regular and responsible migration and mobility of people,[2] as appropriate and in accordance with national laws and policies, in the context of climate change, by considering the needs of migrants and displaced persons, communities of origin, transit and destination, and by enhancing opportunities for regular migration pathways, including through labour mobility, consistent with international labour standards, as appropriate;

(h) Invite United Nations agencies, relevant organizations and other stakeholders, as appropriate and in accordance with their respective mandates:

(i) To continue supporting efforts, including finance, technology and capacity-building, of Parties and other actors, including with and for communities and local actors, in order to avert, minimize and address displacement related to the adverse impacts of climate change, at all levels, including the community, national, regional and international levels;

(ii) To support and enhance regional, subregional and transboundary cooperation, in relation to averting, minimizing and addressing displacement related to the adverse impacts of climate change, including for risk and vulnerability assessments, mapping, data analysis, preparedness and early warning systems;

(iii) To continue developing and sharing good practices, tools and guidance in relation to averting, minimizing and addressing displacement related to the adverse impacts of climate change, inter alia, in:

a. Understanding risk;

b. Accessing support, including finance, technology and capacity-building;

c. Providing assistance to, and protection of, within existing national laws and international protocols and conventions, as applicable, affected individuals and communities;

d. Applying international legal instruments and normative frameworks, as appropriate;

(i) Invite relevant United Nations agencies and other relevant stakeholders to provide the Executive Committee with information arising from their activities undertaken in relation to the work referred to in paragraph 1(h) above with a view to informing the work and future action of the Executive Committee and its expert groups, Parties and other stakeholders;

(j) Invite relevant United Nations agencies and other stakeholders to engage with bodies under the Convention, especially the Executive Committee, when facilitating the efforts of States to address challenges and opportunities associated with climate change related human mobility, including the Global Compact for Migration and the work of the international migration review forum, the United Nations Network on Migration and other

[1] Forecast-based financing systems link climate and meteorological data with early warning systems and early action. They can play a supportive role in averting, minimizing and addressing impacts, including displacement, in the context of climate change.

[2] See United Nations General Assembly document A/RES/70/1.

relevant international frameworks and programmes of action, as appropriate, to avoid duplication on climate change aspects;

(k) Invite the Secretary-General to consider steps, including a system-wide strategic review, for greater coherence in the United Nations system to address human mobility in the context of climate change, and to facilitate the inclusion of integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change in the work of the envisaged high-level panel on internally displaced persons, as appropriate.

2. The technical members of the task force on displacement are from the International Labour Organization, the International Federation of Red Cross and Red Crescent Societies, the International Organization for Migration, the Platform on Disaster Displacement, the United Nations Development Programme, the Office of the United Nations High Commissioner for Refugees, and civil society groups as represented by the Advisory Group on Climate Change and Human Mobility, which includes the Internal Displacement Monitoring Centre, the Norwegian Refugee Council, the Hugo Observatory, the Arab Network for Environment and Development, and Refugees International.

9th plenary meeting
15 December 2018

Decision 11/CP.24

Review of the terms of reference of the Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention

The Conference of the Parties,

Recalling the relevant provisions of the Convention, in particular Article 4, paragraphs 1, 3 and 7, and Article 12, paragraphs 1, 4, 5 and 7,

Also recalling decisions 8/CP.5, 3/CP.8, 17/CP.8, 8/CP.11, 5/CP.15, 1/CP.16, 2/CP.17, 14/CP.17, 17/CP.18, 18/CP.18, 13/CP.19, 19/CP.19, 20/CP.19 and 20/CP.22,

Acknowledging the contributions of the Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention to enhancing capacity-building and participation in measurement, reporting and verification arrangements for developing countries under the Convention,

Recognizing that the Consultative Group of Experts plays an important role in facilitating technical advice and support for the preparation and submission of national communications and biennial update reports,

Also recognizing that the preparation of national communications is a continuous process,

1. *Decides* to extend the term of the Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention for eight years, from 1 January 2019 to 31 December 2026, and to rename it the Consultative Group of Experts;

2. *Also decides* that the Consultative Group of Experts, in fulfilling its mandate, shall function in accordance with decision 19/CP.19 and its annex;

3. *Invites* a representative of Parties not included in Annex I to the Convention that are not represented by the constituencies referred to in decision 3/CP.8, annex, paragraphs 3–8, in the membership of the Consultative Group of Experts to continue to participate in the work of the Group in an observer capacity;

4. *Notes* decision 18/CMA.1, paragraph 15, whereby the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement decided that the Consultative Group of Experts shall serve the Paris Agreement starting from 1 January 2019 to support the implementation of the enhanced transparency framework under Article 13 of the Paris Agreement;

5. *Requests* the Subsidiary Body for Implementation, at its fiftieth session (June 2019), to review and revise the terms of reference of the Consultative Group of Experts taking into account the functions referred to in the annex to decision 19/CP.19, annual reports of the Consultative Group of Experts, and decision 18/CMA.1, paragraph 15, with a view to recommending a draft decision for consideration and adoption by the Conference of the Parties at its twenty-fifth session (December 2019);

6. *Also requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

9th plenary meeting
15 December 2018